

BEFORE THE
GOVERNING BOARD OF THE
STOCKTON UNIFIED SCHOOL DISTRICT

In the Matter of the Non-Reemployment of
Certificated Employees of the Stockton
Unified School District:

OAH No. 2009030709

HALARY ANDAYA, et. al.,

Respondents.

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in Stockton, California, on April 27 and 28, 2009, and on May 6, 7, 13, 14, 15, and 29, 2009.

Ann M. Murray and Marie A. Nakamura, Attorneys at Law, Kronick, Moskovitz, Tiedemann & Girard, represented the Stockton Unified School District (District).

Thomas J. Driscoll, Attorney at Law, Driscoll & Associates, represented all certificated teachers who are members of the Stockton Teachers' Association (STA respondents).

Ernest H. Tuttle, IV, Attorney at Law, Law Offices of Ernest Tuttle, IV, represented all certificated employees who are members of the Stockton Pupil Personnel Association (SPPA respondents).

Heidi Primack Talbot, Attorney at Law, of the Talbot Law Group, represented two certificated employees who are members of the United Stockton Administrators (USA respondents). Ms. Talbot appeared at all hearing days except May 29, 2009.

There were no unrepresented respondents.

Oral and documentary evidence was presented and the parties offered oral closing arguments.¹ The record was then closed and the matter was submitted for decision on May 29, 2009. The parties stipulated that the proposed decision was due on Thursday, June 11, 2009, and that the District shall provide notice of final termination of service by Friday, June 19, 2009.

FACTUAL FINDINGS AND DISCUSSION

1. Anthony Amato is the Superintendent of the Stockton Unified School District (District). His actions, and those of the District's governing body, the Board of Education (Board), were taken solely in their official capacities.

2. The District serves approximately 38,000 students in 52 schools. There are 43 kindergarten through eighth grade (K-8) schools, four comprehensive high schools, and four alternative high schools.² The District's student population is ethnically diverse and includes substantial numbers of English language learners (ELLs). The District is considered a Title I school, based upon the high percentage of economically disadvantaged students who are eligible for this federal supplemental funding.

3. Superintendent Amato directly supervises and is assisted by an advisory "cabinet" of senior staff members. The cabinet members make recommendations to the Superintendent, typically regarding student instruction and school operations in their specific areas of responsibility.

From late 2008 through March 2009, while the District prepared for a possible 2009-2010 layoff, the cabinet included Assistant Superintendent of Schools, Linda Luna; Assistant Superintendent of Secondary Schools, Mark Hagemann; Chief of Staff, Matthew George; Acting Assistant Superintendent of Human Resources, attorney Lily Cervantes; Director of Elementary Education, Adolfo Melara; Assistant Superintendent of Support Services, Julie Penn; and Chief Technology Officer, Robert Torres. The Director of Human Resources typically is a member of the cabinet; however, this position has been vacant since approximately November 2008. Cabinet members participated in formal and informal meetings to discuss the anticipated layoffs and made recommendations to the Superintendent regarding which particular kinds of services should be reduced. In doing so, the overriding theme of these discussions was how to keep the reductions and eliminations of services away from direct student instruction in the classrooms.

¹ On May 29, 2009, Thomas Wirtz, Attorney at Law, specially appeared for the limited purpose of closing argument, on behalf of his wife, SPPA respondent Laurie Hopkins (8/21/01).

² In 2006, the District reorganized its 7th and 8th grades by eliminating middle schools, which were subsumed within the elementary schools.

In late February 2009, after the passage of the State's 18-month budget, the District learned that it needed to cut between \$10 and \$15 million dollars from its current 2008-2009 school year budget. In addition, approximately \$15 million dollars needed to be cut from the 2009-2010 school year budget. Approximately 80 to 85 percent of the District's budget is for personnel costs. Faced with these stark financial realities, the District prepared for layoffs of both classified personnel (160 employees) and certificated personnel (375 employees).

4. On February 27, 2009, the Board passed two resolutions that were to be implemented if a reduction in force was necessary: Resolution No. 08-36, entitled "Competency Criteria In The Case Of Certificated Layoff For The 2009-2010 School Year" (Competency Resolution), and Resolution No. 08-37, entitled "Tiebreak Criteria In The Case Of Certificated Layoff For The 2009-2010 School Year" (Tiebreak Resolution).

5. *Competency Resolution:* The purpose of the Competency Resolution is to ensure that, if a layoff occurred, the District could make assignments and reassignments of more senior certificated employees in a manner consistent with Education Code section 44955. The Competency Resolution provided various recitals, including: (1) a description of the District's student population whose first language is not English (ELLs), which was estimated to be approximately 30 percent of all students served; and (2) the District's legal duty to provide appropriate instruction to ELLs and its efforts to ensure that certificated staff hold recognized credentials to teach ELLs. Pursuant to this resolution, a certificated employee receiving a layoff notice would be "deemed to be competent and qualified to perform certificated service" of a more junior employee [i.e., to "bump" into the position of a junior employee] if: "(a) he or she holds a credential authorizing the service to be provided, and that credential is a regular credential, not a provisional credential as defined by Education Code section 44911, and the employee has performed services within the credential authorization, and (b) he or she holds a BCLAD, CLAD, SB 2042, AB 1059, SB 395 or equivalent certification and training to provide instruction to English Learners."

6. *Tiebreak Resolution:* The purpose of the Tiebreak Resolution is to establish criteria for determining the relative seniority between any employees who have the same seniority date (first date of paid service as probationary certificated employees in the District). Four criteria were to be applied seriatim to break ties between employees with the same seniority date who were providing service to the District under equivalent credentials. In sequence, these criteria were: (1) individuals who are deemed "highly qualified" under the federal No Child Left Behind Act (NCLB); (2) individuals with BCLAD, CLAD, SB 2042, AB 1059, SB 395, SDAIE or an equivalent training and certificate; (3) individuals who currently hold a regular credential, not a provisional credential as defined by Education Code section 44911, which authorizes the service to be provided will be given preference; and (4)

individuals credentialed to teach in the areas of algebra, biology, chemistry, physics special education or English. If these factors are identical, a lottery was to be “conducted among those remaining, and layoff shall be from the lowest number to the highest number from the lottery.

7. *PKS Resolution:* On March 4, 2009, the Board adopted Resolution No. 08-38, entitled “Reduction and Elimination of Particular Kinds of Certificated Services for the 2009-2010 School Year” (PKS Resolution). The Board determined that it was necessary to reduce the following particular kinds of certificated services (PKS) of the District not later than the beginning of the 2009-2010 school year:

1.	Reduction of the Elementary School Administration Program, resulting in the elimination of 25.0 F.T.E. Certificated Assistant Principal positions.
2.	Reduction of the Elementary Classroom Teaching Program, resulting in the elimination of 107.3 F.T.E. certificated Teacher positions: K-3 CSR; K-8 Self-Contained or Core Teachers; 4 th Grade CSR.
3.	Reduction of the Elementary Counseling Program, resulting in the elimination of 41.0 F.T.E. certificated Counselor positions.
4.	Reduction of the Elementary Physical Education Teaching Program, resulting in the elimination of .5 F.T.E. Teacher position.
5.	Reduction of the Elementary School General Education Support and Specialist Program, resulting in the elimination of 12.0 F.T.E. certificated Instructional Specialist positions, and 54.0 F.T.E. certificated Resource Teacher positions.
6.	Reduction of the High School Administration Program, resulting in the elimination of 5.5 F.T.E. certificated Assistant Principal positions.
7.	Elimination of the High School Career Center Coordination Program, resulting in the elimination of a 1.0 F.T.E. certificated Career Center Coordinator positions.
8.	Elimination of the High School Counseling Program, resulting in the elimination of 34.0 F.T.E. certificated High School Counselor positions; 4.0 F.T.E. certificated CWA Counselor positions; and 4.0 F.T.E. Guidance Chairperson certificated Counselor positions.
9.	Reduction of the High School Library Program, resulting in the elimination of 4.0 F.T.E. certificated Librarian positions.
10.	Reduction of the CAHSEE Resource Teacher Program, resulting in the elimination of 16.0 F.T.E. certificated Teacher positions.

11.	Reduction of the Automotive Teaching Program, resulting in the elimination of a 1.0 F.T.E. certificated Teacher position.
12.	Elimination of the Manufacturing Technology Program, resulting in the elimination of a 1.0 F.T.E. certificated Teacher position.
13.	Elimination of the High School Earth Sciences Teaching Program, resulting in the elimination of 15.0 F.T.E. certificated Teacher positions.
14.	Reduction of the Alternative High School Social Studies Program, resulting in the elimination of 3.0 F.T.E. certificated Teacher positions.
15.	Reduction of the Alternative High School English Program, resulting in the elimination of 1.0 F.T.E. certificated Teacher positions.
16.	Reduction of the Alternative High School Work Experience Program, resulting in the elimination of 2.0 F.T.E. certificated Teacher positions.
17.	Reduction of the Alternative High School Science Program, resulting in the elimination of 2.0 F.T.E. certificated Teacher positions.
18.	Reduction of the Alternative High School Mathematics Program, resulting in the elimination of 1.0 F.T.E. certificated Teacher positions.
19.	Reduction of the District Office Instructional Support Program, resulting in the elimination of 3.0 F.T.E. certificated Language Development Specialist positions; 3.0 F.T.E. certificated Reading Specialist positions; 1.0 F.T.E. certificated Inservice Development Specialist position; 1.0 F.T.E. certificated Music Coordinator position; 5.0 F.T.E. certificated Bilingual Specialist positions; and 4.0 F.T.E. Certificated Behavior Support Specialist positions.
20.	Reduction of the District Office Administration Program, resulting in the elimination of a 1.0 F.T.E. certificated Deputy Superintendent management position; 1.0 Administrator on Special Assignment position; 1.0 F.T.E. certificated Director of Technical Programs position; 1.0 F.T.E. certificated Director of State/Federal Programs position; 1.0 F.T.E. certificated Senior Program Specialist/State and Federal Programs position; and 4.0 F.T.E. certificated SLC Coordinator positions.
21.	Reduction of the Special Education Program, resulting in the elimination of 1.0 F.T.E. certificated Administrator Special Education position; 4.0 F.T.E. certificated High School SDC Mild/Moderate positions; 2.0 F.T.E. certificated High School RSP Mild/Moderate Teacher positions; 1.0 F.T.E. certificated Psychologist position; and 1.0 F.T.E. certificated SDC-Communicatively Handicapped Teacher position.
22.	Reduction of the Pre-School Program, resulting in the elimination of 4.0 F.T.E.

Pre-School Teacher permit positions.

As a result of the above PKS reductions and/or eliminations, the Board determined that it was necessary to decrease 373.30 F.T.E. positions for certificated employees in the District at the close of the 2008-2009 school year, in accordance with Education Code section 44955.

After considering all positively assured attrition that had occurred to date (deaths, resignations, retirements, non-reelections and other permanent vacancies), the Board resolved that it was necessary to terminate 323.3 F.T.E. certificated employees of the District at the end of the 2008-2009 school year due to the PKS reduction. The Board directed the Superintendent to take all appropriate action needed to effectuate these terminations, including the sending of appropriate notices to all employees whose positions shall be affected by virtue of this action.

8. *Preliminary Notices to Permanent and Probationary Employees:* Education Code section 44949, subdivision (a), in pertinent part, requires that “[n]o later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, . . . , that it has been recommended that the notice be given to the employee, and stating the reasons therefor”

On March 13, 2009, District Acting Assistant Superintendent for Human Resources, Lily Cervantes, timely sent a “Notice of Intent to Dismiss” letter (Preliminary Notice) to each of the permanent and probationary certificated employee respondents (See Finding 14). The Notice advised these respondents that she had recommended to the Board that they be given preliminary written notice that their services might not be required for the 2009-2010 school year due to reductions in PKS. The form notices sent to permanent and probationary employees differed somewhat; however, each complied with the requirements of Education Code section 44949. Respondents were appropriately advised of their rights to request a hearing. With the Preliminary Notice, respondents were provided copies of the PKS Resolution Number 08-38, Education Code sections 44949, 44955, and 44956, and a blank Request for Hearing form.

9. *Precautionary Notices to Certificated Employees under Temporary Contract:* On March 13, 2009, Ms. Cervantes also sent a “Notification of Completion of Temporary Contract and Precautionary Notification Regarding Recommendation that Services Will Not Be Required” (Precautionary Notice) to each of the certificated employee respondents identified by the District as “temporary.” Pursuant to the Precautionary Notice, these respondents were advised that their temporary contracts with the District would terminate at the conclusion of the 2008-2009 school year. In

addition, these respondents were timely advised that Ms. Cervantes had recommended to the Board that they be given preliminary written notice that their services might not be required for the 2009-2010 school year due to reductions in PKS. Further, precautionary respondents were advised to contact the Human Resources office immediately if they believed that they had been inappropriately classified as temporary and should be a probationary or permanent certificated employee. Finally, with the Precautionary Notice, these respondents were provided copies of the PKS Resolution Number 08-38, Education Code sections 44918, 44949 and 44955, and a blank Request for Hearing form.

10. On March 13, 2009, Superintendent Amato sent a letter to the Board members, notifying them that notice has been given to District certificated employees that he is recommending that their services will not be required for the 2009-2010 school year. The names of the District employees to whom the Preliminary and Precautionary Notices had been provided were contained in Attachment A to this letter.

11. There is no dispute that all respondents timely filed their requests for hearing to determine whether there was cause for not reemploying them for the 2009-2010 school year.

12. On April 3, 2009, Superintendent Amato made and signed the Accusation for layoffs against respondents, who were identified as falling within two categories: permanent and probationary certificated employees; and temporary certificated employees under individual contracts with the District pursuant to Education Code section 44909 who were served with precautionary notices, based in part on the assertion of counsel that their temporary status is incorrect and should be probationary. Respondents' names and their seniority dates or first dates of service under contract were indicated in separate lists attached to the Accusation. The Accusation alleged that respondents' positions were being terminated based upon the reduction or discontinuation of PKS pursuant to Resolution Number 08-38, either directly as within the affected PKS reductions, or because their regular positions were taken by "competent" employees with greater seniority, whose positions were eliminated by the reduction or discontinuation of PKS.

The District served the Accusation on all respondents with accompanying documents, including Resolutions No. 08-36, 08-37, and 08-38; Notice to Members of the Board; List of Respondents with seniority dates; Accusation/Statement to Respondent, copies of relevant sections of the Education and Government Codes, Notice of Hearing, and blank Notice of Defense forms.

13. It is undisputed that all respondents timely filed Notices of Defense.

Withdrawn Accusations

14. During the hearing, the District withdrew the Accusations against the following 12 STA respondents, as reflected in Exhibit 17: Bryan Babcock (7/28/08); Christina Cortez (8/20/04); Irene Hill (7/28/08); Shamsa Khan (8/22/05); Kathy McCarron (8/27/07); Adrienne McDonald (1/16/07); Carin Nelson (9/10/07); Erin Northcutt (7/25/07); Ravy Ou (8/06/07); Natalee Owens (10/31/05); Richard Rocero (11/08/88 [Stipulation No. 2]); and Michael Yonan (11/01/96).³

In addition, the District verbally withdrew the Accusations against Ellen Martis (8/06/07) and Amanda Stockdale (7/09/08). Regarding Ms. Martis and Ms. Stockdale, the District agreed that it had failed to timely serve these respondents with Notices of Intent to Dismiss letters, as required by Education Code section 44949, subdivision (a). By dismissing these Accusations, all respondents were timely served as indicated in Finding 8.

Status of Precautionary Respondents

15. The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal. 4th 911, 916 (*Kavanaugh*). Temporary employees may be dismissed at the pleasure of the board and need only be given a more limited form of notice before the end of the school year, and no hearing. (*Id.* at 917-918.) The District filed 31 Accusations against precautionary respondents; during the hearing, nine of these employees were determined to be probationary employees.⁴

Of the 14 remaining STA precautionary respondents, Rena Almaguer (10/13/08) and Tinka Lebed (3/12/08) are pre-school teachers with child development teacher or supervisor permits. The following 12 STA respondents are categorized by the District as “institutional interns” under temporary contract: Annette Albertoni

³ The District withdrew Accusations against the following teachers who it conceded were not named respondents in this matter: Ren Foshee (7/28/08); Manuel Hernandez, Jr. (7/28/08), Rachael Johnson (7/26/07); and Punny Po (7/28/08). Each of these teachers, except Ms. Johnson, was the subject of Stipulation 5, establishing seniority order for teachers with math credentials. The District also withdrew the Accusation against non-respondent SPPA member Jaime Nunez, a classified employee assigned as a Behavior Support Specialist reduced by PKS Item No. 19. Mr. Nunez was separately noticed of layoff as a classified employee. There is no jurisdiction over Mr. Nunez in this proceeding.

⁴ In Stipulation 4, the District stipulated that the following 9 STA respondents, who were issued precautionary notices as temporary employees, are probationary employees: Bryant Babcock (7/28/08 [Accusation withdrawn]); Joe Casimiro (8/07/07); Wendy Fettke (7/28/08); Kathryn Hall (8/21/07); Shamsa Khan (8/22/05 [Accusation withdrawn]); Giselle Mandujan (8/07/07); Natalee Owens (10/31/05 [Accusation withdrawn]); and Junelle Romano (9/22/08). Danny Mao’s status (8/02/07) was changed to probationary as reflected in ALJ Ex. 1.

(7/28/08); Rosa Baker (7/28/08); Melissa Brookens (7/28/08); Ariana Casillas (12/01/08); Angela Gomez (9/02/08); Gloria Gonzalez (7/09/08); Rebecca Hardison (7/25/07); Lindsay Kumar (7/09/08); Silvia Mata (7/28/08); Susheela Nath (10/29/08); Adrian Nickols (1/07/08), and Adriana Solis (7/09/08).

The eight SPPA precautionary respondents (counselors) are as follows: Lucia Alfaro (7/09/08); Kathryn Coyle (7/24/08); Breeonna Delaire (7/09/08); Tammy Earnest (7/24/08); Janet Kingsland (1/15/08); Tracy Mitchell (9/16/08); Bruce Nguyen (9/09/08); and Maria Pacheco-Ren (7/24/08).

16. Prior to hearing, respondents filed a motion to dismiss the Accusations against certificated employees classified as “temporary” and issued precautionary notices and Accusations by the District. On April 27, 2009, this motion was denied. Ironically, the District filed its precautionary notices and Accusations based upon concerns expressed by STA counsel that their characterization as temporary was inappropriate.

The status of these respondents is addressed in Findings 61 through 73, below.

DISTRICT’S FAILURE TO NOTICE JUNIOR CERTIFICATED EMPLOYEES

17 It is undisputed that the District failed to serve preliminary Notices of Intent to Layoff on 11 certificated teachers and counselors who were scheduled for layoff.⁵ These omissions were discovered after the March 15, 2009, jurisdictional date set forth in section 44949, subdivision (a). As a result of the District’s errors, these certificated employees will retain their jobs for the 2009-2010 school year, even though certificated employees with greater seniority will be laid off.

18. *Teachers:* There were five probationary STA teachers included in this group who were not noticed. Each was scheduled for layoff within PKS Item No. 5 (i.e., reduction of the elementary (K-8) school general education support and specialist program). Their names, seniority dates,⁶ and assignments for 2008-2009 are as follows: Sean Greene (7/09/08, Instructional Specialist); Sharon Greene (9/22/08, Instructional Specialist); Misty Hackworth (10/22/07, Resource Teacher); Victoria Joyce (7/28/08, Resource Teacher); and Betty Jean Warren (8/13/07, Resource Teacher). The names of each of these teachers were included in Exhibit 6B, the March 13, 2009, working document used to prepare the preliminary notices for layoff.

⁵ As indicated in Findings 8 and 14, two other teachers received late notices; their accusations were withdrawn.

⁶ A certificated employee’s seniority date is the date the employee first rendered paid probationary service. Education Code section 44845 provides: “Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position.” Temporary employees do not accrue seniority.

19. *Counselors*: There were six permanent SPPA counselors included in this group who were not noticed. Four of these individuals held positions as high school guidance chairpersons, a program set to be eliminated in the 2009-2010 school year under PKS Resolution Item No. 8 (elimination of the High School Counseling Program). Their names, seniority dates, and assignments are as follows: Andres Uyeda (8/09/06); Jose Cardenas (8/11/05); Barbara Greenwood (8/13/97); and Desiree Luksan (8/26/93). Two other individuals were in the Student Assistance Program (SAP), an area which was not covered by the PKS Resolution. Their names, seniority dates, and assignments are as follows: M. Santella-Rogers (9/21/92, SAP Ch.) and Jennifer Robles (9/02/97, SAP Prog., Specialist). The names of the four high school guidance chairpersons were included in Exhibit 6B, the March 13, 2009 working document used to prepare the preliminary notices for layoff; neither Ms. Santella-Rogers nor Ms. Robles was on this document.

20. As discussed below, respondents contend that, under the express terms of Education Code section 44955, this failure requires that the Accusations of all respondents with more seniority than the least senior teacher and counselor who were not noticed must be rescinded. For STA respondents, this would mean that 95 teachers with seniority dates greater than Sharon Greene's September 22, 2008, seniority date should not be laid off. For SPPA respondents, this would mean that 55 counselors with seniority dates greater than Mr. Uyeda's August 9, 2006, date should not be laid off.

Did The District Intentionally Fail To Notice Certain Junior Employees Or Was This Omission the Result Of A Clerical Error?

21. The District asserts that its failure to notice these junior employees was a mistake, due to clerical error. Respondents argue that the plain meaning of Education Code section 44955 must be applied, without regard to why the errors occurred. As a threshold matter, an analysis of why these particular notices were not issued is necessary.

22. The District delegated the technical aspects of the layoff to two personnel analysts in its Human Resources Department: Sharon Fite, whose primary responsibility was for the secondary and special programs, and Cinda Cornwell, whose primary responsibility was for elementary programs.⁷ Ms. Cornwell was absent from the District due to an ongoing family medical issues; she did not testify. Ms. Fite is a classified confidential employee with over 12 years experience in human resources/personnel issues: two and a half years at the District, and 10 years as a human resources supervisor at a previous district. Ms. Fite testified at length about the

⁷ Ms. Fite holds a bachelor's of science degree in organizational behavior; she does not hold any certificated credential.

process she and Ms. Cornwell employed to prepare and mail the preliminary notices to certificated employees selected for layoff. Her testimony is paraphrased below.

23. *Process for identifying certificated employees subject to layoff:* In January 2009, Ms. Fite sent verification notices to all certificated employees, asking them to verify information (i.e., seniority date, employment status, and credentials) contained in the computerized certificated seniority list maintained by the District's Information Services Department. Employees were asked to return the form with any changes by late January 2009. As the verifications were returned, Ms. Fite and Ms. Cornwell reviewed any concerns raised by the employees. Ms. Fite provided over 400 written responses to inquiries raised in these forms. In reviewing these verifications, Ms. Fite and Ms. Cornwell tracked attrition by retirements and resignations.

During the verification process, Ms. Fite became aware that the District had classified a number of long-term substitute teachers serving in vacant positions as "temporary," even though these employees had not signed contracts for temporary employment. She recommended to Superintendent that these employees be classified as "probationary." This recommendation was approved and the employees were notified of their change in classification.

24. Once the PKS Resolution was approved, Ms. Fite and Ms. Cornwell began looking at the employees who were in the positions affected by the PKS. In the week leading up to March 14, 2009, Ms. Fite and Ms. Cornwell worked as a team in collaboration with legal counsel to determine who would receive the layoff notices.

Two major working documents were created. First, using a template provided by legal counsel and the computerized seniority list, Ms. Fite and Ms. Cornwell created 22 separate charts with one for each of the 22 PKS Items (*Hypothetical Displacement by PKS Chart [PKS Charts]*); each analyst working on the PKS items in her area of responsibility. Each chart listed the employees currently in the positions affected by the PKS, with a color code to indicate various categories, including whether individual employees would be non-reelected, subject to layoff, resigning or retiring. Handwritten notations indicated which senior employees were able to bump into positions of junior employees based upon the status of their credentials on March 15, 2009.⁸ Second, the "hypothetical disposition" information

⁸ In conducting this analysis, Ms. Fite made determinations regarding whether individual employees were "competent" by referring to the Competency Resolution, and she used the criteria listed in the Tie Break Resolution when necessary to break seniority date ties. Ms. Fite testified that she did not receive any input from any supervisors regarding who she should bump or skip; however, she did discuss some of these issues with legal counsel in a collaborative process. Color coding of the PKS Charts was done by legal counsel. Ms. Fite and Ms. Cornwell had joint access to a shared certificated computer subdirectory in which they had working documents; however, counsel had no independent access to these files.

from the PKS Charts was imposed on the much larger District-wide certificated seniority list; this color-coded document became a layoff list that indicated whether an employee was being retained or laid off, and whether the layoff resulted from being bumped by a senior employee, or was directly attributable to a PKS reduction or elimination. Some of the bumping analyses were performed by the District's credential and/or NCLB analysts.

25. *Production of Preliminary Notices:* The preliminary notices were due by no later than Sunday March 15, 2009; consequently, the final production and mailing of the notices took place on Saturday, March 14, 2009. As described in Findings 8 and 9, there were three separate preliminary notice letters that had to be prepared for mailing: for permanent, probationary, and precautionary/temporary employees. These letters were produced by either Ms. Cornwell or Ms. Fite. Ms. Fite used the PKS Charts to produce the preliminary notice letters. The PKS Charts had various iterations; the list with the March 13, 2009, computer print date was the source from which the names of certificated employees who should have received preliminary notices were taken. This computer generated list also had handwritten notations from Ms. Fite or Ms. Cornwell.

On March 13, 2009, Ms. Cornwell prepared the preliminary notice letters for precautionary employees, so the "work crew" involved in the production and mailing of the Preliminary Notices would have a task to begin first thing Saturday morning. On March 14, 2009, approximately 10-12 staff people from Human Resources were present to work on this project. Ms. Cornwell was not there. There was no "supervisor" for the work crew; however, the District's legal counsel Ms. Murray was present.

On the morning of March 14, 2009, Ms. Fite was still making some bumping changes in handwritten notations on the printed PKS Charts.⁹ According to Ms. Fite, "it was not a smooth day." Preparation of notices for mailing required the creation of three separate "merge files" for each of the three form letters. To identify which employee should receive which letter, Ms. Fite entered the excel spreadsheet on computer and, using the printed version of the PKS Charts, placed an "X" next to the name of the permanent or probationary employee who was to receive a particular form notice. Ms. Fite also completed work, begun by Ms. Cornwell, on notices for employees with multiple subject credentials (elementary). There was no process or separate list used to conduct a safety check of noticed employees. After creating the

⁹ During the hearing, the District provided respondents with copies of the PKS Charts with handwritten notations that Ms. Fite testified she "scooped up" and saved at the end of the day on March 14, 2009 (Exhibit 6B). The copies produced had several redactions of numerical notations which District counsel represented she had made after March 14 and were covered by the attorney-client privilege. Following an in camera review, comparing the unredacted versions to the redacted versions, and considering counsel's representation, respondents' request for the unredacted version was denied. Because Ms. Fite testified that these notations were not on the PKS Charts on March 14, 2009, any reference to this material was, in addition, irrelevant.

merge files, Ms. Fite personally printed the letters and produced separate merge runs for related items (i.e., labels, certificated mail receipts). Copying, collating documents, stuffing envelopes in 360 pre-posted envelopes, and mailing was done by the work crew. There was no final check to ensure that preliminary notices had been completed for all employees scheduled for layoff. Ms. Fite did discover that four layoff notices were erroneously prepared for employees who were not to be laid off; she recalled these letters before they were mailed. The Preliminary Notices were taken to the post office on several occasions over the course of the day; for each, the District received a stamped receipt indicating it had been mailed that day.

At the end of the day, there were no leftover letters. Ms. Fite believed that all the required letters had been mailed.

26. On March 17, 2009, Ms. Fite learned that two multiple subject employees were not noticed. She prepared notices, mailed them that day by certified mail, and left voice mail messages for the employees. After spring break, on March 30, 2009, Ms. Fite learned that four Guidance Chairpersons had not been noticed. She later learned that several resource teachers were not noticed. No notices were sent to these employees.

27. In her testimony, Ms. Fite expressed her belief that the failure to send preliminary notices to employees whose names were on the PKS Charts was the result of a clerical error that occurred due to the short timelines. The names of most of the missed employees were on the PKS Charts; however, a letter was not generated for them and they were “just missed.” None of the missed employees’ names was on the 2008-2009 Certificated Layoff List described as Attachment A, to the March 13, 2009 preliminary notice letter sent by the Superintendent to the Board. Ms. Fite prepared this list from the group that had been noticed. The Accusations were served without incident. Ms. Fite was never instructed not to send notices to anyone on the PKS list or not to identify particular persons on the list.

28. Several circumstances occurred at the time the preliminary notices were due which support a finding that the District’s failure to issue certain notices were attributable to mistake or inadvertence. First, Ms. Fite worked lengthy hours during the week of March 8 through 14, 2009: she worked on Saturday and Sunday, March 7th and 8th; she worked for more than 8 hours a day from Monday, March 9 through Friday, March 13, and she worked on Saturday, March 14 until 5:00 p.m. Second, on Thursday, March 12, 2009, Ms. Fite attended a funeral; her continuing grief was obvious in her testimony about this matter. Third, on March 14, 2009, before the preliminary notices were completed, Ms. Cornwell left on a planned absence due to a serious family medical problem. Consequently, on March 14, 2009, Ms. Fite was responsible for completing Ms. Cornwell’s duties as well as her own.

29. Ms. Fite’s testimony was credible. She provided a detailed explanation of an intricate process involving over 300 employees which was conducted under

tremendous pressure. She candidly admitted that the junior employees were “just missed,” and that double-checks had not been done because “I ran out of time.”

30. There is no evidence that the District intentionally hand-selected junior employees it wanted to “save” from layoff and arranged for them not to receive a preliminary notice of potential layoff. Various cabinet members who testified participated in formal and informal cabinet discussions regarding the layoff. These witnesses denied participating in or hearing conversations or directives to intentionally avoid providing preliminary layoff notices to deviate from seniority.

31. The weight of the evidence establishes that the District’s failure to provide preliminary notices to the 11 non-respondents listed in Findings 18 and 19, was due to a mistake. What effect this failure has on the layoffs of respondents who are more senior certificated employees is addressed below.

What is the Remedy for Failure to Notice Junior Employees: Domino Theory or Corresponding Number Theory?

32. *Domino Theory:* The domino theory is based upon provisions in section 44955, subdivisions (b) and (c), which provide, respectively, that “no permanent employee may be terminated while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render,” and that districts must terminate employees “in the inverse order in which they were employed, . . .”

Respondents argue that the plain meaning of section 44955, subdivision (b), mandates that the layoffs of all more senior employees be rescinded whenever junior employees keep their jobs because the District failed to properly notice them. Under respondents’ analysis, the reason a junior employee was erroneously not noticed is irrelevant. It does not matter if the failure of notice occurred due to a clerical error, gross incompetence, or an intentional “culling out” of a junior employee from the layoff process. Respondents’ remedy has traditionally been referred to as “the domino theory.”¹⁰

Respondents estimate that this remedy would reverse the proposed layoffs of approximately 95 teachers and 55 counselors, or a total of approximately 150 certificated employees. Application of this remedy would effectively cut the District’s proposed layoff 323.5 F.T.E. in half.

¹⁰ Respondents reject this label, asserting that each more senior employee has an identical and independent right not be terminated while any less senior employee is retained under 44955, which right is not contingent upon the rights of other employees. They further argue that application of the corresponding number theory urged by the District constitutes an equal protection violation. The term “domino theory” will be used to provide consistency with past references in the sources and decisions discussed below.

33. *Corresponding Number Theory*: The District contends that its clerical errors should be remedied by application of the less draconian “corresponding number” theory, as applied in *Alexander vs. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal. App. 3d 567, 572 (*Alexander*). The District asserts that *Alexander* approved the use of this theory, under which the same number of senior employees scheduled for layoffs are retained as the junior employees who were not noticed. This remedy protects only those most senior certificated employees who were actually prejudiced by the District’s errors, because they would not have been laid off but for the error in missing the junior employees.

34. Respondents’ assertion that *Gassman vs. Governing Board of Rincon Valley* (1976) 18 Cal. 3d 137, 146 (*Gassman*) mandates the dismissal of all more senior employees is not persuasive. The Supreme Court in *Gassman* explicitly stated that it had “no occasion to determine the proper scope of section 13447,” the predecessor statute to 44955 (Stats.1959, c. 2, p. 949, § 13447, amended by Stats.1967, c. 1040, p. 2647, § 1; Stats.1970, c. 1565, p. 3205, § 3). The sole issue was whether the district could refuse to rehire a probationary employee for budgetary or financial reasons pursuant to Education Code section 13443, subdivision (d), the statute relating generally to the termination of a probationary teacher “for cause,” or whether such an economic layoff may only be effected pursuant to Education Code section 13447.

Rejecting the district’s argument, the *Gassman* Court noted that the language in what is now section 44955, subdivision (b), “is quite confusing, and does not make it clear that probationary employees are protected by the provision,…” The Court determined that the statute’s “legislative history and the accompanying statutory provisions (e.g., Ed. Code, §§ 13448.5, 13449) and the additional portions of section 13447 itself (pars. 1 and 3) leave no doubt that the present section was intended to apply to probationary as well as permanent teachers.” (*Id.* at 144.) The Court held that the result urged by the district “cannot be reconciled with the statutorily guaranteed protections which the Legislature afforded such employees in sections 13447, 13448.5 and 13449. Consequently, we conclude that defendant could not properly proceed under section 13443(d) in the present case.”

While *Gassman* affirmed that school districts must use the layoff statutes and that the provisions of 44949, subdivision (b), are applicable to probationary employees, it did not engage in a detailed analysis of the layoff statutes. Specifically, it did not interpret these statutes to determine the appropriate remedy in the circumstances posed by this case.

35. The District’s reliance on *Alexander, supra*, provides support for use of the corresponding number theory. The *Alexander* court concluded that the district had improperly skipped junior employees with bilingual ability and terminated more senior employees. Without analysis, the court found that the corresponding number remedy was appropriate when it stated: “because at least some of the persons skipped

should have received the notices, a corresponding number of the most senior of the employees who were not reemployed must have been improperly given notices. The trial court must determine which of the Teachers suffered prejudicial error in this case.”

In addition to *Alexander*, the District cites administrative decisions, for their persuasive effect, which generally reject the domino theory and support the corresponding number theory as the appropriate remedy. (*San Diego Unified School District* (2008) OAH Case No. 2008030379; *Western Placer Unified School District* (2008) OAH No. 2008030489; *Vallejo City Unified School District* (2004) OAH No. 2004040135; *Rialto Unified School District* (2008) OAH Case No. 2008020556.) The domino theory has been applied in a case where it was impossible to ascertain from the district’s evidence which employee should actually have received notice based on seniority and competency. (*Santa Ana Unified School District* (2004) OAH Case No. L2004030330.)

36. Application of the domino theory has been strongly criticized by a leading commentator in the educational layoff arena. Over thirty years ago, Nancy Ozsogomonyan published two articles with a comprehensive analysis of teacher layoffs and both administrative and appellate layoff decisions. (See: *Note, Teacher Dismissals Under Section 13447 of the California Education Code* (1976) 27 *Hastings L.J.* 1401 (hereafter, *1976 Note*); and Ozsogomonyan, *Teacher Layoffs in California: An Update* (1979) 30 *Hastings L.J.* 1727 (hereafter, *1979 Update*)). Ms. Ozsogomonyan’s articles have been cited by the California Supreme Court in *Gassman*, by the First District Court of Appeal in *San Jose Teachers Assn. v. Allen* (1983) 144 *Cal. App. 3d* 627, 635 (*San Jose*), and by the Fifth District Court of Appeal in *Alexander*.

In *San Jose, supra*, the Court concluded that appellant had in fact been timely served with a preliminary notice. Discussing appellant’s proposed remedy that would have precluded the district from terminating him as well as “all employees in the same assignment with greater seniority” based upon a single mistake, the court in dicta stated that:

“Of all the legal questions and problems related to layoffs, the one most crucially in need of resolution is the application of the domino theory.” (30 *Hastings L.J.*, *supra*, 1761.) By dicta, *Moreland Teachers Assn. v. Kurze* (1980) 109 *Cal. App. 3d* 648 . . . appears to approve the domino theory, but without a thorough analysis of the issue. The Legislature would benefit school districts and teachers alike by specifying whether clerical error requires such a domino effect.

As noted by Ms. Ozsogomonyan in the *1979 Update*, “a single error of this type may set off a domino effect, invalidating the dismissals of some or all of the employees senior to the one mistakenly retained.” (*Update* at 1754.)

Application of the domino theory can have devastating results. Dozens of otherwise valid dismissals may be disallowed because of a single error by a district. Because the statute obligates districts to terminate employees in the inverse order of employment, the real issue is whether the domino effect is the appropriate remedy when a district fails to do so.

Given the large number of teachers involved, the complexity of the procedure, and the legal uncertainties involved in determining seniority, the opportunity for error is enormous. Unless another remedy is mandated by statute, the consequences of a district’s good-faith error in determining seniority should be limited to reinstatement of employees who were actually prejudiced by the mistake.

...The statutory requirement that districts terminate in the inverse order of employment does not compel a remedy that would result in the reinstatement of employees not adversely affected by a good-faith procedural error.

Ms. Ozsogomonyan argued that “[j]udicial interpretation or perhaps legislation is needed to relieve districts of the harsh and absurd consequences of the domino effect. The remedy of a reinstatement must be limited to teachers actually prejudiced by a district’s error.” (*Update*, at 1761.)

37. In the absence of any guiding precedent, the language of section 44955, subdivisions (b) and (c), on which respondents rely, does not automatically require the application of the domino theory.

38. The principles of statutory construction are well established. As articulated by the Court in *Bonnell*, *supra* at 1261:

We begin our discussion with the oft-repeated rule that when interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute’s words their plain, commonsense meaning.” [Citation.] In undertaking this task, we adhere to the guideline that “[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature’s intent is

unnecessary.” (*Ibid.*) When the statutory language is unambiguous, “ ‘we presume the Legislature meant what it said and the plain meaning of the statute governs.’ ” [Citation.] Statutory language is not considered in isolation. Rather, we “instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.” [Citation.]

This seemingly straightforward analytical framework can be challenging to apply. Regarding the “plain meaning rule,” the California Supreme Court in *Flannery v. Prentice* (2001) 26 Cal.4th 572, 577-578, noted that “any [plain meaning] construction that would produce absurd consequences” is to be avoided. Similarly, in *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, the Court noted that:

...the “plain meaning” rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]. . .

Similarly, the Court has long recognized that, “where possible, all parts of a statute should be read together and construed to achieve harmony between seemingly conflicting provisions rather than holding that there is an irreconcilable inconsistency. [Citations.]” (*Estate of McDill* (1975) 14 Cal.3d 831, 837.)¹¹

¹¹ As noted in *People ex rel. Gillespie v. La Barre* (1924) 193 Cal. 388, 391, “‘It is a well-settled rule that different statutes relating to the same subject are to be construed together. [Citations.] ‘Statutes are to be regarded as forming parts of one great and uniform body of law, and are not to be deemed isolated and detached systems complete in themselves.’ [Citations.] ¶ ‘When two or more statutes, whenever passed, relate to the same thing or the same class of things or to the same general subject-matter, they are in *pari materia* and are to be construed as forming an unitary system and as one statute.’ [Citations.]”

39. In determining the appropriate remedy, the “plain language” in section 44955 relied on by respondents must be interpreted in light of the statute’s primary purpose, which is to provide the governing boards of school districts a means of terminating certificated employees when it becomes economically necessary to do so. Interpreted in this broader context, it would be contrary to the statutory purpose to apply subsection (b) to dismiss the layoffs of certificated employees who would have been terminated regardless of these errors, without considering actual prejudice. Employees clearly suffer financial prejudice when they are laid off; however, those who would have been laid off regardless of these noticing errors by the District do not suffer actual prejudice resulting from the errors. This is also true of employees who have been participating in the district or university internship programs.¹² By contrast, senior employees who would not have been laid off if the District had not made the notice errors are actually prejudiced.

Senior employees who suffered actual prejudice from the District’s clerical errors are protected by application of the corresponding number theory. This interpretation balances the statutory intent to afford fiscal relief to school districts in dire financial circumstances with the seniority protection to those employees directly impacted by the mistake. While the domino theory may be an appropriate remedy under different facts, in this case, its application is contrary to sections 44949 and 44955.

40. *Stipulated Remedy under Corresponding Number Theory:* In Joint Stipulation No. 1, the parties agreed which employees would be returned to their jobs if the “corresponding number” theory was applied to remedy the failure to notice junior employees. Specifically, the following STA/USA respondents would be returned to teaching assignments: A. Podesto;¹³ D. Warford [USA]; E. Menicucci; C. Brauer; P. Davidson; Luanne Moore; C. Dacian; A. Stockdale; and E. Martis.¹⁴ In addition, the following SPPA respondents would be returned to a position requiring a PPS (School Counseling) credential: S. Heidner; C. Carrillo; B. Nagai; D. Ensele; L. Capello; and S. Style-Zanotti.

¹² Marguerite Tamayo has been a first grade teacher with the District since July 28, 2008. She an internship credential and participates in the District’s Impact Internship program which takes two and a half years to complete. Ms. Tamayo testified that, if she is laid off, she will have to start all over again at another district or enroll in a university internship program. Rosa Baker testified that she does not know if her layoff will affect her ability to complete her internship, which only requires completion of some paperwork over the summer.

¹³ Stipulation No. 1 refers to “Podesto, A.” This appears to be a typographical error. As indicated in the certificated seniority list (Exhibit 9A), there is no employee by the name of A. Podesto; however, Antoinette L. Podesto (9/1/1970) is a certificated employee.

¹⁴ As indicated in Findings 14, the District withdrew its Accusations against both Ms. Martis and Ms. Stockdale, due to late preliminary notices.

In consideration for this agreement, all respondents agreed to “not challenge the District’s use of lack of CLAD or its equivalent, as a competency criteria and a tie-break criteria.” Should the domino theory be applied, the District agreed that it would not apply the CLAD competency criteria to the above-named counselors and teachers.¹⁵

PARTICULAR KINDS OF SERVICE

41. The school’s governing board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district may consider its financial circumstances in deciding whether to reduce or discontinue a particular kind of service. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App. 3d 627, 639.)

42. *Testimony of District Witnesses Regarding PKS Items:* The following District cabinet members testified about the particular services selected for reduction or elimination for the 2009-2010 school year: Assistant Superintendent of Curriculum and Instruction Linda Luna, Interim Associate Superintendant for Secondary Education Mark Hagemann, Ph.D., and Assistant Superintendent of Student Support Services Julie Penn. Their testimony established that, except as discussed below, none of the PKS Items are mandated by law, and as to those mandated items, the District will provide sufficient services. Their testimony, in relevant part, is paraphrased as follows.

43. *PKS Item Nos. 1 and 4:* There is no mandate to provide Assistant Principals (APs) at the elementary schools; nevertheless, the District established a ratio of 700 students to 1 AP for the 2009-2010 school year. Funding needs also resulted in the elimination of .5 F.T.E. in the elementary P.E. program.

44. *PKS Item No. 2:* The reduction of 170.3 F.T.E. within the Elementary Classroom Teaching Program does not result in exceeding legally mandated class size requirements. The District employs approximately 1,300 K-8 teachers. K-3 Classroom Size Reduction (CSR) funding requires staffing at a 20.4 student to 1 teacher ratio. During the 2009-2010 school year, the District will staff its K-3 classes

¹⁵ This stipulation was amended by Stipulation No. 3, reflecting the parties’ agreement that USA respondents Administrators D. Warford and P. Davidson are “teachers” for purposes of the District’s agreement not to apply the CLAD competency criteria if the domino theory is applied. (Stip. No. 3.) Separately, Ms. Warford’s seniority date was corrected to be October 6, 1992. (Stip. No. 6.)

at a 22:1 ratio. Classroom size is not mandated; however, the reduction may affect this funding. (*Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal. App. 4th 838, 850 (*Zalac*.) The District is expecting that the State will be lenient in issuing penalties for class sizes above 20.4:1 due to statewide financial problems in the schools. In fourth grade, Title II funding has historically been available to the District if it maintains these classes with 25:1 ratio. There is no state mandate for fourth grade CSR. For the 2009-2010 school year, the fourth grade will be staffed pursuant to the collective bargaining unit at 33:1.

45. *PKS Item No. 5*, the Elementary School General Education Support and Specialist Program, involves the elimination of 12.0 F.T.E. certificated Instructional Specialist positions, and 54.0 F.T.E. certificated Resource Teacher positions. There is no requirement that the District have either Instructional Specialists or Resource Teachers for students in the general education population. The District is currently being monitored by the California Department of Education (CDE) for “Program Improvement” compliance with NCLB. The District is in Program Improvement Year Three. Monitoring is accomplished via a District Assistant Intervention Team (DAIT) which makes “recommendations” for programs. The District construes DAIT program improvement “recommendations” as mandates of what they must do to be compliant with NCLB. The current “best practice” recommendation is for schools to provide ongoing support and coaching services to classroom teachers rather than pull-out instruction to small groups of students. As a consequence, the District is restructuring this program by changing from a pull-out model where itinerant literacy resource teachers provide direct services to students, to a coaching model in which Program Specialists, Literacy Specialist and Numeracy Specialists provide coaching services and support to the classroom teachers. Funding for the positions being eliminated or reduced, as well as the new coaching services, comes from site-based categorical funding. These are primarily federal monies.

46. *PKS Item No. 19* involves a reduction of the District’s Office Instructional Support program. District is restructuring its Instructional Support Program; this includes the elimination of 3.0 F.T.E. certificated Language Development Specialist positions; 3.0 F.T.E. certificated Reading Specialist positions; 1.0 F.T.E. certificated Inservice Development Specialist position; 1.0 F.T.E. certificated Music Coordinator position; 5.0 F.T.E. certificated Bilingual Specialist positions; and 4.0 F.T.E. Certificated Behavior Support Specialist positions. Some of these positions are currently not site-based, but are located in various central offices with teachers who provide itinerant services to the schools; others have been directly hired by particular schools. By restructuring, each school site will have the flexibility to use their categorical budgets to add bilingual specialist to serve their ELL populations; other services will be provided by the new Literacy and Numeracy Specialists. None of the positions eliminated are mandated.

47. *PKS Item No. 21* requires a reduction of certificated positions in the District’s Special Education Program, by eliminating one administrator position; four

High School special day class (SDC) Mild/Moderate positions; two High School resource specialist program (RSP) Mild/Moderate Teacher positions; one Psychologist position; and one SDC-Communicatively Handicapped Teacher position.

Ms. Penn is responsible for supervising the District's special education program which serves approximately 4,000 special education students in a variety of settings. The District is a self-contained SELPA and provides for an array of services designed to meet the unique needs of this population. While special education services are mandated by both federal and state law, the reductions imposed by the District do not impede its ability to meet these mandates. Rather, cuts were imposed in administrative vacancies and due to the decline in enrollment in both SDC and RSP classes. The reductions will not result in the District's inability to comply with SDC student staff ratios of 14:1, RSP mild-moderate ratios of 28:1, and will not affect the delivery of services currently being provided. The District must provide pre-school services to special education students, and these services will not be affected by the pre-school reductions, discussed below.

48. *PKS Item No. 22* requires a reduction of the District's Pre-School Program, resulting in the elimination of 4.0 F.T.E. Pre-School Teacher permit positions. Ms. Penn, who supervises the pre-school program, testified that the District provides pre-school services to approximately 1,100 students at 51 pre-school sites which are generally located on elementary school campuses. The elimination of these positions, which are not mandated for general education students, was based solely on the District's financial limitations. The District relies on various funding sources for this program, and one of the grant funding sources has expired. If additional funding is obtained, the District intends to rehire some of these teachers.

49. *PKS Item No. 20* requires a reduction in the District's Office Administration Program, resulting in the elimination of 5.0 F.T.E. positions (Deputy Superintendent management position; Administrator on Special Assignment position; Director of Technical Programs position; Director of State/Federal Programs position; and Senior Program Specialist/State and Federal Programs position). These positions were eliminated based upon existing vacancies, funding, and restructuring. This PKS Item also calls for the elimination of 4.0 F.T.E. certificated SLC Coordinator positions, for reasons described below by Dr. Hagemann.

50. The District's four comprehensive high schools have a student-teacher ratio of 32:1. The District is restructuring its comprehensive high schools by moving toward a "small learning community" (SLC) environment. Each high school will have several SLCs of 320 to 400 students with 14 teachers. Each of the SLCs will select a Career Technical Education or CTE theme around which their classes will be organized. Teachers of various subjects will coordinate their curriculums around similar themes, with the goal of preparing students for a profession or university on

graduation. Part of the restructuring plan is to provide each SLC with great flexibility to decide what staffing and support needs best suit their environment. This flexibility includes the ability to decide whether or not to have an SLC coordinator. The District is in the process of transitioning to the SLC model. There is an SLC within Chavez High School. The SLC model will be implemented in the other comprehensive high schools as soon as school commences in the fall of 2009. This summer, teachers will participate in a five-week training program about how to implement SLCs.

There are also four smaller specialty high schools which are staffed at 25:1 ratio; each has three additional F.T.E. certificated staff. The class sizes at the specialty schools range from 8 to 20 students. *PKS Items Nos. 14 through 18* mandate reductions in the social studies, English, work experience, science, and mathematics programs of the alternative schools, which are also referred to as the small specialty high schools. Given the greater staffing at these schools, the District selected to cut in areas where the classes were the smallest while still leaving students with an alternative way to meet any requirements.

51. *PKS Item Nos. 6, 7, 12:* There are currently 19 high school assistant principals (APs). Because these are not mandated positions, in *PKS Item No. 6*, the District reduced these APs by establishing a new ratio. Effective for the 2009-2010 school year, there will be two APs for high schools with under 2,000 students, and three APs for high schools with more than 2,000 students. The specialty high schools have never had APs. Some of the PKS items were selected because the position had remained unfilled (*PKS Item No. 7*), or because classes did not have sufficient enrollment (*PKS Item No. 12*).

52. *PKS Item No. 10:* The California High School Exit Examination or CAHSEE Program provides additional instruction to students in the areas of English and math only, whose skills are far below basic. The District offers specific CAHSEE classes through the CAHSEE Resource Teacher Program. This program is not mandated. While the State mandates that this type of intervention be offered to students, it leaves the method of doing so up to the local educational agency. The District intends to allow the SLCs to determine the type of CAHSEE intervention to be provided. The CAHSEE classes are disbursed among the high school's English and math teachers.

*Specific challenges to the PKS reductions or eliminations*¹⁶

53. *PKS Item Nos. 3 and 8 (Elimination of the Elementary and High School Counseling Programs):* In these two PKS items, the District has eliminated its counseling program. In the elementary arena, 41.0 F.T.E. certificated Counselor positions are to be eliminated. In the high school arena, PKS Item No. 8 calls for the

¹⁶ STA respondents resolved any challenges to *PKS Item No. 11*, the Reduction of 1 F.T.E. Teacher Position in the Automotive Teaching Program, by stipulation. (Stipulation No. 2.)

elimination of 34.0 F.T.E. certificated High School Counselor positions; 4.0 F.T.E. certificated CWA Counselor positions; and 4.0 F.T.E. Guidance Chairperson certificated Counselor positions. As indicated above, due to the missed notices to six junior counselors and the remedy imposed for this error, the District will have at least 12 certificated employees with Pupil Personnel Services (PPS) counseling credentials during the 2009-2010 school year.

Ms. Penn described the District's elementary and secondary counseling programs as providing very necessary, but not mandated, services to students in a wide variety of areas. At the elementary level, these services include personal, social, and emotional counseling; social services type activities; and groups for specific issues such as grief and loss, behavior, and peer mediation. At the secondary level, in addition to personal and social counseling, the counselors provide students services that primarily emphasize class scheduling, report card review, preparation for the California High School Exit Exam (CAHSEE) and SAT exam, and for attending college. In both arenas, counselors provide services to the teaching staff. Child Welfare and Attendance (CWA) counsels focus on truancy issues. Guidance chairpersons oversee the operations of the counseling program at the various school sites. They do not supervise other counselors. The Board did not include the Student Assistant Program (SAP) within the PKS resolution. SAP program specialists work at the district level to provide training and support to site counselors; they also write grants and work with tobacco use prevention and education. A counseling credential is required for the SAP position, because these individuals need to understand the counseling process to do their jobs.

The elimination of the counseling program was not intended to reflect the Board's belief that these services are not needed. Rather, it was necessary due to the severe budget constraints and the fact that counselors do not provide direct instruction to students. At the time the PKS Resolution was adopted, the Board had only discussed the elimination of the counseling program. Ms. Penn testified that the District will be offering some type of guidance services for its students next year, but there is no defined program as yet. Some counselors may be rehired on the basis of seniority. There is an opportunity to use outside services including county mental health and counseling services from outside agencies. Nothing specific has been determined. The District does not intend to have its teachers provide these counseling services.

Ms. Penn also discussed an as-yet-undefined, possible restructuring of the counseling programs, which would be dependent upon the existence of funds through grant writing or other categorical sources. Some draft job descriptions have been prepared, but have not been issued, and any action is contingent on the availability of funding. Ideas for this restructuring include using classified social worker employees to provide services to students.

54. SPPA respondents argue that these are not appropriate PKS items, because the District does not truly intend to eliminate the counseling program, as indicated by its failure to notice guidance chairpersons and its failure to include the SAP in the layoffs.¹⁷ Elementary school counselor Larry Capelo testified that he attended a February 24, 2009 Board meeting which discussed the elimination of the counseling program. Mr. Capelo testified to hearsay statements from Superintendent Amato that counseling services would be reduced but not eliminated, and that there would be three million dollars to provide guidance counseling services for the 2009-2010 school year. According to Mr. Capelo, Ms. Penn later reaffirmed the Superintendent's statements in a meeting with counselors and advised that some of the counselors would be brought back.

55. The Board's decision to eliminate the counseling program is not arbitrary or capricious and is not an abuse of its discretion. Any representations made by the Superintendent predated the passage of the PKS Resolution by the Board. In light of the ongoing uncertainty in the state's budget process, the District has decided to make painful but necessary cuts. SPPA respondents' concerns about any restructuring of the program that may occur in the future, as well as its impact on the requirements of its collective bargaining agreement, are beyond the scope of this decision.

56. *PKS Item No. 9 (Librarians)* provides for a reduction in the High School Library Program, resulting in the elimination of 4.0 F.T.E. certificated Librarian positions. Dr. Hagemann testified that, after the layoff, there will be 1.5 F.T.E. librarian positions in the District. "There is no statutory requirement that librarians be employed. The code simply provides that if a librarian is employed, the librarian must be credentialed." *San Jose, supra*, at 639. STA Respondents expressed concern at that the District would use individuals without a library credential to instruct pupils in the choice and use of library materials. According to Dr. Hagemann, the SLCs will determine if the need any such instruction. The extent of the need for librarians at the SLC for the 2009-2010 school year is unknown. If there was such a need, the SLC administrator would contact the District's librarian to determine how these needs should be met. The District has no intention to use other personnel to perform duties that can only be performed by a credentialed librarian.

57. *PKS Item No. 13 (Earth Sciences)* calls for the elimination of the High School Earth Sciences Teaching Program, with a layoff of 15.0 F.T.E. certificated

¹⁷ In light of the District's elimination of the elementary and secondary counseling program, there was an unfortunate belief among some respondents that the District deliberately planned not to give notice to these individuals so that some form of guidance program would be "up and running" on the first day of the 2009-2010 school year. There is no evidence to support this claim. The suggestion was further advanced by Mr. Wirtz that the District's attorney, Ms. Murray, was somehow involved in this plot. It is not unusual for school districts to involve their attorneys in the complicated process of planning and effectuating a certificated layoff. There is no reasonable basis to infer that Ms. Murray would violate her ethical obligation to participate in such an alleged and wholly speculative scheme.

Teacher positions. The District requires two years of science for graduation: one year must be in a physical science and one year must be in a biological science. (Board Policy 6146.1) For University of California (UC) admission, students must complete a third year in a laboratory science. Physical sciences may include physics, chemistry, or earth science. (Educ. Code , 51225.3, subd. (a)(1)(C).)

STA Respondents strongly dispute whether this is an appropriate PKS for reduction. Earth science teacher Deborah Lebanik (8/27/01) testified that earth science is accepted throughout the country as a ninth grade science course and has been required at the District. Earth Science courses are listed in the District's course catalogue as prerequisites for taking chemistry or physics. In her experience, only students with high grades can obtain a waiver out of this class and take biology instead. Counselor Pat Klopstock testified that some of the District's eighth grade students have already registered to take earth science next year, and that the course is listed on the District's "Personal Learning Plan 2009-2010." Ms. Klopstock doubted that many students had the academic standing necessary to move directly into biology.

Dr. Hagemann testified that the elimination of earth sciences was consistent with the District's restructuring of the high schools and move to the SLC model. It was designed to give each SLC the flexibility to determine which physical science fit best with its theme. If earth science was selected, the District would rehire earth science teachers. Student will be apprised of changes and the course catalogue will need to be updated.

Respondents' concerns are a policy matter for the Board, which has not abused its discretion in selecting this program for a PKS elimination.

58. *Burden of Proof re Need for PKS Reductions/Eliminations:* STA Respondents argue that the District has not met its burden of proof that a PKS reduction is at all necessary, because the District has 180 certificated vacancies available for teachers for the 2009-2010 school year and only 181 F.T.E.s of the current layoff relates to teachers. This argument rests on the following facts. First, sometime in May 2009, the District offered a "golden handshake" to senior employees under a supplemental retirement program known as the PAR program. Ms. Fite testified that she had a "vague idea" that approximately 100 teachers had accepted the offer. Second, Ms. Luna testified that the District began implementing literacy and numeracy coaches during the 2008-2009 school year. These positions were unadvertised and were considered to be temporary under the collecting bargaining contract. There are approximately 80 such positions which will be subject to an "interview and select" process which is open to any certificated employee.

Respondents' argument is unpersuasive. Regarding the PAR program, Ms. Fite believed there would be more retirees at the end of the 2008-2009 school year; however, she did not know how many of these potential retirees had already been

counted as retirements. The true impact of the PAR program is currently unknown. Regarding the literacy and numeracy coaches, Ms. Luna testified that individuals currently staffing these coaching positions may be tenured employees. It is unclear how many of those positions will actually be available to respondents. Any attrition that may occur as a result of either of these circumstances is speculative at this point.¹⁸

As noted in *San Jose, supra*, at 635, school boards make their preliminary determination of the number of permanent employees not to be re-employed for the following year before March 15. “Board members are not soothsayers. . . the board should not be compelled to allocate future resources based solely on projections and estimates of other sorts of potential attrition.” Consequently, a school district need not consider positively assured attrition occurring between the date of the preliminary notice and the final notice in determining the number of certificated employees to be terminated by reason of a reduction or discontinuation of a particular kind of service. (*Ibid.*)

59. In summary, the District has established that the particular kinds of services it selected for reduction or elimination in Resolution No. 08-38 are appropriate and are not arbitrary or capricious.

DISTRICT’S CERTIFICATED SENIORITY LIST

60. The District’s Information Services Department (ISD) maintains computerized data that includes information from which the District’s certificated seniority list was derived. The certificated seniority list contains employees’ names, seniority dates, certificates, and employment status (permanent, probationary, temporary). When an employee advises the Human Resources Department of changes in status or certificate, the HR staff inputs the information which is then forwarded to the ISD to be added to the computer data base. As explained by Mr. Torres, the ISD can then select data to be printed in various forms as requested by the end user.

Beginning in early January 2009 and extending through the conclusion of the hearing in this matter, the District has worked consistently to ensure that its certificated seniority list is accurate. Before the layoffs, the status of long-term substitutes who were originally classified as temporary employees was changed to reflect their probationary status. Over 400 corrections to the raw data were made by Ms. Fite after reviewing employees’ returned verifications forms. During the hearing, attorneys for all respondents gave the District their challenges to the information contained on the seniority lists. Computers were available to review personnel files, and Ms. Fite and other District staff worked in conjunction with respondents’ counsel

¹⁸ “Positively assured attrition” is attrition which has actually occurred and is to be distinguished from “potential attrition” which may be anticipated, but is still unknown.

to make any changes with which the District agreed. The District withdrew certain Accusations.

Exhibit 8A, the May 12, 2009 certificated seniority list by seniority date, and Exhibit 9A, the May 12, 2009 alphabetical certificated seniority list, were admitted as business records pursuant to Evidence Code sections 1270, 1271, and 1280. The parties continued their joint efforts toward clarifying changes agreed to during the hearing process; these are reflected in ALJ Ex. 1 (Respondents With Changes and Disposition). Except as amended in these Findings and in the parties' Stipulations, the certificated seniority list is an accurate and trustworthy source used by the District to determine which employees were subject to layoff.

PRECAUTIONARY RESPONDENTS

*Status of University Interns*¹⁹

61. The District employs teachers who are part of its Impact Program Intern program through the San Joaquin County Office of Education. The District considers these "District interns" to be probationary employees. As indicated in Findings 15 and 16, the District served precautionary notices on various employees they considered to be temporary. A subgroup of STA precautionary respondents are "university interns" who are participating in internship programs through a university. (These employees are also referred to by the District as "institutional interns.")

STA respondents assert that the District erred in identifying university interns as temporary and that, pursuant to Education Code section 44909 and *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal. App. 4th 1260 (*Bakersfield*), they are to be given the same probationary status as District interns. Ms. Fite testified that the District does not always categorize university interns as temporary employees. Rather, in determining the employee's status, the District looks to the position the employee is being hired to fill. If the person is filling a position that is categorically funded, or is "filling behind" another employee for such a position, they are placed on a temporary contract.²⁰ If the individual is filling a vacant position, they would be placed on a probationary contract.

¹⁹ Pursuant to Education Code § 44467, colleges and universities may develop and maintain internship credential programs under their own auspices seeking the cooperation of school districts in their full implementation.

²⁰ The defining characteristics of categorically funded programs are that the program be financed outside the base revenue limit with funds designated for a use specified by the particular program. (*Zalac, supra*, at 848, fnnt 10.)

The following university interns testified and provided their temporary contracts:

62. *Rosa Baker* was hired at Grant Elementary before the start of the school year to fill what she believed was a vacant position. She later heard that the teacher who had been in this job had been terminated by the District. Ms. Baker signed the Offer of Temporary Employment on July 22, 2008. Pursuant to this agreement, Ms. Baker was advised that she was being hired in a temporary capacity, under Education Code section 44909, as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program. She was further notified that the period of her employment was from July 28, 2008, to “not to exceed May 29, 2009.” Ms. Baker began teaching her fourth grade class on July 28, 2008.

63. *Melissa Matthews Brookens* has taught fourth grade since July 28, 2008. She signed an Offer of Temporary Employment on July 22, 2008. Pursuant to this agreement, Ms. Matthews Brookens was advised that she was being hired in a temporary capacity, under Education Code section 44909, as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program. She was further notified that the period of her employment was from July 28, 2008, to “not to exceed May 29, 2009.”

64. *Gloria Gonzalez* signed the District’s standard contract “Offer of Temporary Employment” on July 2, 2008. Pursuant to this agreement, Ms. Gonzalez was advised that she was being hired in a temporary capacity, under Education Code section 44909, as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program. She was further notified that the period of her employment was from July 28, 2008, to “not to exceed May 29, 2009.” The District’s Personnel Authorization Form confirms this start date, indicates that her funding source is QEIA [Quality Education Improvement Act], and that her status is temporary. Ms. Gonzalez testified that her first day of teaching was on July 29, 2008, and that she attended a week-long new teacher orientation that began on July 9, 2008, and a language arts training the week before school began. Ms. Gonzalez was paid for attending each of these trainings.

65. *Ariana Casillas* teaches eighth grade at Taylor Elementary. She signed the District’s standard contract “Offer of Temporary Employment” on November 26, 2008. Pursuant to this agreement, Ms. Casillas was advised that she was being hired in a temporary capacity, under Education Code section 44909, as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program. She was further notified that the period of her employment was from December 1, 2008, to “not to exceed May 29, 2009.”

Ms. Casillas testified that she had been in her position since July 28, 2008. She was told this was a vacant position. At the time she was offered the position, Ms. Casillas did not have a credential. She had a 30-day permit. Principal Green told her this was fine because they did not have a credentialed teacher for the position. Ms. Casillas performed all the typical duties of a teacher during the 2008-2009 school year, including extra tutor before and after school. Ms. Casillas was waiting for the results of her C-SET examination for math and science; these results were received in November. Ms. Casillas was then contacted by Cinda Cornwell to sign the Temporary Contract on November 25, 2008. Ms. Casilla applied for an internship credential in December 2008.

66. *Annette Albertoni* has taught fifth grade since July 28, 2008. On interview, she was told her position was a vacancy and was QEIA funded. Ms. Albertoni signed an Offer of Temporary Employment on July 18, 2008. Pursuant to this agreement, Ms. Albertoni was advised that she was being hired in a temporary capacity, under Education Code section 44909, as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program. She was further notified that the period of her employment was from July 28, 2008, to “not to exceed May 29, 2009.”

67. *Adriana Solis* has taught sixth grade since July 28, 2008. At the time she was hired, Ms. Solis was in a university intern program through California State University, Stanislaus. Ms. Solis signed an Offer of Temporary Employment on July 8, 2008. Pursuant to this agreement, Ms. Solis was advised that she was being hired in a temporary capacity, under Education Code section 44909, as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program. She was further notified that the period of her employment was from July 28, 2008, to “not to exceed May 29, 2009.” She attended new teacher training beginning on July 9, 2009 and the SB 472 math training the following week, and was paid for these trainings.

68. Education Code section 44909 provides in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this

section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

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

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

69. As recognized by the court in *Zalac vs. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App. 4th 838 at 845 (*Zalac*):

The intent of former section 13329 [now § 44909] was “to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.” [Citation.] The section “was intended to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or cut back.”

The court in *Zalac* noted that “school districts might be disinclined to participate [in a categorically funded program] if there were a risk that teachers hired to implement the program would have seniority rights if the particular program should be discontinued.” (*Zalac*, *supra*, 98 Cal.App.4th at p. 851.) (See also *Schnee v. Alameda Unified School District* (2004) 125 Cal.App.4th 555 (*Schnee*).

70. The *Bakersfield* court addressed the issue of whether employees in categorically funded programs which had not expired should be afforded the due process protections set forth in Education Code sections 44949 and 44955 during a layoff. The *Bakersfield* court did not address whether employees whose programs or contracts had already expired should obtain seniority credit for the time they had worked in categorically funded positions in the past. In its lengthy discussions, *Bakersfield* expressed its opinion that the Legislature, in amending the statute for tenure for university interns (44466) intended to make it consistent with the corresponding statute (section 44885.5) regarding tenure for district interns. (Id. at 1292.)²¹

The District is not prohibited by *Bakersfield* from entering into temporary contracts with employees working in categorically funded programs under section 44909. This is consistent with the policy concerns expressed in *Zalac* and *Schnee*. These precautionary respondents were provided with an opportunity to participate in the hearing; consequently any due process concerns expressed in *Bakersfield* were satisfied.

Kavanaugh Issues

71. An employee who is not given written notice of status as a temporary employee at the time of her initial employment, because she did not receive such notice on or before her first day of paid service, must be considered a probationary employee as a matter of law (Educ. Code, § 44916; *Kavanaugh, supra*, 29 Cal.4th at 926.

As set forth in Finding 65, Ms. Casillas did not receive a timely temporary contract. Accordingly, she is probationary employees as a matter of law.

Preschool Teachers

72. STA respondents who are preschool employees (Rena Almaguer (10/13/08), Tinka Lebed (3/12/08) argue that they should be considered probationary

²¹ Pursuant to Education Code section 44466, intern “shall not acquire tenure while serving on an internship credential.” If, after completing a teaching internship program, the individual “is employed for at least one complete school year in a position requiring certification qualifications by the school district that employed the person as an intern during the immediately preceding school year and is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year, acquire tenure.”

Education Code section 44885.5, subdivision (a), provides in pertinent part that “[a]ny school district shall classify as a probationary employee of the district any person who is employed as a district intern pursuant to Section 44830.3 and any person who has completed service in the district as a district intern pursuant to subdivision (b) of Section 44325 and Section 44830.3 and is reelected for the next succeeding school year to a position requiring certification qualifications.”

rather than temporary employees. They are correct. As indicated by the Court in *San Jose, supra*, at 641, the Legislature has afforded children’s center employees credit for one year of service for purposes of section 44882 [now section 44929.21] where they have performed 134 days of service. (Educ. Code, § 8365.5.)²² As a result, their time in the children’s center program is to be counted in determining their date of employment. There was no evidence that these respondents were provided temporary contracts, and the District does not dispute that they met the requirements of Education Code section 8365.6.

SPPA Precautionary Respondents

73. As set forth in Finding 15, there are eight SPPA counselors who were served with precautionary notices. These respondents presented no evidence to challenge their temporary status. Accordingly, they are not appropriate parties to this matter and the Accusations against them are dismissed.

INDIVIDUAL CLAIMS

74. *Karen Tomlin*: Ms. Tomlin is a counselor with a seniority date of August 3, 1993. She is currently assigned as an elementary counselor. Ms. Tomlin testified that she worked as a Student Assistance Program (SAP) Chairperson for nine years, and that she is more senior than the current SAP chair John New. Mr. New has a seniority date of July 1, 1996. Both he and Ms. Tomlin holds PPS credentials. As previously indicated, the SAP program was not one of the PKS Items for layoff. Ms. Fite agreed that Mr. New’s position under the SAP program was essentially a counseling position that a more senior counselor could bump into. She testified that she should have, but did not, consider whether more senior SPPA counselors could bump into Mr. New’s position.

The District provided no evidence regarding why Mr. New should be “skipped” from the layoff. While it is clear that Ms. Tomlin is more than qualified to bump into this position, it is not apparent that she is the most senior counselor who could bump into this job. As a result, the Accusation of the most senior counselor

²² Education Code section 8365.5 refers to Education Code section 44882. As indicated in the Historical Notes, Section 44882, added by Stats.1976, c. 1010, § 2, amended by Stats.1983, c. 498, § 46, related to classification of certain employees of a school district of any type or class having an average daily attendance of 250 or more as permanent employees. See Education Code section 44929.21.

Education Code section 44915 requires school board to “classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.”

competent to bump into Mr. New's position, who is not already included in the corresponding number stipulation set forth in Finding 40, shall be rescinded.²³

75. Any other assertions raised by respondents at hearing which are not addressed above are found to be without merit and are rejected.

76. Except as stated above, no more junior employees are being retained to render services that more senior respondents are certificated and competent to perform.

77. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of its schools and pupils.

LEGAL CONCLUSIONS

1. As set forth in Factual Findings 1 through 14, all notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

2. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

The services identified in PKS Resolution No. 08-38 are particular kinds of services that may be reduced or discontinued under Education Code sections 44949

²³ Ms. Fite also agreed that she did not do a bumping analysis on SAP Program Specialist Jennifer Robles (9/02/97) or on SAP Chair Maryann Santella-Rogers (9/21/92). After this issue was brought to her attention, Ms. Fite reviewed Ms. Robles' credentials and determined she could not have bumped into another position based upon her credentials. As indicated above, both Ms. Robles and Ms. Santella-Rogers were included in the group of employees who were improperly not noticed and will be retained for 2009-2010 school year. The error in failing to notice them was remedied under the corresponding number theory. As a result, no additional remedy is necessary to correct this failure by the District.

and 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. As set forth in the Factual Findings and Legal Conclusions as a whole, and with the exceptions noted particular in Findings 17 through 40, the District has established that no employees junior to respondents are being retained to perform the services which respondents are competent and certificated to render.

RECOMMENDATION

1. As set forth in Finding 73, the following temporary respondents served with precautionary notices are not appropriate parties to this proceeding, and their Accusations are dismissed: Lucia Alfaro; Kathryn Coyle; Breeonna Delaire; Tammy Earnest; Janet Kingsland; Tracy Mitchell; Bruce Nguyen; and Maria Pacheco-Ren.

2. Pursuant to the application of the corresponding number theory, the Accusations against the following certificated teachers and counselors are dismissed: A. Podesto; D. Warford; E. Menicucci; C. Brauer; P. Davidson; Luanne Moore; C. Dacian; A. Stockdale; and E. Martis; S. Heidner; C. Carrillo; B. Nagai; D. Ensele; L. Capello; and S. Style-Zanotti.

3. As set forth in Finding 74, the Accusation of the most senior counselor competent to bump into the SAP chairperson position held by John New is dismissed.

4. The District shall amend its certificated seniority list to indicate the probationary status of its pre-school permit teachers subject to PKS Item No. 22.

5. The District shall amend its certificated seniority list to reflect the probationary status of Ariana Casillas.

6. The District may give notice to the remaining respondents in the inverse order of seniority that it will not require their services for the 2009-2010 school year.

DATED: June 11, 2009

/s/
MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings