

BEFORE THE
GOVERNING BOARD OF THE
MERCED UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-
Reemployment/Reduction in Force of:

HAYDEE ARREOLA
YOUNES BENOMAR
MARIA L. FUENTES
MARTHA MARMOLEJO
MAYRA FLORES-REYES
MAYCOL WILSON

OAH No. 2010030514

Respondents.

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 15, 2010, in Merced, California.

Todd A. Goluba, Attorney at Law, appeared on behalf of the Merced Union High School District.

Ernest H. Tuttle, III, Attorney at Law, appeared on behalf of all respondents, who were present throughout the hearing.

Evidence was received, and the record remained open to allow respondent Younes Benomar to submit evidence that he is "Highly Qualified" under the No Child Left Behind Act to teach 9th grade mathematics. On April 19, 2010, Rosa Wood, Human Resource Specialist, submitted a Declaration, stating under penalty of perjury, that, "[b]ased on the information I received from the [California Commission of Teacher Credentialing] CCTC, it is my professional conclusion that Mr. Benomar is 'Highly Qualified' under the No Child Left Behind Act to serve in a 9th grade math assignment for the 2010-2011 school year." The record was closed, and the matter was submitted for decision on April 19, 2010.

FACTUAL FINDINGS

1. Vincent Scott Scambray is the Superintendent of Merced Union High School District (District). Raynee J. Daley, Ed.D., is the Assistant Superintendent of Human Resources of the District. Their actions and the actions of the District's Governing Board (Board) were taken in their official capacities.

2. Respondents are permanent or probationary certificated employees of the District.

3. On March 11, 2010, the Board adopted Resolution No. 10-09 (Resolution), which provided for the reduction or elimination of particular kinds of services (PKS), and the reduction of a corresponding number of certificated employees not later than the beginning of the 2010-2011 school year. In order to limit the number of reductions, the District considered all positively-assured attrition, including deaths, resignations, retirements, non-reelections, and other permanent vacancies. The Board directed Superintendent Scambray to send appropriate notices to all employees whose services will be terminated by virtue of the PKS reductions and eliminations. The PKS reductions and eliminations are based solely upon economic reasons, and are not related to the skills, abilities or work performance of the affected teachers.

4. Pursuant to the Resolution, the following particular kinds of services were identified for reduction or elimination:

<u>Certificated Positions</u>	<u>FTE</u>
Classroom Teaching Positions	
Business	1.50 FTE
Foreign Language – Spanish	3.00 FTE
Industrial Technology	0.40 FTE
Physical Education	2.00 FTE
Social Science	2.80 FTE
Special Education (Mild/Moderate)	2.00 FTE
Advancement via Individual Determination (AVID)	0.80 FTE
Enrichment	4.20 FTE
Counseling Positions	
Counselor	4.00 FTE
Administrator Positions	
Director of Categorical Programs	1.00 FTE
<hr/>	
Total	21.70 FTE

5. On March 11, 2010, the Board defined the “competency” of a senior employee for reassignment into a position currently held by a junior employee, for the 2010-2011 school year, as follows:

(A) currently possesses clear or preliminary credential(s) authorizing the subject(s) and grade level(s) to which the employee will be assigned, and

(B) has taught the subject area or served in the nonteaching position (e.g. Teacher on Special Assignment) to which he/she will be assigned for at least one semester in the past five school years, and

(C) has “highly qualified” status under the No Child Left Behind Act (NCLB) for the subject matter and grade level to which he/she will be assigned, and

(D) possesses a currently valid and properly filed CLAD, BCLAD, SDAIE or other regular (non-emergency) EL certificate, and

(E) if assigned to teach AVID, have completed AVID training and taught AVID for at least one semester in the past five school years, and

(F) if assigned to teach an Advanced Placement class, shall possess valid documentation of completion of Advanced Placement training and have taught at the Advanced Placement level for at least one semester in the past five school years.

6. On March 11, 2010, the Board developed the following “tie-breaking” criteria to be used in determining the order of termination of certificated employees who first rendered paid service to the District on the same date:

- a. Possession of a current valid and properly filed regular credential (clear, professional clear, or preliminary).
- b. Possession of a currently valid and properly filed CLAD, BCLAD, SDAIE, or other regular (non-emergency) EL certificate.
- c. The employee is “Highly Qualified” within the meaning of the No Child Left Behind Act.

- d. Possession of a supplemental or single subject credential (not Board authorization) to teach in the following areas:
 - (1) Math
 - (2) Science
 - (3) English
- e. The employee whose currently valid and properly filed credentials authorize a broader scope of service.
- f. The employee holding the highest current placement on the salary schedule.
- g. If a tie still exists after application of criteria a. to f., the tie shall be broken by lot. Numbers shall be drawn with the lowest number drawn winning the tie and continuing until all remained tied individuals are ranked in order.

7. On March 11, 2010, in accordance with the Board's Resolution, and pursuant to Education Code sections 44949 and 44955, the District served preliminary and precautionary layoff notices on 47 certificated employees advising that their services would be reduced or would not be required for the 2010-2011 school year. Each written notice set forth the reasons for the recommendation and enclosed a copy of the Board's Resolution reducing the certificated staff by 21.70 FTE. Twenty-six certificated employees timely filed a Request for Hearing to determine if there is cause for not reemploying them for the ensuing school year.

8. On March 26, 2010, Superintendent Scambray made and filed Accusations against the 26 certificated employees who timely filed a Request for Hearing. The Accusations with required accompanying documents and blank Notices of Defense were timely served on certificated employees, including respondents. Between March 30, 2010, and March 31, 2010, sixteen respondents timely filed Notices of Defense to the Accusations. On April 1, 2010, the District served notices of rescission on 10 affected teachers¹ who had timely filed a Notice of Defense to the Accusation, and the matter proceeded against the remaining six respondents.

District's Memorandum Regarding English Learner Authorization

9. On September 18, 2007, Dr. Daley issued a memorandum advising certificated employees that the Board required all teachers to obtain English Language Learner (EL) Authorization by April 15, 2008, and that the principals were assisting teachers to develop an

¹ The names and dates of hire of the ten certificated employees who were not present or represented by counsel at the hearing are: (1) Gary Haflich – August 20, 1991; (2) Kathrin Hernandez – November 27, 2007; (3) Jillian Mendoza – August 6, 2008; (4) Janel Mouillesseaux – August 6, 2007; (5) Donald Olaver – August 27, 1992; (6) Joshua Pedroza – August 6, 2008; (7) Tom Post – August 6, 2004; (8) Anna Ramirez – August 6, 2008; (9) Veronica Serrano – August 6, 2008; and (10) Nancy Williamson – August 6, 2004.

action plan to successfully complete the EL authorization process. On February 24, 2009, Superintendent Scambray recommended to the Board, and the Board voted unanimously to authorize “the use of the EL Authorization as skipping criterion for future certificated layoff processes.”

District’s Layoff Procedures

10. The District maintains a Seniority List which contains data obtained from the District’s records and its employees, including, but not limited to, employees’ seniority ranking; tenure status; seniority dates; names; full-time equivalent (FTE) positions; departments; assignments; sites; credentials; and EL certificates. The District used the Seniority List to develop a 2010 Certificated Layoff Implementation Chart identifying the certificated employees who would receive preliminary and precautionary layoff notices. None of the respondents raised any challenges to the accuracy of the Seniority List or 2010 Certificated Layoff Implementation Chart.

11. At hearing, Dr. Daley asserted that the District issued a preliminary layoff notice to Martha Marmolejo because EL students comprise between 15 and 100 percent of the students in her classes, and she has not obtained her EL Authorization.

12. Dr. Daley also asserted that the District issued preliminary layoff notices to Younes Benomar, Haydee Arreola, Mayra Flores-Reyes, and Maria Fuentes because they did not express an interest in, attend or complete an Advanced Placement (AP) training course. The District “skipped” two probationary teachers (Maycol Wilson and Maria Arteaga), and one permanent teacher (Moises Gutierrez), because each of the three junior teachers expressed an interest in, attended and completed a one-week AP training course in San Diego, California. In addition, each of the junior teachers has taught at the AP level for at least one year subsequent to their AP training course. The District did, however, issue precautionary layoff notices to the three junior teachers. According to Dr. Daley, the AP training course is valuable to the District because the “teachers get a specialized view of how they take students through the curriculum to the point where students are able to sit for college-level ... exams.” In addition, the District is emphasizing a rigorous curriculum in order to “clos[e] the achievement gap,” and encouraging its students to be college-bound. Dr. Daley stated that “AP is a demanding curriculum, so it’s not uncommon [for AP teachers] to only teach one class,” and admitted that there is no legal requirement for certificated teachers to take AP training courses to teach AP students. However, the District wishes to retain junior teachers who can help to “sustain [their] program.” The District does not believe that it is required to offer AP training to all of its certificated teachers.

13. Dr. Daley asserted that the District applied the “tie-breaking” criteria between Mayra Flores-Reyes and Maria Fuentes, and broke the tie in favor of Maria Fuentes based on her higher salary. In addition, the District applied the “tie-breaking” criteria between Haydee Arreola and Janel Mouillesseaux, but did not break the tie. The District recommended drawing lots at the end of the hearing to break the tie and to determine if Ms. Arreola would be laid off

entirely, or would receive a 0.20 FTE position. Ms. Arreola refused to participate in the drawing because “the District said it doesn’t want someone teaching one period.”

Discussion

14. The Classroom Teaching Positions at issue in this hearing are 0.50 FTE in Business; 3.00 FTE in Foreign Language – Spanish; and 0.80 FTE in AVID. Based on seniority dates and credentials, the affected certificated employees, are as follows:

A. **Martha Marmolejo** has a seniority date of 8/20/96. She holds a Single Subject Credential in Spanish, Single Subject Credential in Business, and Administrative Credential. She served as an Administrator with the District for five years, and was reassigned to the classroom for the 2009-2010 school year. Ms. Marmolejo is currently assigned to teach 0.50 FTE in Business; 0.167 FTE in Foreign Language – Spanish; and 0.333 FTE in AVID at Buhach Colony High School. Her services were eliminated by 1.50 FTE for Business; 3.00 FTE for Foreign Language – Spanish; and 0.80 FTE for AVID, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year.

At hearing, Dr. Daley asserted that the No Child Left Behind (NCLB) Act, along with federal funding requirements, requires the District to ensure that all teachers obtain their EL Authorization. According to Dr. Daley, if a teacher without proper EL Authorization teaches a class with one or more EL students present, it is recorded as a “misassignment,” which can affect their funding. Two opportunities were made available for the District’s certificated teachers to obtain their EL Authorization. They could: (1) undertake coursework to obtain a Crosscultural, Language and Academic Development (CLAD) Certificate; or (2) study for and take the California Teachers of English Learners (CTEL) exam. Dr. Daley stated that “the District ... provided information regarding opportunities for teachers to obtain their EL certification,” and worked with the teachers’ union to get the word out. The District imposed a deadline of April 15, 2008 for teachers to obtain their EL Authorization, and 80 to 85 percent of the certificated teachers complied. As for new teachers hired by the District, they have their CLAD “built into their credential.” Dr. Daley confirmed that “administrators serve at the will of the board and can be placed back in the classroom at any time,” and that between 2004 and 2009, Ms. Marmolejo was the Program Specialist assigned to work with the teachers to develop action plans to obtain their EL Authorization. The District submitted evidence to demonstrate that EL students comprise between 15 and 100 percent of the students in Ms. Marmolejo’s classes, and Dr. Daley asserted that the district cannot redistribute the students to ensure that no EL students attend Ms. Marmolejo’s classes.

Ms. Marmolejo admitted at hearing that “I knew teachers needed the CLAD certificate, but did not know the deadline,” and “unfortunately, I didn’t see the time coming to going back into the classroom.” As part of her administrative duties, Ms. Marmolejo was “responsible for the EL program,” and for assisting and ensuring that all of the teachers obtained their EL authorization. She did not obtain her CLAD, however, because her administrative duties were “huge,” and “[she] had other meetings going on.” Ms. Marmolejo asserted that when she returned to the classroom in the 2009-2010 school, she “was concerned about [her] curriculum,

not [her] CLAD.” Then, in January 2010, when the District changed her classes, it “required another type of preparation.” In addition, during the 2009-2010 school year, Ms. Marmolejo began experiencing significant health problems, which culminated in a surgical procedure requiring eight days off work in March 2010. Furthermore, Ms. Marmolejo was finalizing her divorce proceedings. Together these incidents delayed her ability to begin her CLAD courses. Ms. Marmolejo is currently taking expedited on-line CLAD courses through the University of Phoenix, and hopes to complete her EL authorization by June 14, 2010. She asserted that “I’m a good teacher ... I love my students ..., and I’ve served my district with energy.” She apologized for not obtaining her EL authorization, and believes that “a courtesy reminder would have been nice.” According to Ms. Marmolejo, she became aware of the requirement to complete the EL authorization when a co-worker mentioned it to her in January 2010, but did not become aware of the actual deadline until March 2, 2010, when she met with Dr. Daley. She does not recall the Board’s February 24, 2009 Minutes authorizing the Superintendent to use the EL authorization for skipping criteria. Ms. Marmolejo argued that because other teachers do not have their EL authorization, she should be able to retain her position because she is “working on it,” and has “invested a lot of years in the District.”

B. **Younes Benomar** has a seniority date of 8/6/07. He is a probationary employee. He holds an Internship Credential in Spanish, Preliminary Single Subject Credential in Spanish, and Supplementary Authorization in Mathematics. He is Highly Qualified under NCLB to teach 9th grade mathematics. Mr. Benomar is assigned to teach 1.00 FTE in Foreign Language – Spanish at Buhach Colony High School. His services were eliminated by 3.00 FTE for Foreign Language – Spanish, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year. Pursuant to stipulation by the parties, the District has agreed to reassign Mr. Benomar to a 9th grade mathematics position during the 2010-2011 school year.

C. **Haydee Arreola** has a seniority date of 8/6/07. She holds a Single Subject Credential in Spanish, Supplemental Credential in Psychology, and Bilingual, Crosscultural, Language and Academic Development (BCLAD) Certificate, pursuant to SB 2042. She is currently assigned to teach 0.80 FTE in Spanish and 0.20 FTE in AVID at Atwater High School. Ms. Arreola’s services were eliminated by 3.00 FTE for Foreign Language – Spanish, and 0.80 FTE in AVID, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year.

D. **Mayra Flores-Reyes** has a seniority date of 8/7/06. She holds a Single Subject Clear Credential in Foreign Language – Spanish, and CLAD Certification. She is currently assigned to teach 1.00 FTE of Foreign Language – Spanish at Merced High School. Her services were eliminated by 3.00 FTE for Foreign Language – Spanish, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year.

E. **Maria Fuentes** has a seniority date of 8/7/06. She holds a Single Subject Clear Credential in Foreign Language – Spanish, and BCLAD Certificate. She is currently assigned to teach 1.00 FTE in Foreign Language – Spanish at Merced High School. Her services were

eliminated by 3.00 FTE in Foreign Language – Spanish, pursuant to the Board’s Resolution to reduce Classroom Teaching Positions in the 2010-2011 school year.

At hearing, Ms. Arreola, Ms. Flores-Reyes and Ms. Fuentes asserted that they were not offered an opportunity to take an AP training course, and were not told that they would be laid off if they did not take an AP training course. They each expressed a willingness to take an AP training course at their own expense, as well as to teach an AP class. Together, they believe that the layoff procedures should be clear, transparent and fair, especially in light of the time and money they have invested in the District and the District has invested in them.

F. **Maycol Wilson** has a seniority date of 8/7/08. He is a probationary employee. He holds a Single Subject Credential in Foreign Language – Spanish, and EL Authorization. He is currently assigned to teach 1.00 FTE in Foreign Language – Spanish at Merced High School. His services were eliminated by 3.00 FTE for Foreign Language – Spanish, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year. Mr. Wilson received a precautionary layoff notice, and filed a Notice of Defense in this matter. No issues were raised at hearing by or on behalf of Mr. Wilson.

G. **Maria Arteaga** has a seniority date of 1/15/05. She is a probationary employee. She holds a Single Subject Credential in Foreign Language – Spanish, and EL Authorization pursuant to SB 2042. She is currently assigned to teach 0.60 FTE in Foreign Language – Spanish and 0.40 FTE AVID at Atwater High School. Her services were eliminated by 3.00 FTE for Foreign Language – Spanish, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year. Ms. Arteaga received a precautionary layoff notice, but did not request a hearing or file a Notice of Defense in this matter.

H. **Moises Gutierrez** has a seniority date of 8/6/07. He holds a Single Subject Credential in Foreign Language – Spanish, and BCLAD Certificate. He is currently assigned to teach 1.00 FTE Foreign Language – Spanish at Atwater High School. His services were eliminated by 3.00 FTE for Foreign Language – Spanish, pursuant to the Board’s Resolution to eliminate Classroom Teaching Positions in the 2010-2011 school year. Mr. Gutierrez received a precautionary layoff notice, but did not request a hearing or file a Notice of Defense in this matter.

Skipping Junior Teachers with EL Authorization

15. The District’s goal was to have 100 percent of its faculty obtain EL Authorization by April 15, 2008. Ninety-two percent of the faculty complied with the District’s goal by February 24, 2009. On that same day, the Board authorized the use of the EL Authorization as “skipping” criteria for future layoff procedures. Thereafter, the District continued to actively encourage its faculty, including Ms. Marmolejo, to obtain their EL Authorization. On January 29, 2010, Dr. Daley issued a memorandum to Ms. Marmolejo giving her until February 5, 2010 to submit proof that she had completed and/or was in the process of obtaining her EL Authorization. On February 1, 2010, Ms. Marmolejo advised the

District that she was planning to take the CTEL Examination on June 12, 2010 to obtain her EL Authorization. On February 4, 2010, Ms. Marmolejo advised the District that she would not take the CTEL examination, but would instead pursue CLAD coursework through the University of Phoenix. She began her on-line CLAD coursework on February 16, 2010.

The District's rationale for skipping junior teachers and laying off Ms. Marmolejo is the District's belief that other provisions of the Education Code require that a teacher who provides instruction to even a single EL student² must possess an EL Authorization. Failure to comply with this perceived mandate would, in the view of the District, subject it to the risk of civil liability and sanctions by state and federal governmental agencies. These sanctions include the loss of funding.

16. The Legislature has directed the California Commission on Teacher Credentialing (CTC) to "issue a certificate that *authorizes* the holder to provide [specified] services to limited-English-proficient pupils..." (Ed. Code, § 44253.) This statute follows a legislative declaration that limited-English-proficient pupils have the right to a quality education and "their special needs *must* be met by teachers who have essential skills and knowledge related to English language development and specially designed content instruction delivered in English..." (Ed. Code, § 44253.1.) The same section expresses the Legislature's intent that the CTC "implement an assessment system to certify those teachers who have the essential skills and knowledge necessary to meet the needs of California's limited-English-proficiency pupils." Education Code section 44253.5 requires the CTC to develop an examination by which teachers may establish their "competence in the knowledge and skills necessary for effective teaching of limited-English-proficient pupils." School districts must report instances in which teachers have been misassigned including those instances in which districts have failed to follow Education Code sections 44253, et seq.(Ed. Code, §44258.9.) In summary, it is the CTC which "licenses" teachers and prescribes the areas in which they may provide instruction by virtue of their credentials. (Ed. Code, §§ 44001, 44830, 44831, and 44253.1.) The CLAD certificate was the designated certificate created in response to the Legislative mandate. If such certificate, or its equivalent, "authorizes" instruction to limited-English-proficient pupils, the teaching of such students without the certificate is necessarily *unauthorized*. This interpretation is in accord with the position taken by the California Department of Education as reflected in documents received in evidence at the administrative hearing.

17. Ms. Marmolejo did not establish that the Board engaged in arbitrary or capricious action or violated its discretion by requiring that certificated teachers obtain their EL Authorization. The District established that it is required by state and federal law to ensure that EL students receive instruction from certificated teachers with EL Authorization, and that EL students comprise between 15 and 100 percent of the students in Ms. Marmolejo's classes.

² Education Code section 305, subdivision (a), reads: "'English learner' means a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English, also known as a Limited English Proficiency or LEP child."

Therefore, Ms. Marmolejo does not meet the “competency” criteria set forth in the Board’s Resolution, which requires that she possess a currently valid and properly filed CLAD, BCLAD, SDAIE or other regular (non-emergency) EL certificate, and is subject to layoff.

Skipping Junior Teachers with Advanced Placement Training

18. The District argued that it was permitted to skip three junior (two permanent and one probationary) teachers with AP training, and terminate three senior teachers without AP training because the AP training constitutes “special training and experience.” The only permissible justifications for skipping are contained in Education Code section 44955, subdivision (d). A school district may not create justifications for skipping. To do so would deprive teachers of their seniority rights. While Education Code section 44955, subdivision (d), does not define the term “special training and experience,” it is clear that the focus of the inquiry must be on a district’s “specific need” and on what is “necessary” to qualify a teacher to teach a course that requires “special training and experience.” Under section 44955, subdivision (d), the inquiry is focused on whether the senior teacher does “not possess” the “special training and experience necessary to teach [a] course”

19. While a governing board has latitude in determining what factors contribute to competency for provision of a particular service, those factors must be reasonable. There must be a rational relationship between the competency criteria and performance of a particular service. The governing board also has latitude in choosing to skip junior employees who provide specialized services. But, the Board must show these junior employees have special training and experience necessary to teach AP classes, and that others with more seniority do not possess those skills. The Board may prefer to keep its junior teachers who have completed an AP training course and completed at least one year of AP teaching. These junior teachers appear to be performing well in their AP classes, and have brought much to the District’s plan to expose students to AP teachers. However, even though they may be the ideal teachers to teach AP classes, they are not the only teachers who can effectively teach AP classes. Ms. Arreola, Ms. Flores-Reyes, and Ms. Fuentes are senior employees who are certificated and competent to teach AP classes. As set forth below in the Legal Conclusions, the very clear intent of the Education Code is to prevent the termination of permanent employees while probationary employees or employees with less seniority are retained to render services which the senior employee is certificated and competent to render. Establishing a preference for existing staff, by enacting competency criteria designed to exclude senior teachers, violates the intent of the Education Code. The District admitted that certificated teachers are not required to take AP training courses to teach AP classes. Therefore, the District failed to establish that the three senior teachers without AP training are not certificated or competent to teach AP classes.

20. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. The District employees who received notices that their services would not be required in the 2010-2011 school year are not being laid off for reasons related to their ability or performance.

2. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondents are factually and legally appropriate. The District has met its burden. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under section 44955. As stated in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” The District must be solvent to provide educational services and cost savings are necessary to resolve its financial crisis. The Superintendent’s recommendation to reduce particular kinds of services was a proper exercise of his discretion. In addition, all notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. The notices sent to respondents indicate the statutory basis for the reduction of services and adequately describe the particular kinds of services to be reduced, and, therefore, were sufficiently detailed to provide them due process. (*Ibid.*, at p. 627; see also, *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831; *Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; and *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

3. 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.) As set forth in Factual Finding 4, the services identified in the Resolution are particular kinds of services that may be reduced or discontinued under Education Code sections 44949 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 sections 44949 and 44955.

4. Education Code section 44253.10, subdivision (i), provides, in pertinent part, That “[t]he governing board of each school district shall make reasonable efforts to provide limited-English-proficient pupils in need of English language development instruction with teachers who hold appropriate credentials, language development specialist certificates, or

cross- cultural language and academic development certificates that authorize English language development instruction”

5. Education Code section 44955, subdivision (b), provides in pertinent part:

Whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, ...or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

6. Education Code section 44955, subdivision (c), provides that when certificated employees face layoffs due to reduction or elimination of PKS, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers, if the senior teacher has both the credentials and competence to occupy such positions. The intent of the Legislation is clearly to prevent districts from laying off senior teachers while retaining junior teachers.

7. Education Code section 44955, subdivision (d), establishes two justifications for a school district to skip over a junior employee and terminate a more senior employee:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

8. The District has the burden of demonstrating that certificated employees have the “special training and experience” necessary to teach a course of course of study. If the necessity for this “special training and experience” is demonstrated, the District must further establish that junior employees possess the qualifications necessary to teach such course or course of study, and that senior employees do not possess the “special training and experience.” (*Beldsoe v. Biggs Unified School Dist.* (2009) 170 Cal.App.4th 127.)

9. Pursuant to Education Code section 44955, subdivision (d), cause exists to give notice to respondent Martha Marmolejo that her services will not be required for the 2010-2011 school year, as set forth in Factual Findings 14A, and 15 through 17. The District established that EL students comprise between 15 and 100 percent of the students in Ms. Marmolejo’s classes. Ms. Marmolejo had adequate notice and a reasonable opportunity to obtain her EL Authorization, but failed to do so in a timely manner.

10. Cause does not exist to give notice to respondent Younes Benomar, that his services will not be required for the 2010-2011 school year, as set forth in Factual Finding 14B. Pursuant to stipulation by the parties, the District has agreed to reassign Mr. Benomar to a 9th grade mathematics position during the 2010-2011 school year.

11. Because the District failed to demonstrate that certificated teachers are required to complete an AP training course prior to teaching AP classes, the District may not skip teachers with AP training under Education Code section 44955. Therefore, cause does not exist to give notice to respondents Haydee Arreola, Mayra Flores-Reyes, and Maria Fuentes that their services will not be required for the 2010-2011 school year, as set forth in Factual Findings 14C, 14D, 14E, 18 and 19. Junior employees are being retained to perform the services which respondents Haydee Arreola, Mayra Flores-Reyes and Maria Fuentes are certificated and competent to render.

12. Pursuant to Education Code section 44955, cause exists to give notice to respondent Maycol Wilson, that his services will not be required for the 2010-2011 school year, as set forth in Factual Finding 14F. No certificated employees with seniority dates junior to Mr. Wilson are being retained to teach classes for which he is certificated and competent to teach.

RECOMMENDATION

1. Final notice may be given to respondent Martha Marmolejo that her services will not be required for the 2010-2011 school year.

2. The Accusation against respondent Younes Benomar is dismissed.

3. The Accusations against respondents Haydee Arreola, Mayra Flores-Reyes, and Maria L. Fuentes, are dismissed.

4. Final notice may be given to respondent Maycol Wilson that his services will not be required for the 2010-2011 school year.

DATED: May 5, 2010

REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings