

BEFORE THE  
GOVERNING BOARD OF THE  
MOUNTAIN VIEW SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH Case No. 2010030729

Certificated Employees of the Mountain View  
School District,

Respondents.

PROPOSED DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 6, 2010, in El Monte, California.

Margaret A. Chidester, Attorney at Law, represented Gloria Diaz, Assistant Superintendent of Personnel Services for the Mountain View School District (District).

Emma Leheny and Charlotte Noss, Attorneys at Law, Rothner, Segall, Greenstone & Leheny, represented 98 certificated employees set forth in the attached Appendix A, who are collectively referred to as Respondents. Kathy O'Neil and Michaela O'Neil, California Teachers Association, were also present at hearing on behalf of Respondents.

Oral and documentary evidence was received at the hearing. The record was left open to allow the parties to submit written closing arguments on or before May 13, 2010. On May 13, 2010, the District and Respondents submitted timely written post-hearing briefs and this matter was submitted for decision. The closing briefs were marked as Exhibits 13 and 14 respectively.

FACTUAL FINDINGS

1. Assistant Superintendent Gloria Diaz (Assistant Superintendent) filed the Accusation in her official capacity.
2. Respondents are certificated and probationary employees of the District.
3. Before March 15, 2010, the Assistant Superintendent provided written notice to the District's Governing Board and Respondents that the District was recommending the reduction or discontinuation of certain particular kinds of services for the 2010-2011 and that

Respondents' services would not be required for the 2010-2011 school year.

4. On March 10, 2010, the Governing Board of the District (Governing Board) adopted a Resolution entitled "RESOLUTION OF THE GOVERNING BOARD OF THE MOUNTAIN VIEW SCHOOL DISTRICT REGARDING REDUCTION OR DISCONTINUANCE OF PARTICULAR KINDS OF SERVICE," (hereinafter referred to as "Resolution"), reducing or discontinuing the following services at the close of the 2009-2010 school year:

<u>Service</u>	<u>FTE<sup>1</sup> Reduction</u>
K-8 Classroom Teaching Positions	72.0
Literacy Coaches	8.0
Teachers on Special Assignment (2 at 50%)	1.0
Counselors	2.0
Physical Education Teaching Positions	2.0
Social Science Teaching Position	1.0
Business/Computer Teaching Position	1.0
Psychologist	1.0
<u>Total</u>	88.0 FTE

5. Between March 11 and 15, 2010, the District provided written notice by personal service or certified mail to 126 Respondents that the Assistant Superintendent had recommended that 88 FTE would not be required for the 2010-2011 school year due to the reduction of particular kinds of services. The District received 120 timely requests for hearing from the Respondents.

6. On March 22, 2010, the District filed and served the Accusation and other required documents on 120 Respondents. Thereafter, 112 Respondents filed timely notices of defense, seeking a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

7. The services set forth in Factual Finding No. 4 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. Respondents challenge whether the PKS was properly implemented by the District which is dealt with in the Factual Findings below.<sup>2</sup>

8. The Governing Board took action to reduce or discontinue the services set forth in Factual Finding No. 4 because of budget cuts as a result of reduced State and federal funding and

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<sup>1</sup> FTE refers to "full-time equivalent" position.

<sup>2</sup> All further references are to the Education Code.

the reduction in student enrollment. The Assistant Superintendent testified that federal money that had been intended for use over a two year period had been expended during the 2009-2010 school year. In her opinion, the District would go “bankrupt” if the reductions in the Resolution were not implemented as recommended. The Assistant Superintendent stated that the budget cuts, along with the decline in student enrollment over the last seven to eight years had severely reduced the District’s funding. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District’s discretion.

9. The reduction of services set forth in Factual Finding No. 4 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

10. The Governing Board also adopted criteria by which to “exempt” certain certificated employees from the order of layoff “by virtue of their credentials, competence, assignment, experience, or certification.” Exhibit “A” of the Resolution specifies categories of certificated employees the Governing Board seeks to exempt from or “skip” during the layoff process. These categories are (1) certificated employees who possess administrative credentials; (2) certificated employees who possess a credential authorizing service in special education; (3) certificated employees who possess a credential authorizing service as a Newcomer teacher; (4) certificated employees who possess a credential authorizing service in alternative education (Magnolia Learning Center); (5) certificated employees who possess a credential authorizing service as a Head Start Literacy Coach or First 5 Literacy Coach; and (6) certificated employees who possess a credential authorizing service as an English Language Development Teacher on Special Assignment (ELD/TOSA).

11. The Governing Board also adopted tiebreaker criteria for determining the relative seniority for employees with the same first date of paid service. Exhibit “B” of the Resolution provides that the order of termination of employees with the same first date of paid service shall be determined by reference to certain tiebreaker criteria and to points assigned to each category of tiebreaker criteria. The Resolution further established a lottery process to be implemented if the tiebreaking criteria did not break all ties between employees with the same first date of paid service. The criteria were not all equally weighed, and points were awarded for each item. The tiebreaking criteria are reasonable as they relate to the skills and qualifications of certificated and probationary employees, and the District properly applied the criteria. There were no specific challenges raised by Respondents based upon implementation of the tiebreaker criteria by the District.

12. The District maintains a seniority list which contains employees’ seniority dates (first date of paid service with the District), current assignments and locations, whether an employee is “exempt” from the layoff, the employee’s status as permanent, probationary, temporary, etc., credentials and authorizations, advance degrees, and major areas of study. In January 2010, the District sent all of the certificated employees the seniority list notifying the employees of the information contained in the seniority list and requesting that they verify the

information. On at least two subsequent occasions in March and April 2010, employees were given an opportunity by the District to correct or dispute information contained in the District's seniority list.

13. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees who were identified in the particular kinds of services sought to be reduced or discontinued by the Resolution. Based on the information from the seniority lists, the District determined whether senior employees designated for layoff possessed credentials in other areas that would entitle them to "bump" junior employees holding positions that were not included in the particular kinds of services designated for reduction in the layoff. The District also used the seniority list to apply the tiebreaking criteria in Exhibit "B" of the Resolution.

14. Subsequent to the adoption of the Resolution, the District identified vacancies in the 2010-2011 school year due to Positively Assured Attrition (PAA) including retirements, deaths, and resignations. In consideration of such attrition the District concluded that the number of certificated employees required to be terminated pursuant to this proceeding would be reduced by 16 FTE positions; specifically 13 FTEs for K-8 Classroom Teaching Positions and two (2) FTEs for Literacy Coach positions.<sup>3</sup>

15. On April 13, 2010, the District rescinded its notices of non-reemployment issued to, and the Accusation as it pertained to, Respondents: Steve Brownson, Rachel Chan, Ramona Chandler, Sandy Delgado, Andrea Enciso, Olga Gallegos, Aracely Hernandez, Jacqueline Hernandez, Vinh Huynh-Kieu, Erin Lewis-Morris, Jose Santiago, Haile Ucbagaber, Fernando Velazquez, Maria Villavicencio, and Michael Yurkas. As a result of the rescinded layoff notices, 98 Respondents remained subject the Resolution and were represented at the layoff hearing.

16. Subsequent to the decision to rescind its layoff notice to Andrea Enciso, the District discovered an error had been made in determining Ms. Enciso's first date of service with the District. Ms. Enciso's first date of service in the seniority list was originally September 1, 1999, and placed her as (#313) on the seniority list. However, a review of her payroll records revealed her first day of service was in fact August 29, 2000, placing her as (#350) on the revised seniority list prepared by the District. Consequently, Ms. Enciso, who has a multiple subject credential with a crosscultural language and academic development (CLAD) authorization, was retained over several senior certificated employees who are scheduled for layoff and who are certificated and competent to teach the fourth grade class Enciso was retained teach. Thus, the District inappropriately "skipped" Ms. Enciso.

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<sup>3</sup> One other position was vacated through attrition/retirement: Anita Cole's Special Education RSP position. This position, however, was filled by Diana Rich, (#378), who was formerly a K-8 classroom teacher, but possessed a Clear Specialist Credential in Special Education which qualified her to be placed into Cole's special education position. No challenges were made by Respondents as to Ms. Rich's placement into this position.

17. The more senior certificated employees impacted by the District's error in calculating Respondent Enciso's seniority date are: Respondents Bernadette Dincin (#341); Felicita Li (#342); Diana Decamp (#343); Nelly Ann Fernandez (#344); Patricia Gutierrez-Bowers (#345); Lizette Loya (#346); Ryan Namihira (#346); and Marisa Torres (#348). All of these certificated employees possess a multiple subject credential with CLAD or BCLAD (bilingual) authorizations that would qualify them to teach the position held by Respondent Enciso. By virtue of the District retaining Respondent Enciso, the District has retained a junior employee to teach a class that a more senior employee is certificated and competent to teach. Therefore, Respondent Bernadette Dincin, the most senior of the teachers subject to layoff that could have filled this position, will be retained for the 2010-2011 school year.

*Reduction of Particular Kinds of Service For K-8 Classroom Teachers*

18. Respondents argue that the Governing Board's designation of "K-8 Classroom Teachers" was a general definition of the PKS and therefore only seniority should be considered in implementing the reduction for this PKS. Respondents essentially argue that the District failed to provide sufficient notice of its intent to exclude seventh and eighth grade teachers, nine in total, in departmentalized math, science, and English classes, and therefore failed to afford Respondents notice and reasons why these teachers were excluded. Respondents argue that the nine most senior K-8 teachers subject to layoff should therefore be retained by the District.

19. Respondents' argument that "K-8 Classroom Teachers" does not provide enough specificity to place teachers on notice is not persuasive. This PKS placed all K-8 teachers on notice of the District's intent to reduce teacher positions for these grades, including the teachers teaching departmentalized classes in the seventh and eighth grades. The District decided to implement the reduction by reducing K-6 teachers with multiple subject credentials teaching in self-contained classrooms, and seventh and eighth grade teachers teaching "core" classes in the middle schools. The District has the discretion to achieve the K-8 reduction in this manner as long as they were not arbitrary and capricious in its implementation.

20. In implementing the Resolution's reduction for "72 K-8 Classroom Teaching Positions," the District determined that it would retain seventh and eighth grade mathematics, science and English teachers who possessed either single subject credentials or supplemental authorizations in those subjects and who taught in departmentalized classes at the middle school level. Although the Resolution did not specify an exemption or skipping criteria for seventh and eighth grade teachers in departmentalized classes for math, science, and English, the Assistant Superintendent testified that teachers with single subject and supplemental authorizations in math, science, and English were retained to teach the departmentalized classes they were assigned because there were not more senior employees who were certificated and competent to teach these classes at the middle school level. The District's seniority list confirmed that no more senior K-8 teacher subject to layoff was certificated and competent to teach these departmentalized courses math, science, and English. Respondents also offered no evidence that any more senior certificated employee was certificated and competent to "bump" into any of the

departmentalize classroom position. The District's action was not arbitrary or capricious in implementing the K-8 Classroom Teacher reduction in the Resolution.<sup>4</sup>

21. Additionally, although it did not articulate that departmentalized math, science and English teachers would be skipped in the Resolution, the District was justified in skipping these teachers. The District is not required to provide justification for skipping a particular teacher or position in its Resolution. The District need only show evidence that it has a specific need for personnel to teach a specific course of study, and the junior employee retained has the special training and experience necessary to teach that course. Here, the Assistant Superintendent testified that seventh and eighth grade teachers with single subject credentials and supplemental authorizations were retained to teach specific departmentalized classes in math, science, and English in the middle schools. These teachers were presently assigned to those departmentalized classes, except for three who bumped into the departmentalized classes due to being more senior than the teacher presently teaching the class, and the District intends to maintain them in those assignments for the 2010-2011 school year. This constituted a sufficient basis for skipping these teachers because no more senior employee was certificated and competent to teach the classes and their retention related to the needs and welfare of the District and its students.

#### *Exemption or Skipping Related to the Newcomer Position*

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<sup>4</sup> The seniority list revealed that nine seventh and eighth grade certificated employees with single subject and supplemental authorizations in math, science, and English were retained to teach departmentalized classes in the middle schools: Lourdes Fonseca (#358) to teach life science with a single subject credential in biological science; Abelina Blocker (#360) to teach science/math with a single subject credential in physical science and a supplemental authorization in math; Marcos Bowers (#362) to teach math with a multiple subject credential with CLAD and a supplemental authorization in math; Debra Ho-Bates (#365) to teach science with a multiple subject credential with CLAD and a supplemental authorization in science; Carrie Ann Coss (#367) to teach English with a multiple subject credential with CLAD and a supplemental authorization in English; Carol A. Chavarin (#375) to teach math/science with a multiple subject credential with BCLAD and a supplemental authorization in math; Neelam Tandon (#383) to teach science with a single subject credential with CLAD in biological science, chemistry, and English; Jerado L. Puente (#387) to teach math with a single subject credential with CLAD in business and a supplemental authorization in math; and Kathy M. Kurtz (#396) to teach science with a single subject credential with CLAD in life science. Respondents argued that three other middle school teachers were inappropriately retained by the District: Danny Hamm (#398), Jacqueline Chavez (#459), and Melissa Dawn (#460). However, these three teachers were bumped by more senior teachers who possessed single subject credentials or supplemental authorizations to teach the departmentalized classes they were assigned to teach. Ms. Chavarin (#398) bumped Mr. Hamm, Ms. Blocker (#360) bumped Ms. Chavez, and Ms. Coss (#367) bumped Ms. Dawn.

22. The District seeks to exempt or “skip” Respondent Irma Laura Parisi, its only Newcomer teacher, from layoff based upon her special training and experience to perform this position. Although Respondent Parisi is located at one school location, fourth through sixth grade students are enrolled in the Newcomer program in her class from all ten of the District’s elementary schools. The Newcomer program essentially is an English immersion program specifically designed for students who have been in the United States for one year or less and speak little or no English. Approximately 70 percent of the District’s student population is Spanish speaking. Students enrolled in the Newcomer program have unique and special needs associated with their inability to speak English, their recent introduction into the American community and culture, the sometime traumatic circumstances surrounding their immigration to the United States, including separation from parents and family, and the inability of the their parents to communicate in English if the parent is present in their home. The Newcomer teacher must work with other teachers and parents in assessing the student’s needs and determining the appropriate classroom placement of the Newcomer student.

23. Required qualifications for the Newcomer teacher include in relevant part: the ability to work cooperatively and effectively with others, particularly at grade level assignment; ability to work with a spirit of enthusiasm and cooperation on a school team; knowledge of discipline techniques; knowledge of effective practices in English Language Development (ELD); multiple subject credential with a Bilingual Certificate of Competence (BCC), the predecessor to the BCLAD, or BCLAD; successful experience working with non-English speaking students; training in Project GLAD (Guided Language Acquisition Design) or willingness to participate in such training; and being bilingual and biliterate.

24. Respondent Parisi has a seniority date of August 29, 2001, and is (#368) on the seniority list. She has been the Newcomer teacher with the District for nine years and had been employed with the District as a bilingual teacher for almost 15 years prior to entering the Newcomer position. Ms. Parisi has a Masters Degree in Science and Reading and holds a BCC. She is bilingual and biliterate in the Spanish language. The BCC allows Ms. Parisi to teach K-12 grades, pre-school, adult education, and to teach English as a second language. She possesses the systematic ELD and Specially Designed Academic Instruction in English (SDAIE) certificates and also is a District trainer for the ELD certificate. Ms. Parisi is trained in early literacy strategies, the Kate Kinsella Acquisition Vocabulary, Project GLAD, Systematic Instructional Observation Protocol (SIOP), the Avenues Program (State adopted ELD program), Thinks MAPS (cognitive training), and has been the Title One Coordinator and a bilingual coordinator for the District in past years. Finally, Ms. Parisi expressed a sincere and deep passion for working with non-English speaking students, manifested out of her personal experiences as a “Newcomer” immigrating to this country. Her testimony evidenced a vast amount of experience in working with non-English speaking students both in the context a Newcomer teacher, and her prior experience as a bilingual teacher for the District.

25. Respondents Ofelia Heredia (#356) and Felicita Li (#342) offered evidence that they were certificated and competent to teach the Newcomer position. Although both possessed

the minimum qualifications required to teach the Newcomer position, Respondent Parisi possessed significantly more training and experience as a Newcomer teacher. Respondent Heredia had particularly impressive qualifications to fill the Newcomer teacher position. She possessed a multiple subject credential with BCLAD authorization, and has a supplemental authorization to teach Spanish and a Bachelors Degree in Liberal Arts. Ms. Heredia is bilingual and biliterate and has training in SDAIE, GLAD, SIOP, systematic ELD, ELL, Thinking MAPS, and is a site trainer in ELD. Ms. Felicita had no experience teaching Newcomer students or additional training in the area of teaching non-English language students. She has never served worked in an alternative education program, as a literacy coach, or as a support provider or mentor in the District, positions that may have afforded her training and experience in dealing with students enrolled in the Newcomer program.

26. Respondent Parisi, however, has significantly more training and experience working with the students in the Newcomer program by virtue of her employment in that position for the last nine years. Although Ms. Heredia asserts she has ten years experience teaching ELL students, this experience is not in a position specifically designed to address the needs of non-English speaking students. The Newcomer students have special and unique needs as discussed above in Factual Finding 23, and Ms. Parisi has a higher level of experience and competence to meet those needs.

#### *Exemption or Skipping Related to the Magnolia Learning Center Program*

27. The District also seeks to exempt or “skip” Respondents Sharon Faye Durall (#384) and Antonio Balbuena (#441), its two alternative education teachers in the Magnolia Learning Center (MLC) program, from layoff based upon their special training and experience to perform this position. Ms. Durall teaches a combination seventh and eighth grade class, and Mr. Balbuena teaches a combination fifth and sixth grade class. The classes taught in the MLC program provide the same multiple course instruction provided in mainstream classrooms, except the classes are smaller because of the behavioral challenges presented by the students. The MLC program is an academic program managed under guidelines for community day schools. The classroom setting provides for a smaller, self-contained learning environment for students who have academic and severe behavioral challenges that prevent them from being assigned in the mainstream classroom environment.

28. The qualifications required for the MLC position are a multiple subject credential, ELL authorization, No Child Left Behind (NCLB) compliant, and three years teaching experience. Desired qualifications include knowledge and experience working in an alternative education setting and/or with “at risk” students, demonstrated ability to work with and motivate students with academic and behavioral challenges; and be bilingual in English and Spanish. The Assistant Superintendent testified that the students in the MLC program have severe behavioral issues that required a tremendous amount of support and attention from the teachers assigned to that program. MLC teachers received a significant amount of specific training designed to prepare them for teaching and motivating students with severe and aggressive behavioral issues.

29. Respondent Durall has a seniority date of August 28, 2002, and has a multiple subject credential with CLAD authorization, a Bachelor of Arts degree in Child Development, and Masters Degrees in Educational Administration and Multicultural Education. She is NCLB compliant and has ELL training. She has taught in the MLC program four years. Prior to teaching in the MLC program, Ms. Durall taught as a Literacy Coach with the District and has also taught reading intervention classes, assisted in developing the District's writing plan, was the coordinator for the high school tutor program for middle school students, and worked as a mentor and as a support provider in the District.

30. Ms. Durall testified that the students in the MLC program have severe behavioral problems, including drug and gang related issues, that sometimes result in violent behavior that requires specific and targeted interventions to neutralize the student's aggressions and protect the teacher, the student, and other students in the classroom. She has received training through workshops on non-violence crisis prevention and intervention, trainings dealing autistic and bi-polar behaviors in the classroom, and training in programs such as "Boys Town" (Georgetown) and "Ripple Effects" dealing with how to handle a crisis in the classroom. Through her assignment in the MLC program, Respondent Durall has received significant training specifically targeted at dealing with students in the alternative education program.

31. Respondent Balbuena has a seniority date of August 29, 2006, and has a multiple subject credential with a supplemental authorization in social science, and a Masters Degree in Crosscultural Teaching. Mr. Balbuena has taught in the MLC program for four years, and was a long term substitute teacher in alternative education for two years prior to his MLC assignment. He has received much of the same training Respondent Durall received as a result of his assignment in the MLC program. He reaffirmed Ms. Durall's testimony that students in the MLC program had significant and severe behavioral problems associated with, among other factors, gangs and drugs, and required specialized training to address these behavioral problems in an effective manner. Mr. Balbuena has received training through workshops on non-violence crisis prevention and intervention, trainings dealing autistic and bi-polar behaviors in the classroom, and training in programs such as "Boys Town" (Georgetown) and "Ripple Effects."

32. Respondents Nellie Fernandez (#344), Patricia Gutierrez-Bowers (#345), Julie Swenson (#351), Kenneth Bowman (#352), and Lei Chen Barnitt (#376) offered evidence that they were certificated and competent to teach in the MLC program that the less senior Respondents Durall and Balbuena were retained to teach. Respondents Fernandez, Gutierrez-Bowers, Swenson, Bowman, and Barnitt all have multiple subject credentials with either CLAD or BCLAD authorizations that would satisfy the certifications required to perform the MLC teaching position.

33. However, the inquiry into whether the District properly skipped a more senior employee in favor of a junior employee necessarily focuses on the "special training and experience" it has determined is necessary to qualify a teacher to teach in the MLC program.

Students in the MLC program have been removed from the mainstream classrooms due to their severe academic and behavioral problems. The students were described as extremely high risk students and required teachers trained in methods and interventions that assisted the teachers in working with this type of student. Respondents Fernandez, Gutierrez-Bowers, Swenson, and Bowman presented no evidence that they have ever worked with students in an alternative education or community day school program or that they had acquired the necessary training and experience to qualify them for placement in the MLC program.

34. Respondent Lei Chan Barnitt, who has a multiple subject credential with a BCLAD (not in Spanish) and a Masters Degree in TESOL (Teaching English to Speakers of Other Languages) testified that she had prior experience teaching as a Literacy Coach in the “Twin Cities Educational Center,” an alternative education program in the District from 2001 to 2004. The Twin Cities program later became the MLC program. Ms. Barnitt worked with students in the Twin Cities program that had behavioral issues and received training in the “Georgetown Boy’s” (Boys Town) program to deal with students with severe behavior issues, teaching strategies, and ways of de-escalating aggressive or violent incidents that occurred in the classroom. She received other relevant trainings including the GLAD Project training.

35. Respondent Barnitt believed that the academic requirements and standards in the Twin Cities program were the same as those in the MLC program. However, the evidence showed that in 2001-2004, Ms. Barnitt taught a single subject, reading as a Literacy Coach, and not the multiple subjects currently required to be taught in the MLC program. Ms. Barnitt also admitted that the level of training currently provided in the MLC program was not available in the Twin Cities program. More importantly, however, Ms. Barnitt has not taught in an alternative education program since 2004, over six years ago. She admittedly has not kept up to date with the MLC program or the training required for the program. Respondents Durall and Balbuena have more recent training and experience in the MLC program by virtue of their assignment in the MLC program since 2006. Ms. Durall and Mr. Balbuena have a greater degree of the special training and experience necessary to perform the MLC teaching position.

#### *Exemption or Skipping Related to the ELD/TOSA Position*

36. Finally, the District seeks to exempt or “skip” Respondent Hanna Estes (#349), its ELD/TOSA teacher, from layoff based upon her special training and experience to perform this position. The ELD/TOSA position, under the general supervision of the Director English Learner & Parent Programs, “provides direct support services to staff [teachers] to help them identify English Learner gaps and assist with teaching strategies to improve the academic gaps specifically in the areas of English Language Development.” The ELD/TOSA teacher works collaboratively with teachers, parents, and administrators to facilitate student learning, and helps the administration implement the District’s ELD program. The position requires the employee to have a clear credential with ELL authorization, experience working with English Learners, computer literacy skills, expertise in reading/language arts programs, demonstrated ability to present staff development sessions and/or workshops, previous experience in school and

community leadership roles, knowledge of current research in literacy for English Language Learners, willingness to learn new model literacy programs. Essentially, the ELD/TOSA teacher provides direct support to teachers in the area of ELL students, specifically assisting in staff development, using training in ELD and SDAIE, and collecting and maintaining data on ELL students and their achievement levels.

37. Respondent Estes has a clear multiple subject credential with a BCLAD authorization (Spanish), she is NCLB compliant, has an ELL certification, and a Bachelor of Arts Degree in Religious Science. She has taught for over 18 years and has been with the District for ten years, one year as the ELD/TOSA teacher and nine years as a Newcomer teacher. Ms. Estes identified several areas of training she has received, including but not limited to, Systematic ELD, SDAIE, Constructing Meaning, Project GLAD, Explicit Direct Instruction (EDI), Lexia Phonics, Title III Accountability Institute, California English Learner with Disabilities, LETRS Module 10 Syllabication and Advance Decoding, the California English Language Development Test (CELDT), the Online Assessment Reporting System (OARS), and SST Training. Over the past year, Ms. Estes has become particularly astute in gathering and analyzing data relating to ELL students to assist staff and teachers in developing curricula and programs to improve ELL students' academic performance. She has worked collaboratively with teachers to improve the systematic ELD program within the District.

38. Respondent Diana Decamp (#343) offered evidence that she was certificated and competent to serve as the ELD/TOSA teacher. Ms. Decamp's seniority date is August 29, 2000, the same first date of rendered service as Respondent Estes. As a result of the tiebreaker criteria employed by the District, Respondent Decamp was the more senior of the two on the District's seniority list. Neither Respondent has challenged the appropriateness of the District's criteria for tiebreaking or the manner in which the tiebreaking criteria was implemented. Therefore, Respondent Decamp's challenge to Respondent Este is viewed solely in terms of Ms. Decamp's claim that the District retained a junior employee to perform a service that the more senior Decamp is certificated and competent to perform.

39. Respondent Decamp has a clear multiple subject credential with a BCLAD authorization (Spanish), a specialist instruction certificate in bilingual crosscultural education, she is NCLB compliant, has a ELL certification, and a Masters Degree in Education. Ms. Decamp has worked for the District for ten years and has taught for 24 years. She is currently a biliteracy teacher for the first grade with the District. Ms. Decamp has worked with ELL students and the systematic ELD programs employed by the District. She also has many of the same or similar trainings as those completed by Respondent Estes, including training in Systematic ELD, SDAIE, Constructing Meaning, Project GLAD, EDI, Lexia Phonics, OARS, California Early Literacy Learning (CELL), Thinking MAPS, 5-year AB 466 Houghton Mifflin training, and peace-builders training.

40. Respondent Estes and Respondent Decamp essentially possess very similar qualifications in many respects. However, Respondent Estes has one year experience in the

ELD/TOSA teacher position which tilts the scale in Ms. Estes' favor. Although, Respondent Decamp has had some experience in presenting staff development sessions and workshops, this experience was not specifically related to the ELD/TOSA position in the District. On these facts, it is concluded Respondent Estes has the special training and experience necessary to teach the ELD/TOSA position that Respondent Decamp, a more senior teacher does not possess. Therefore, the District may exempt or "skip" Respondent Estes.

41. The District did not retain any junior certificated employee to render a service which a more senior employee is certificated and competent to render, except as provided in Factual Finding No. 16 and 17 as to Ms. Enciso.<sup>5</sup>

### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

#### *PKS vs. ADA Layoff*

2. Respondents contend that the District was required to initiate an average daily attendance (ADA) layoff instead of a PKS layoff because the Assistant Superintendent testified that declining enrollment over the past seven or eight years was partially responsible for the District's budget shortfall, and the District implement the process for layoffs required when the reduction is based on average daily attendance as provided in Education Code section 44955, subdivision (b).

3. In *San Jose Teachers Assn. 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 Education Code section 44955, 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." Such a decision may be overruled if proven to be arbitrary or capricious, but a motivation to maintain flexibility in light of financial

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<sup>5</sup> One other Respondent, Kimberly S. Corrales-Gloria (#414) challenged the District's calculation of her seniority date at hearing. Ms. Corrales-Gloria essentially argued that her seniority date should have been August 1996 and not August 28, 2003, the date listed in the District's seniority list. She asserts a "break-in-service" argument based upon the District asking her to leave service after the 2001-2002 school because she was not NCLB compliant. The District, however, presented evidence that showed Ms. Corrales-Gloria was not retained after the 2001-2002 school year because she had an emergency permit and the District was unable to justify using emergency permits after the 2001-2002 school year. Ms. Corrales-Gloria was rehired by the District after she obtained her multiple subject credential on June 14, 2003. Respondent Corrales-Gloria's challenge to her seniority date can not be sustained because the District properly calculated her first date of paid service as August 28, 2003.

uncertainty is neither. (*Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.)

Here, the District established that the reduction of particular kinds of services pursuant to Education Code section 44955 was a result of substantial budget cuts and reduced State and Federal funding, as well as declining student enrollment, by reason of Factual Findings 1-9. The District's layoff decision resulted from overall budget cuts, and not just a reduction in ADA. Thus, the reason for the layoff, i.e. the reduction or elimination of particular kinds of services, was correctly stated in the pertinent notices. Education Code section 44955, subdivision (b) does mandate that when declining student enrollment is one factor, among others, that the District must initiate an ADA layoff as oppose to a PKS. The Legislature's use of the term "may" in section 44995, subdivision (b), following the enumeration of the different types of reductions (PKS or ADA) indicate that the Governing Board has discretion to proceed under either process.

#### *Reduction of PKS for K-8 Classroom Teachers*

4. Respondents contend that the District failed to follow the Resolution when it sought to reduce the 72 FTE of "K-8 Classroom Teaching Positions." Respondent argues that "K-8 Classroom Teaching Positions" must apply to all K-8 teaching positions and that the District's decision to exclude teachers teaching math, science, and English in departmentalized classes in the middle school is an inappropriate deviation from the Resolution. Respondents do not assert that the District improperly "skipped" more senior teachers or that any senior teacher had bumping rights as to the seventh and eighth grade math, science and English teachers retained by the District.

5. Boards of Education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers; Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that "such a standard may permit a difference of opinion." (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831 (*Santa Clara*)). Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796). Further, the courts have held that a PKS may be defined in general terms such as "kindergarten through sixth grade classes," or K-6 classroom teachers. (*California Teachers Ass'n v. Goleta Union Sch. Dist.*, (1982) 132 Cal.App. 3d 32.)

6. Here, the "K-8 Classroom Teachers" placed Respondents on sufficient notice that teachers in these grades would be subject to layoff. The District notified K-6, as well as seventh and eighth grade teachers that taught the departmentalized classes, that their services

may not have been required for the 2010-2011 school year. The District in implementing its layoff for the 72 FTE K-8 classroom teachers determined that it would exclude seventh and eighth grade teachers that possessed single subject credentials or supplemental authorizations for departmentalized classes in math, science, and English. Neither the Governing Board nor the District clearly expressed the intention to exclude these teachers from the Resolution. At hearing, however, the Assistant Superintendent testified that the decision was made to retain teachers with single subject credential and supplemental authorizations in math, science, and English because there were no teachers with more seniority who were designated for layoff were certificated and competent to teach the departmentalized courses.

7. The District acted within its discretion in implementing the Resolution in determining that seventh and eighth grade math, science, and English teachers rendering services in departmentalized middle school classroom courses would be excluded from the K-8 classroom teachers reduced. A review of the District's seniority list revealed that math, science, and English teachers at the middle school level who had single subject credentials or supplemental authorizations were excluded from the layoff by the District. The teachers assigned to the departmentalized classes in math, science and English were retained to teach those classes for the 2010-2011 school year. Thus, it cannot be concluded that the District acted arbitrarily or capricious in excluding these teachers. There are no more senior teachers certificated and competent to render the services that the more junior teachers were retained to provide. (*See* Educ. Code, § 44955, subd. (b).) The District also demonstrated a specific need for the departmentalized math, science, and English teachers in the middle schools, and the junior teachers retained possessed the training and experienced required render that service. (Educ. Code, § 44955, subd. (d)(1).

The District complied with the Governing Board's Resolution in implementing the reduction in K-8 classroom teaching positions. Respondents' argument that the District inappropriately applied the Resolution is not sustained, by reason of Factual Findings 18-21 and Legal Conclusions 4-7.

### *The Domino Theory*

8. Respondents contend that because Ms. Andrea L. Enciso's (#350) notice of non-reemployment was withdrawn by the District, and more senior employees commencing with (#349) through (#341) who are certificated and competent to teach Ms. Enciso's class are subject to lay-off, that all such senior employees must be retained by the District. Respondents rely on Education Code section 44955, subdivision (b) that provides "Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." (Educ. Code, § 44955, subd. (b).)

9. Respondents' argument is frequently made in these kinds of proceedings and is

known as “the domino theory.” However, the “domino theory” has been disfavored by the courts. (*See Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) Although here, the District withdrew the layoff notice because of an error in calculating Ms. Enciso’s seniority date, the District’s error is analogous to failing to provide notice in the first instance as a result of inadvertence. Education Code section 44949, subdivision (c)(3), specifically provides: “Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.” Therefore, the service of notice error is not a basis for invalidating the entire layoff or imposing a “domino effect.”

10. *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567 adopted a “corresponding number” approach in not applying the over-inclusive remedy of forcing the school district to retain all senior employees to junior employees who were not noticed. The remedy was tailored to correct the mistake to identify only those employees who were directly prejudiced by the error. The Court held:

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. (*Id.* at p. 576.)

11. Accordingly, an appropriate remedy in this case would be to retain the most senior employee prejudiced by the District’s error, Respondent Bernardette Dincin (#341). This conclusion is based upon Factual Findings 16-17 and Legal Conclusion 8-12.

### *Skipping Issues*

12. Respondents argue that the District inappropriately exempted or “skipped” four junior teachers to render services as the Newcomer teacher, Respondent Irma Laura Parisi (#368), the MLC teachers, Respondents Sharon Faye Durall (#384) and Antonio Balbuena (#441), and the ELD/TOSA teacher, Respondent Hanna Estes (#349).

13. Education Code section 44955, subdivision (d)(1) provides: “Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons: (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 of study or to provide those services, which others with more seniority do not possess. . . .” Education Code section 44955, subdivision (b) provides, in part: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is

retained to render a service which said permanent employee is certificated and competent to render.”

14. Section 44955, subdivision (d)(1) provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2009) 170 Cal.App.4th 127, 134-135.) In *Bledsoe*, a district was able to skip two junior employees because of the district’s demonstrated need for teachers with experience in instruction in a community day school. The junior teachers possessed special training and experience that enabled them to meet the district’s specialized needs for alternative education. This need was demonstrated by showing the teachers had taken courses in subjects that covered areas of instruction, had training in areas related to working with students with behavioral issues, and had actual experience in dealing with the day school students.

#### *Newcomer Teacher*

15. Here, the District sought to skip Respondent Parisi in the Resolution and retain her as the Newcomer teacher. The District demonstrated a specific need for personnel to teach the Newcomer course and Respondent Parisi possessed the special training and experience necessary to teach that course. She has extensive training in areas related to teaching non-English language students, she is a biliterate and bilingual teacher, and she has nine years experience as a Newcomer teacher in the District. Although Respondents assert that two more senior certificated employees, Respondents Ofelia Heredia (#356) and Felicita Li (#342) were certificated and competent to teach the Newcomer class, the evidence showed that Respondent Parisi’s training and experience was superior to either of these employees. The District properly skipped Respondent Parisi by reason of Factual Findings 22-26 and Legal Conclusions 12-15.

#### *MLC Teachers*

16. The District also sought to skip Respondents Sharon Faye Durall (#384) and Antonio Balbuena (#441) and to retain them as MLC teachers. As discussed in Factual Findings 27 through 35, the District demonstrated a specific need for MLC teachers to provide alternative education services. Respondents Durall and Balbuena possessed the special training and experience necessary to teach the MLC class.

17. As in *Bledsoe*, here the District demonstrated a specific need for personnel to meet the special needs of the alternative education students in its MLC program. The evidence showed that MLC students had severe and serious behavioral issues related to gangs and drug activity. Both Respondents Durall and Balbuena have received training in dealing with the emotional and behavioral needs of District students. Both have demonstrated adaptability in meeting the needs of students with special needs.

18. Respondents Nellie Fernandez (#344), Patricia Gutierrez-Bowers (#345), Julie Swenson (#351), Kenneth Bowman (#352), and Lei Chen Barnitt (#376) offered evidence that they were certificated and competent to render services as the MLC teachers. However, only Respondent Barnitt had any significant experience and training in working with students in an alternative education environment. Ms. Barnitt's, however, had not worked with alternative education students since 2004, and had not kept up with the training that is necessary to be effective in teaching these students.

19. Consequently, the District properly skipped Respondents Durall and Balbuena by reason of Factual Findings 27-35 and Legal Conclusions 12-14 and 16-19.

*ELD/TOSA Teacher*

20. Finally, the District sought to skip Respondent Hanna Estes (#349) and retain her as the ELD/TOSA teacher. The District demonstrated a specific need for an ELD/TOSA teacher and Respondent Estes Parisi possessed the special training and experience necessary to teach that course. Although Respondent Diana Decamp (#343) had very similar credentials and training, Respondent Estes' one year experience in the ELD/TOSA position in the District gives Ms. Estes the experience over Respondent Decamp. Thus, the District properly skipped Respondent Estes, by reason of Factual Findings 36-41 and Legal Conclusions 12-14, and 20.

21. The services identified in the Governing Board's Resolution listed in Factual Finding No. 4 are determined to be particular kinds of services within the meaning of section 44955, by reason of Factual Finding Nos. 4 and 7.

22. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in Factual Finding No. 4, which cause relates solely to the welfare of the District's schools and pupils, by reason of Factual Finding Nos. 1 through 9.

23. Cause does not exist to terminate the services of Respondent Bernadette Dincin, by reason of Factual Findings 16-17 and Legal Conclusions 8-12.

24. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

25. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to perform, except as to Ms. Andrea L. Enciso, by reason for Factual Findings 16-17 and Legal Conclusions 8-12.

## ORDER

1. The Accusations issued against Respondents Antonio Balbuena, Kristine Barbero, Steve Brownson, Marcos Bowers, Tammy Capilla, Rachel Chan, Ramona Chandler, Carol Chavarin, Carrie Ann Coss, Jose Davila, Sandy Delgado, Bernadette Dincin, Sharon Faye Durall, Andrea Enciso, Anita Esparza, Hannah Estes, Maria Estevez, Olga Gallegos, Lourdes Fonseca, Maricela Gonzalez, Laura Gorgonio, Chad Greene, Aracely Hernandez, Jacueline Hernandez, Vin Huynh-Kieu, Belinda Hyde, Michele Ivey, Kathy Kurtz, Andria Leahy, Cecilia Leonin, Erin Lewis-Morris, Tasanda Limon-Escarcega, Daniel Montejano, Juana Morales, Juan Orellana, Irma Laura Parisi, Jerado Puente, Diana Rich, Jose Santiago, Jennifer Siebel, Neelam Tandon, Haile Ucbagaber, Ricky Villacorte, Fernando Velazquez, Maria Villavicencio, and Michael Yurkas are DISMISSED.

2. The District may give notice to the following Respondents that their services will not be required for the 2010-2011 school year: Felicita Li, Diana Decamp, Nelly Ann Fernandez, Patricia Gutierrez-Bowers, Lizette Loya, Ryan Namihira, Marisa Torres, Julie Ann Swenson, Kenneth Bowman, Linh Chau-Phan, Ruby Barajas, Tizoc Tirado, Ofelia Heredia, Amalia Macias, Marcos Garcia, Danielle Surowiec, Miguel Hernandez, Melida Haye, Anna Lau, Elaine Chun, Ronald Reyes, Adriana Murray, Heidi Zampach, Lei Chen Barnitt, Luis Acevedo, Esther Stone, Christina Gomez, Maria Arana, Gabriel Orosco, Christine Broussard-Simone, Yesenia Holquin, Ricardo Ortega, Danny Hamm, Sean Jacobs, Michael Jimenez, Amanda Castaneda, Debra Pak, Leticia Hernandez, Mayra Saenz-Ulloa, Nancy Lindsay, Krista Hand, Maricela Borrayo, Cynthia Davis, Sandra Saldana, Jeffrey Gutierrez, Kimberly Corrales-Gloria, Maria Robles-Rocha, Claudia Abascal, Carol Notti, Heather Whitaker, Monica McCullough, Matthew Leyva, Ailene Flores, Jeffrey Koenig, Karen Knudsen, Martha Banuelos-Sotelo, David Morris, Gabriela Duarte-Santos, Sabrina Diaz, Martha Larsson Cesar Chacon, Vicki Kawasaki, Bageshree Bhakta, Melissa Garrido, Analilia Montes, Emma Bolivar, Okalani Ulloa, Aileen Ermino, Maria Palmieri, Jacqueline Chavez, Melissa Restovich, and Edith Sandoval.

DATED: May 28, 2010

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MICHAEL A. SCARLETT  
Presiding Administrative Law Judge  
Office of Administrative Hearings

“APPENDIX A”  
Mountain View School District  
List of Respondents  
May 6, 2010 Hearing  
OAH Number 2010030729

1. Abascal, Claudia
2. Acevedo, Luis
3. Arana, Maria
4. Balbuena, Antonio
5. Banuelos-Sotelo, Martha
6. Barajas, Ruby
7. Barbero, Kristine
8. Barnitt, Lei
9. Bolivar, Emma
10. Borrayo, Maricela
11. Bowers, Marcos
12. Bowman, Kenneth
13. Broussard-Simon, Christine
14. Capilla, Tammy
15. Castaneda, Amanda
16. Chacon, Cesar
17. Chavarin, Carol
18. Chau-Phan, Lyhn
19. Chavez, Jacqueline
20. Chun, Elaine
21. Corrales-Gloria, Kimberly
22. Coss, Carrie
23. Davila, Jose
24. Davis, Cynthia
25. Diaz, Sabrina
26. Duarte-Santos, Gabriela
27. Durall, Sharon
28. Ennino, Aileen Tudayan
29. Esparza, Anita
30. Estes, Hannah
31. Estevez, Maria
32. Fernandez, NellyAnn
33. Flores, Ailene
34. Fonseca, Lourdes
35. Garcia, Marcos
36. Garrido, Melissa
37. Gomez, Christina
38. Gonzalez, Maricela
39. Gorgonio, Laura
40. Greene, Chad
41. Gutierrez, Jeffrey
42. Gutierrez Bowers, Patricia
43. Hamm, Danny
44. Hand, Krista
45. Haye, Melida
46. Heredia, Ofelia
47. Hernandez, Miguel
48. Holguin, Yesenia
49. Huerta Hernandez, Leticia
50. Hyde, Belinda
51. Ivey, Michele
52. Jacobs, Sean
53. Jimenez, Michael
54. Kawasaki, Vicki
55. Knudsen, Karen
56. Koenig, Jeffrey
57. Kurtz, Kathy
58. Larsson, Martha
59. Lau, Anna
60. Leahy, Andria
61. Leonin, Cecilia
62. Leyva, Matthew
63. Li, Felicita
64. Limon-Escarcega, Tashanda
65. Lindsay, Nancy
66. Loya, Lizette
67. Macias, Amalia
68. McCullough, Monica
69. Montejano, Daniel
70. Montes, Analilia
71. Morales, Juana
72. Morris, Dave
73. Murray, Adriana
74. Namihira, Ryan

“APPENDIX A”  
Mountain View School District  
List of Respondents  
May 6, 2010 Hearing  
OAH Number 2010030729

75. Orellana, Juan
76. Orosco, Gabriel
77. Ortega, Ricardo
78. Pak, Debra
79. Palmieri, Maria
80. Parisi, Irma
81. Puente, Jerardo
82. Restovich, Melissa
83. Reyes, Ronald
84. Rich, Diana
85. Robles, Maria
86. Saenz-Ulloa, Mayra
87. Saldana, Sandra
88. Sandoval, Edith
89. Siebel, Jennifer
90. Stone, Esther Joy
91. Surowiec, Danielle
92. Swenson, Julie
93. Tandon, Neelam
94. Tirado, Tizoc
95. Torres, Marisa
96. Ulloa, Okalani
97. Villacorte, Ricky
98. Zarnpach, Heidi