

BEFORE THE
SUPERINTENDENT OF THE
STANISLAUS COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In The Matter Of The Non-Reemployment
of:

HALLA BERNARD, ET AL,

Respondents.

OAH No. 2009020791

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 8, 2009, in Modesto, California.

Chesley D. Quaide and Marisa L. Rubitz, Attorneys at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Superintendent of the Stanislaus County Office of Education.

Ernest H. Tuttle, IV, Attorney at Law, represented all of the respondents in this matter.

Evidence was received and the matter was submitted on April 8, 2009.¹

FINDINGS OF FACT

Jurisdictional Matters

1. Tom Changnon, Superintendent of the Stanislaus County Office of Education (SCOE), made and filed the Accusation in his official capacity.
2. Each respondent is a certificated employee of SCOE.

¹ On April 19, 2009, the Administrative Law Judge notified the parties of his intent to take official notice in accordance with Government Code section 11515 of two specified California Department of Education documents. The parties were given until April 27, 2009, to object or offer evidence to refute such evidence. Neither party objected to the taking of official notice.

3. On March 9, 2009, Superintendent Changnon adopted a Statement Reducing Particular Kinds of Services which reduced or discontinued particular kinds of certificated services no later than the beginning of the 2009-2010 school year. The particular kinds of services were:

- 12.0 FTE Alternative Education Services²
- 1.0 FTE Severely Handicapped Special Education Teacher
- 1.6 FTE Resource Specialist Teacher
- 1.0 FTE Learning Handicapped Teacher
- 1.3 FTE School Nurse, Health Services Program

4. The Superintendent determined that it was necessary by reason of these reductions and discontinued services to decrease the number of permanent and/or probationary certificated employees at the end of the present school year by a corresponding number of full time equivalent positions. The Superintendent notified the affected employees of his determination.

5. On and before March 15, 2009, each respondent was given written notice by the Superintendent that his or her services would not be required for the ensuing school year. Each respondent filed a timely request for a hearing.

6. On March 23, 2009, the Superintendent filed the Accusation in this matter. The Accusation and related documents were served upon respondents, each of whom filed a timely Notice of Defense.

Alternative Education Program

7. The bulk of the evidence received at the administrative hearing related to the validity of the Superintendent's assertion that certain employees should be "skipped" by virtue of their unique qualifications to teach in the alternative education program. Twelve "precautionary" notices were served to preserve necessary budget cuts resulting from the proposed reduction or elimination of particular kinds of services if it was determined that the attempted skipping violated the Education Code.

8. SCOE provides an alternative education program for the benefit of the 27 school districts within Stanislaus County. The program operates out of nine satellite facilities, including Stanislaus County Juvenile Hall. Program students, other than those housed in juvenile hall, fall within two categories. Approximately one-third of the students are "involuntary" transfers into the program, these students having been expelled and may no longer attend any of the school district facilities within the county. The other approximately two

² The original number was 23.8, which was reduced to 12 at the administrative hearing.

thirds of the students are voluntary transfers into the alternative education program who have been suspended on multiple occasions from district schools and face imminent danger of expulsion. Some of the satellite sites operate a “community school,” some operate independent study programs, and some offer both. The students are high school and junior high school age, the majority being high school students. The number of students varies throughout the year; enrollment swells as more students are expelled during the school year or transfer voluntarily under threat of expulsion. At the time of the administrative hearing, there were approximately 800 students in the alternative education program, with approximately 50 being junior high school age. In recent years, as many as 2500 students have enrolled in the program at some point in the school year. The academic needs of the students vary and many are far behind in the standard curriculum. The alternative education program attempts to provide high school age students with the required courses for graduation.

9. High school students in the community high school classes receive an education that is much like that provided in a conventional high school with the students able to move from one class to another to complete the curriculum required to graduate. Generally, junior high students remain in a single self-contained class during the school day. Students in independent study programs attend small group sessions and work with one or more teachers who monitor work that students complete away from the school site.

10. Classes conducted in juvenile hall are self-contained. The wards are separated into units depending on security considerations, and the wards in one unit are not permitted to attend classes with other units. Thus, even high school age wards do not change classrooms or teachers during the school day. Typically, teachers teach all subjects in the curriculum to the juvenile hall wards.

11. This school year, there are approximately 35 teachers assigned to the alternative education program, nine of whom are assigned to juvenile hall. At the John B. Allard site, there is one “elementary” community school class³, and five community high school classes. There are five independent study teachers. Empire Community School currently has two high school classes. Ceres Community School has seven community high school classes. Patterson Community School has four high school classes. PACE Community School has one elementary class and two high school classes. PACE independent study program has four teachers and PEP has two teachers (the evidence suggested that this may be a program for special education students.) Oakdale independent study program has three assigned teachers.

³ The evidence suggested that this designation, rather than junior high, reflects the level of the curriculum, rather than the students’ ages.

12. SCOE anticipates a budget reduction of approximately \$80,000 for next school year's alternative education program. The projected deficit reflects a budget shortfall and an anticipated drop in enrollment in the program. The latter is the result of budget issues faced by school districts in the county and their expected attempts to reduced costs by fewer transfers of students to SCOE. Student enrollment is down in all of the school districts in the county except one. The 12 FTE proposed reductions are in response to the anticipated budget shortfall.

13. SCOE proposed two alternative methods for determining which of the alternative program teachers should receive a notice of non-reemployment. Their preference is the alternative which retains three teachers: Figueroa-Lau, Bernard, and James, and under which a final notice will be issued to three more senior teachers: Macias-Souza, Dolce, and Debora. The other option is to provide notice strictly based on seniority; under this alternative, final notice would be provided to the three most junior teachers.

14. SCOE's rationale for skipping junior teachers is the Superintendent's desire to comply, to the maximum extent practicable, with federal No Child Left Behind (NCLB) provisions. Stanislaus County is a Title 1 designated jurisdiction and it must comply with NCLB provisions or risk federal and/or state sanctions. Since 2007, SCOE educational programs have had to meet the NCLB requirement that teachers be "highly qualified" in the core academic courses that they teach. SCOE has conceded that it is not currently compliant with the NCLB requirements, but SCOE wants to continue toward the goal of total NCLB compliance and avoid regression. SCOE sometimes avoids NCLB non-compliance by switching high school students among community school teachers and independent study teachers in an effort to ensure that students are taught by a teacher who is highly qualified in the area of instruction. With 12 fewer teachers, SCOE fears that it will not be able to assign students among staff in such a manner that will result in maximum compliance with NCLB. As one administrator put it, "NCLB trumps seniority."

15. SCOE's skipping strategy involved identifying how many of the nine areas for federal highly qualified certification were held by teachers in the alternative education program. The nine designated areas are: mathematics, science, English, reading/language arts, history, civics/government, economics, geography, and arts (visual and performing). The Superintendent then decided to skip those junior employees who would otherwise be subject to lay off if those employees held five or more NCLB highly qualified certifications. Under this scenario, Macias-Souza, who is highly qualified in English, reading/language arts, and arts, will be noticed for layoff although she is senior to 11 teachers who would be skipped. Dolce, who is highly qualified in English and reading/language arts, will be noticed for layoff despite his

being senior to nine teachers who would be skipped. Debora, who is highly qualified in mathematics, science, and history, will be noticed for layoff although he is senior to four teachers who would be skipped. Macias-Souza, Dolce and Debora began paid service with SCOE in 1994, 1998, and 2001 respectively. The three teachers who would be “saved” by this skipping method were hired in 2006 or 2007.

16. The two SCOE representatives who testified about the described skipping strategy provided somewhat different explanations for the selection of five areas of highly qualified certification as the cut-off. One explanation was that some areas of highly qualified certification typically included three or more others. Examples provided were social studies which may include history, civics/government, economics and geography. The other example was English which may include reading/language arts. There was other testimony that did suggest that teachers who test in these areas or qualify by experience often do obtain multiple certifications, but the areas are discrete.⁴ The second explanation was that those who have been certified in at least five areas are likely to go on and complete all nine. No research data or other evidence was offered to support this hypothesis.

17. SCOE provided a 2008-2009 Master Schedule for the alternative education program which listed the various sites and the teachers assigned to them. The document also included the courses or subjects generally taught by the teachers in each location, with an indication whether they were highly qualified or not in the area of instruction, and a calculation by ratio and percentage of compliance with NCLB for most of the locations. There were no sites at which SCOE was 100 percent compliant, although the two elementary/junior high community schools at John B. Allard and PACE were shown as 100 percent compliant, because the single teacher at each held the required multi-subject certification to teach all subjects at that level.⁵ By simply deleting the teachers who may be laid off if junior teachers are skipped, one may calculate the changes in compliance levels. One site does go from approximately 83 per cent compliance to 100 percent, but only one teacher would remain and that teacher is not highly qualified in government and economics which are presently taught. Among the other sites, some go up in compliance and some go down.⁶

⁴ SCOE’s own exhibits demonstrate that highly qualified certification in one of the related areas does not necessarily mean that the teacher has the same certification in the others as well.

⁵ It should be noted that the Allard teacher is resigning and the PACE teacher (Carroll) will be noticed for layoff under either scenario because she has only three highly qualified areas.

⁶ The percentages shown are somewhat misleading, because the number of classes taught includes classes of the same subject matter. For example, in the Allard community high school,

18. SCOE presented no evidence regarding tentative assignments among the staff for the next year which reflects the anticipated reductions in staff. Enrollment will probably not drop at Juvenile Hall where teachers typically teach in at least six areas requiring highly qualified status, and three of the nine teachers also teach a seventh area, art. SCOE suggested that three or more teachers with multiple areas of NCLB highly qualified certification may have to be reassigned to juvenile hall next year, but no particular employee has been assigned. There was no other evidence regarding assignments or reassignments for the ensuing school year.

No Child Left Behind Requirements

19. All California public school teachers, including those teaching in juvenile hall schools, community day schools, and independent study, must comply with the 2001 federal No Child Left Behind Act. In California, teachers of NCLB “core academic subjects” must have: (1) at least a bachelor’s degree from an accredited institution of higher education; (2) the appropriate California teaching credential, supplementary authorization, or subject matter authorization or be enrolled in a California Commission on Teacher Credentialing (CTC) approved intern program for no more than three years; and (3) demonstrate subject-matter competence for each NCLB core academic subject they teach.

20. The NCLB core academic subjects are:

- A. Mathematics
- B. Science
- C. English
- D. Reading/language arts
- E. Civics/government
- F. Economics
- G. History
- H. Arts
- I. Geography⁷
- J. Foreign language (specific language)

Self contained elementary school teachers must demonstrate competence in the areas generally taught as part of the elementary school curriculum, typically including at least reading and mathematics.

one teacher is shown as compliant in seven of seven classes, but the teacher teaches five periods of math and one history class. It may be more accurate to state that he is compliant in two of two.

⁷ Geography and foreign languages are not part of the SCOE alternative education curriculum.

21. Kathryn Garrick is a SCOE human resource supervisor. She is responsible for tracking NCLB compliance and reporting the level of compliance to the California Department of Education (CDE). Where teachers are providing instruction in core academic areas without the necessary highly qualified certification, she works with the teachers to create a compliance plan for submission to the CDE. Garrick has never told any of the SCOE teachers that his or her position depended upon obtaining more areas of highly qualified certification, and she only reports those instances where teachers are non-compliant based on core academic areas actually taught by the teachers. CDE has informed her that NCLB “is not an employment issue.” According to Garrick, the initial deadline for compliance with NCLB requirements was July 1, 2006, but that deadline had been extended to July 1, 2007.⁸ Garrick does meet with CDE from time to time to discuss non-compliance issues, but there have been no threats of sanctions against SCOE. Garrick related that SCOE’s obligation is to demonstrate progress toward meeting NCLB requirements and SCOE could be sanctioned if it cannot demonstrate due diligence in doing so.

Verification Process for Middle and High School Teachers in Special Settings

22. The CDE has recognized the difficulties faced by school districts and county offices of education in assuring that teachers who must teach many core academic subjects meet NCLB requirements. To help deal with these situations, the CDE created the Subject Matter Verification Process for Middle and High School Level Teachers in Special Settings, known by the acronym VPSS. The VPSS process is available to “new” and “not new” teachers assigned to teach in alternative educational settings and secondary special education settings. Upon completion of the process, the participating teacher will be NCLB-compliant in each of the four core academic areas: science, mathematics, social science and English/language arts/reading in an alternative setting. This demonstration of competence is transferable only within defined alternative settings.

23. California’s guidelines for VPSS include the requirements for participation in VPSS. Participants must: (1) have at least a bachelors degree; (2) have a California State credential or have an Intern Certificate/Credential for no more than three years; (3) have demonstrated NCLB High Quality Teacher compliance in one NCLB Core Academic Subject as defined in NCLB (20 USC 9101 [11]) including elementary multiple subjects; and (4) be assigned to teach one or more core academic subjects in the following settings:

A. Secondary special education settings

⁸ This may or may not be accurate, as neither of the CDE publications regarding NCLB compliance or the VPSS mentions an extension of the deadline.

- B. Secondary alternative programs: As specified by California Education Code (EC) Section 44865, secondary alternative programs are limited to the following: home teacher; hospital classes; necessary small high schools; continuation schools; alternative schools; opportunity schools; juvenile court schools; county community schools; and community day schools. An alternative education teacher must be NCLB-compliant in one core academic subject or elementary multiple subjects and has up to three years from date of assignment as an eligible teacher to demonstrate subject matter competence in the necessary core academic subjects.
- C. Secondary Small Rural School Achievement (SRSA) Programs:

VPSS guidelines include that independent study is an alternative instructional strategy and not an alternative curriculum. Teachers in these secondary special settings who use the independent study instructional strategy are eligible to use VPSS.

24. According to VPSS Guidelines, teachers have up to three years from assignment in a “Hard-to-Staff-Setting” to complete the VPSS process. However, the process was not developed by CDE until 2006 and was submitted to the federal Department of Education on July 7, 2006, as a solution for required multiple NCLB certifications in these special settings. A hypothetical example recited by CDE for use of the VPSS was a teacher highly qualified in two of the four listed academic core requirements who began VPSS in 2007. The included chart gave the teacher until 2010 to obtain the additional two areas of core academic competence.

25. VPSS courses were offered to SCOE certificated employees for the first time in January of this year. Two teachers who were not skipped because they have less than the required five areas of highly qualified certification are enrolled in the program. They began taking the courses in January and will receive their additional areas of certification for special settings on May 2, 2009. The courses involve lectures, creating lesson plans and other activities. The teachers are not required to pass a proficiency examination to receive their additional certifications.

Learning Handicapped Reduction

26. The Superintendent resolved to reduce Learning Handicapped Teacher services by 1.0 FTE. This resulted in a notice of non-reemployment to respondent Darith Keo. The Superintendent had determined to reduce the three teacher current staff in this program by two positions, leaving just one

FTE. One of the staff was a probationary employee to whom a timely notice of non-reelection was issued. This was considered when notice was provided to Mr. Keo that his services would not be required for the ensuing school year.

LEGAL CONCLUSIONS

1. Education Code section 44955 provides, in pertinent part:

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, 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.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

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.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) 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 or course of study or to provide those services, which others with more seniority do not possess. (emphasis added).

2. There are two cases which are helpful in deciding the legality of the proposed skipping by SCOE in this matter. The first, *Alexander v. Board of Trustees* (1983) 139 Cal. App. 3d 567, was decided before the addition of subdivision (d) to Education Code section 44955.

3. In *Alexander*, the Delano Joint Union High School District's governing board skipped teachers deemed to have Spanish speaking skills. Approximately half or more of the students in the district were of either Hispanic or Philippine descent. Delano had developed tie-

breaking criteria for certificated employees with the same seniority date. Among the factors were “language needs” and “competency.” As to teachers with different seniority dates, the superintendent first determined if a teacher had a certificate of competency in Spanish. If the teacher did not possess such a certificate, he relied upon the assessment of the employee’s ability to communicate in Spanish, Tagalog, or Pillipino by a committee of the teachers who held bilingual certificates. Employees who could demonstrate that they were bilingual were skipped, on the basis that they could fill the district’s language needs. There was no requirement that the skipped teachers would be assigned to teach courses in the bilingual program.

4. The *Alexander* court acknowledged the propriety of considering language skills when breaking ties among teachers with the same seniority date, inferring that students with Spanish speaking backgrounds had not fully developed their English speaking and thus, teachers with the same seniority date might properly be retained or discharged depending on their ability to communicate in Spanish. This would be consistent with the “needs of the district and the students” as that phrase is used in that part of subdivision (b) of Education Code section 44955 that deals with teachers with the same seniority date. *Alexander*, pg. 573.

5. As the *Alexander* court noted, with respect to teachers who have a different seniority date, the “needs of the district and students” is not a proper measure of priority. Ordinarily, the test is whether the senior employee is certificated and competent to displace the more junior employee. The *Alexander* court rejected Delano’s contention that bilingualism was a proper general criterion for competency. The court acknowledged what was then the legislative mandate to provide bilingual education, but added:

Employment of new teachers with bilingual ability and gradual, prospective amendment of job descriptions to include language skills, may be a proper means of creating district-wide bilingualism. However, presently employed teachers hired as monolingual teachers, who are otherwise competent, may not be discharged under these conditions merely because more junior employees have achieved passing grades from a committee of bilingual teachers.

6. The second case is *Bledsoe v. Biggs Unified School District* (2009) 170 Cal. App. 127 (review den. April 15, 2009), a skipping case which did apply subdivision (d) of Education Code section 44955. *Bledsoe* was a

certificated employee of the Biggs Unified School District who had worked for the district for nine years teaching English and social studies to seventh and eighth grade students. He was noticed for layoff based on reduction or elimination of particular kinds of services for the 2007-2008 school year. Bledsoe was senior to Gates and Sormano, who taught at the district's community day school. The district's community school was reserved for students who had been expelled or had behavior problems that prevented them from being in a regular classroom.

7. The Court of Appeal first determined that Bledsoe was certificated and competent to "bump" into a position at the district's community day school. Education Code section 44865 requires only a valid teaching credential and the teacher's consent to teach in a community school. The school district's governing board had adopted a resolution which defined competency to teach in alternative education as either possession of a full credential or at least one semester actual teaching experience in alternative education within the last five years. Bledsoe had the required credential, so he met one of the alternative criteria for competency.⁹

8. The court then applied the language of subdivision (d) of Education Code section 44955. The trial court had determined, as had the Administrative Law Judge and governing board, that the district had established a specific need for personnel to teach a specific course or course of study, the skipped junior certificated employees had the special training and experience necessary to teach that course, and Bledsoe did not possess such special training and experience.

9. The Court of Appeal affirmed the trial court's determination that the school district had shown the need for specific teachers to teach in the community day school. The district's interim superintendent's testimony established that community day schools serve a distinct and difficult student population and that to deal appropriately with such students, teachers need specialized background, training and experience. The court then examined the special training and experience of the junior teachers who had been skipped. The superintendent had experience assigning teachers to community day school and developed factors for consideration of such assignments. They included the teacher's background in psychology and sociology, background in behavior modification, and temperament. The court observed that while the superintendent testified that community day school teachers teach all of the

⁹ The court rejected the school district's contention that Bledsoe had not consented to the assignment. There was no evidence that district had offered him a position in alternative education in the context of its obligation to make assignments and reassignments to protect senior employees pursuant to Education Code section 44955.

academic subjects to their students so they should be credentialed in as many subjects as possible and highly qualified under NCLB, he did not testify it was mandatory for the teacher to have multiple credentials and NCLB qualifications.

10. The Court of Appeal upheld the determination that the junior teachers possessed the requisite special training and experience. Gates had a multiple subjects credential and was highly qualified under NCLB in multiple subjects. Sormano had a clear single subject social science credential and was highly qualified in that subject. Sormano also had courses in other areas of high school instruction and a number of college units in sociology. Both teachers had been teaching in the community school for several years and demonstrated the necessary temperament to do so in the superintendent's opinion. Gates had a bachelor's degree in applied psychology and extensive training in mediation, aggression management, abuse recognition, and other areas related to working with difficult student populations. Sormano also had extensive background and training in areas relating to teaching in a community day school including management of assaultive behavior and drug abuse recognition. He had experience working with special needs children and in utilizing behavior modification techniques.

11. The Court of Appeal likewise affirmed the finding of the trial court that Bledsoe did not possess the special training and experience necessary to teach in a community day school. The court acknowledged that Bledsoe had multiple credentials and was NCLB highly qualified in multiple subjects. Bledsoe had taken 15 units of psychology and sociology in college, taught for a semester at a community day school and for a year at juvenile hall, and worked for two summers at a county boy's camp. However, Bledsoe had not taken any psychology or sociology courses since college, had no recent crisis intervention or drug abuse recognition training, and not worked in a community day school since 1995. He had no recent experience in a self contained classroom which is analogous to a community day school classroom.

12. This case is factually both similar and dissimilar to *Bledsoe*. It is similar to *Bledsoe* in that it involves a very similar group of problem students who require instruction in a variety of NCLB core academic subjects. The self contained classes described in *Bledsoe* are essentially the same environment as the alternative education classes at juvenile hall and those designated as "elementary." The interim superintendent of the Biggs Unified School District felt that highly qualified certifications in multiple subjects, while useful, were not mandatory. One of the teachers skipped in the *Bledsoe* case was highly qualified in only one area. In this case, none of SCOE's administrators testified that five or more areas of highly qualified certification were necessary to teach in the program. Rather, they focused on SCOE's

obligation as a Title 1 jurisdiction to become 100 percent compliant with NCLB, or to come as close as possible in the next school year. However, the evidence established that none of the current sites is now 100 percent compliant. Only by isolating the two elementary schools at Allard and PACE, could SCOE claim 100 percent compliance in any area, and each of the two elementary teachers will be gone next school year. At this point, there is no way of knowing whether SCOE's skipping proposal will raise the percentage of compliance at any site or overall. The gist of the testimony of the two administrators most familiar with the alternative education program was that it would more difficult to provide the match between required courses and NCLB certification if skipping is not permitted.

13. This matter is dissimilar to *Bledsoe* in that here, the three senior teachers who will be laid off if skipping is permitted do not seek to "bump" into positions held by junior certificated employees. All of the teachers are currently employed in the alternative education program, and SCOE has not attempted to further classify the positions within the program by level taught or location (juvenile hall, community day schools, combined community day school/independent study, or solely independent study). SCOE has not asserted that any of the affected employees lack the credentials to teach alternative education. More significantly, SCOE has not suggested that any of the teachers lack competence to teach in the program. In fact, the senior teachers have successfully taught in the program for approximately fourteen years, ten years and seven years, respectively. In this regard, this matter is similar to the factual situation presented in the *Alexander* decision, in which the governing board sought to layoff senior teachers who did not possess bilingual skills, without demonstrating the teacher's needs for such skills in the ensuing school year.

14. No one knows how many students will be referred to the SCOE alternative education program in school year 2009-2010, but the number is likely to be lower than this school year. The curriculum areas in which students are deficient will continue to vary. The extent to which any of the staff will be required to teach outside of his or her areas of NCLB certification cannot be known at this point. If teachers are assigned to areas beyond their NCLB highly qualified certifications, they may seek additional certifications, and they may take advantage of the now available expedited VPSS route. SCOE asserted that the reason for proposed skipping was its very legitimate desire to satisfy CDE and federal mandates that it demonstrate progress in meeting NCLB requirements. They can do so by continuing to work with teachers who may be assigned core academic subjects outside their areas of NCLB certification to obtain such certifications. VPSS provides a very quick route for satisfying NCLB requirements in this unique environment. In summary, SCOE has failed to establish, as is its burden, that the alternative education "course of study" requires at least five areas of highly qualified

certification. Thus, the proposed plan to skip teachers junior to Macias-Souza, Dolce and Debora violates section 44955 of the Education Code.¹⁰

Learning Handicapped Reduction

15. The Superintendent properly noticed Darith Keo for non-reemployment in the ensuing school year based on Superintendent's decision to reduce Learning Handicapped Teacher services by 1.0 FTE.

ORDER

1. Superintendent Changnon shall give notice to respondents, except Larry Debora, Ralph Dolce and Francis Macias-Souza, that their services will not be required in the 2009-2010 school year.

2. Notice shall be provided based exclusively on seniority, and no alternative education teacher shall be skipped.

Dated: May 6, 2009


KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings

¹⁰ This conclusion avoids a decision which may be difficult to reconcile with *Bledsoe*, in which the Court of Appeal expressly approved the skipping of a junior teacher providing instruction in a nearly identical "course of study" although NCLB compliant in only one area.