

BEFORE THE
ORANGE COUNTY SUPERINTENDENT OF SCHOOLS
STATE OF CALIFORNIA

In the Matter of the Accusations
Against:

JAMES LEE ADAMS, and OTHER
CERTIFICATED EMPLOYEES OF THE
ORANGE COUNTY DEPARTMENT OF
EDUCATION,

Respondents.

OAH Case No. 2009030093

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge, on April 6 and 9, 2009, at Costa Mesa. Complainant Orange County Superintendent of Schools was represented by Anthony P. De Marco, Attorney at Law.

Respondents James Lee Adams and the 66 other respondents named in the Amended List of Certificated Employees represented by Reich, Adell & Cvitan (Exh. E) were represented by Carlos R. Perez, Attorney at Law.¹ Respondents Michael A. Kashdan, Krisha Kerr, John M. Wells, and Wendy Michelle Wilson were present and represented themselves.² Respondent Christine Hall was present and was represented by Dean W. Hall, Attorney at Law.

The following respondents did not appear and were not represented at the hearing: Erica Alvarez, Jodi Banks, Kimberly Bradshaw, Charles Clint Collins, Richard Collins, Kelli Lynn Colombo, Nancy Wilcox Davis, Marnie Shay Dean, Daniel Dekold, Lisa Annette

¹ On April 13, 2009, respondents' counsel filed an Amended List of Certificated Employees represented by his law firm, Reich, Adell & Cvitan. The original and Amended List are hereby marked and admitted into evidence as Exhibit E. In addition, the sign-up sheet for respondents to mark their presence on the first day of hearing is hereby marked and admitted into evidence as Exhibit F.

² Respondent Krisha Kerr was represented by counsel Carlos R. Perez on the first day of hearing, April 6, 2009. Respondents Denelle M. Reid and Wendy Michelle Wilson were represented by the same counsel beginning on the second day of hearing, April 9, 2009.

Ehlow, Sharon A. Gramling, Stacey Hendrickson, Sarah Herbert, James Lewis Hicks IV, Blaine Igarta, Dinah Maged Ismail, Chase Martin, Patrick M. McMahon, Karen McBride Miller, Worth Rob Nicholl, Christine Oda, Craig Rousselot, Elizabeth Anne Salio, Lisa Sanchez, Carrie Savage, Shayne Ronald Shearer, Fred Smith, Marie Allison Taylor, Poh Gaik Teh, Tanya Tello, Carol Drellack Terborch, Martin Hubert Veneroso, and Sue Ann Williams.

Oral, documentary, and stipulated evidence and written arguments having been received and oral arguments heard, the Administrative Law Judge submitted this matter for decision on April 13, 2009, and finds as follows:

FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on March 20, 2009, the Accusation was made and filed by Nina Boyd in her official capacity as Assistant Superintendent for Human Resources and Support Services (Assistant Superintendent) of the Orange County Department of Education and as a designee of the Orange County Superintendent of Schools (hereinafter Department).

2. Respondents, and each of them, are permanent or probationary as well as temporary certificated employees of the Department.

3. (A) Through its Special Schools Division, the Department provides special education and services to students with special needs, including students who are severely disabled, deaf and hard-of-hearing, visually impaired, and autistic. School districts in Orange County refer the students to the Department when the school districts cannot provide services to them. The Department bills the school districts for its services for the students. Through its Access Division, the Department provides alternative educational programs to students in the county juvenile detention center and camps, group homes, and day homes. These students are referred to the Department by schools, courts, and the juvenile justice system. The Department receives funding for its services from State of California based on the average daily attendance numbers of these students in the Access programs.

(B) The enrollment of students in the Special Schools and Access Divisions has fluctuated in years past. Special Schools students may stay in their programs for a length of time and then leave for other programs and locales. The enrollment of students in the Access Division fluctuates daily as students are detained and discharged from custody, found to be truant, or move out of the county. The Department employs teachers for both the Special Schools Division and Access Division; teachers may be assigned to teach at county and regional sites as well at school districts. To manage, in part, the fluctuations in enrollment and to provide teachers for the two divisions, the Department hires temporary teachers and long-term substitute teachers in addition to employing permanent and probationary employees and maintains a call center for hiring substitute teachers.

(C) For the 2008-2009 school year, the Department has determined that it will have a budget shortfall of approximately \$5 million in the Special Schools and Access Divisions. The Department has projected that this budget shortfall will increase to more than \$7 for the 2009-2010 school year. The budget shortfalls are a result, in part, of the decreases in enrollment due to decisions or plans of school districts not to refer students to the Department's Special Schools and Access Divisions. In addition, the Department anticipates that it will receive less state funding for education due to the budget problems of the government of the State of California. Due to these budget shortfalls for this school year and the next school year, the Department has determined that it must reduce expenditures in the Special Schools and Access Divisions and must do so by terminating the employment of classified and administrative personnel, temporary teachers, and permanent and probationary employees.

4. (A) On March 2, 2009, pursuant to Education Code sections 1294, 44949, and 44955, the Deputy Superintendent as an authorized delegate of the Orange County Superintendent of Schools (Superintendent) determined that, because the Orange County Department of Education has or will have insufficient revenue to maintain the current levels of its programs, it is necessary to reduce or discontinue particular kinds of services which are now being rendered by certificated personnel no later than the beginning of 2009-2010 school year. The Superintendent also found that the reduction or discontinuance of these particular kinds of services will result in the termination, reassignment, and displacement of probationary and/or permanent certificated employees by level, subject field or classification, and full-time equivalent (FTE) position.

(B) On March 2, 2009, the Superintendent resolved that particular kinds of services must be discontinued or reduced in administration by 6.0 FTE positions, classroom teaching in the Special Schools Division by 18.0 FTE positions, classroom teaching in the Access Division by 75.0 FTE positions, and ancillary staff by 2.0 FTE positions, no later than the beginning of the ensuing 2009-2010 school year. The Superintendent further resolved that, because of the reduction or discontinuance in particular kinds of services, it is necessary to terminate no later than the beginning of the 2009-2010 school year probationary and/or permanent certificated employees equal in number to the positions affected and services reduced or discontinued. The Superintendent resolved that his designated representative send appropriate notices to all employees "possibly affected by virtue of the reduction and elimination of particular kinds of service." The Superintendent also adopted tiebreaking criteria to be used in determining the order of termination or layoff of certificated employees who first rendered paid service to the Department on the same date or have the same first date of service.

(C) On March 13, 2008, the Superintendent further found that the Department has employed temporary certificated employees or teachers and that the resolution to reduce or discontinue particular kinds of services is related to the justifications for employing temporary employees. The Superintendent determined that the resolution to reduce or discontinue particular kinds of services is related to the loss or potential loss of "revenue limiting funding and of certain categorical or specially-funded programs, the possibility of

probationary and permanent employees returning from leaves of absence, and other considerations that relate directly to the justifications for employment of temporary certificated employees.” The Superintendent thus determined that temporary certificated employees must be released from their temporary assignments to effectuate the reduction or discontinuance of particular kinds of services

5. On or about March 3, 2009, pursuant to the resolutions of the Superintendent and the provisions of Education Code sections 1294, 44949, and 44955, the Assistant Superintendent of Human Resources and Support Services as designee of the Superintendent gave written notices by personal service or otherwise to respondents, who are permanent or probationary employees of the Department, and each of them, that the Superintendent had recommended that their services will not be required for the ensuing 2009-2010 school year and the reasons for this action. The written notices included the resolutions of the Superintendent to reduce and/or discontinue certain services or programs in the Department, the list of particular certificated services to be reduced or eliminated, tie-breaking criteria, pertinent sections of the California Education Code, and a request for hearing. Respondents, who are permanent or probationary employees of the Department, and each of them, requested a hearing to determine if there is cause for not re-employing them for the ensuing school year.

6. On or about March 13, 2009, pursuant to the resolutions of the Superintendent and the provisions of Education Code sections 1294, 44949, and 44955, the Assistant Superintendent as designee of the Superintendent gave written notices to respondents, who are temporary certificated employees, that the Superintendent had recommended that their services will not be required for the ensuing 2009-2010 school year and that, as temporary certificated employees, they may be released from employment without a hearing. The written notices included the resolutions of the Superintendent to reduce and/or discontinue certain services or programs of the Department, the list of particular certificated services to be reduced or eliminated, tie-breaking criteria, pertinent sections of the California Education Code, and a request for hearing. The Department further notified these temporary certificated employees, that if they claimed that they could not be released from employment without a hearing, they were required to submit a request for hearing, attend the layoff proceeding, and present evidence at the hearing that they are entitled to participate in the hearing. Respondents, who are temporary certificated employees of the Department, and each of them, requested a hearing to determine if there is cause for not re-employing them for the ensuing school year.

7. The Department’s notices dated March 3 and 13, 2009, were sufficient in providing notice to respondents under Education Code sections 44949 and 44955. Respondents were not prejudiced by errors in the notice, if any, with respect to the description of their current assignments, home addresses, or any other matters. No claims were raised in the hearing that the notices were, in fact, deficient in any respect.

8. On or about March 20, 2009, the Department served respondents, who are permanent or probationary certificated employees or temporary certificated employees, and

each of them, with an Accusation, Statement to Respondent, copies of Education Code sections 1294, 44949, and 44955 and Government Code sections 11500, 11505, 11506, 11507.5-11507.7, 11509, and 11520, Notice of Defense form, and Notice of Hearing. Except for those certificated employees who did not file notices of defense, respondents, and each of them, filed timely notices of defenses, requesting a hearing to determine if there is cause not to employ them for the ensuing school year. In addition, the District invited any respondents and certificated employees, who were given a preliminary notice and/or served with an Accusation but did not file hearing requests or notices of defense, to participate in the noticed hearing. All prehearing jurisdictional requirements have been met by the parties.

9. On March 2, 2009, pursuant to his Resolution and Findings, the Superintendent resolved and took action to reduce or discontinue certain services or programs offered by the Department for the 2009-2010 school year in the following FTE positions:

<u>Administrative</u>	<u>Full-Time Equivalent Positions</u>
Principal	1.0
Assistant Principal	4.0
Psychologist Coordinator, Early Education	1.0
 <u>Classroom Teaching—Special Schools</u>	
SDC/ Adapted P.E.	1.0
SDC/Severely Handicapped	13.0
SDC/Deaf & Hard of Hearing	3.0
SDC/Oral Deaf	1.0
 <u>Classroom Teaching--ACCESS</u>	
Contract Learning Classes	27.0
Day School Classes	26.0
Institutions	20.0
Special Education	2.0
 <u>Ancillary Staff</u>	
Language, Speech & Hearing Specialists	2.0

The reduction or discontinuance of the services set forth hereinabove constitute a total of 101.0 full-time equivalent positions.

10. (A) The services set forth in Findings 4 and 9 above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Superintendent of the Department to reduce or discontinue these services is within the sound discretion of the Department, related to the welfare of the Department and its students, and not arbitrary or capricious. The Department will continue to provide services mandated by law although in different manner in some areas and plans to re-employ respondents whose services are reduced or discontinued in the event that services or programs are reinstated due to sufficient funding. The Department will terminate temporary certificated employees before permanent or probationary certificated employees and plans to terminate the employment of classified employees as well.

(B) The Department has obviated the need to reduce or discontinue all of the particular kinds of services described in Finding 4 and 9 above by taking into account the personnel changes due to resignations, temporary attrition, and/or reassignment of individual employees within the Department. Further, the Department is considering implementation of retirement incentives to mitigate the layoff of certificated employees and will discuss the terms of retirement incentives with the teachers' association.

11. The Department prepared a Seniority List of Certificated Employees (Exh. 5) that contains information about seniority and hire dates, credentials, assignments, and job locations. Said information was obtained from the Department's database which was updated after soliciting additional information from certificated employees. The Department re-evaluated and corrected and/or re-classified the seniority dates of certificated employees to their first dates of paid service with the Department, rather than their credentials, as required by decisional law. The Department also prepared a Certificated Layoff Analysis (Exh. 6) using personnel information and documentation verified by the Human Resources office. Thereupon, the Department used the Seniority List and Certificated Layoff Analysis to developed a proposed layoff list (Exh. 7) of the least senior certificated employees assigned to services being reduced or discontinued and developed a bumping chart as well (Exh. 8).

Individual Respondents

12. The Department has determined to remove or "skip" certain certificated employees from the reduction or discontinuance of particular kinds of services. Cora B. Lee, the sole teacher in the visually-handicapped program for elementary students, has a seniority date of October 24, 2005. She has specialty training and experience and will be skipped inasmuch as she is needed to teach due to the expected enrollment of students next year in the visually-handicapped program. Elizabeth M. Desloge will be skipped for benefit of the PIES program, an interagency support program for parents and their infants and toddlers. Desloge, who has a seniority date of August 1, 2006, has specialty training as well as experience working with infants and she is the most senior of certificated employees for the program. Terra D. Bernard and Susan S. Keir will be skipped to continue teaching in the University of California at Irvine (UCI) program. The UCI program is a blended and

collaborative therapy program for students who have failed in the traditional classroom environment due to medical, psychological, or behavioral concerns. The program is comprised of teachers, therapists, and social workers who work together with students in a therapeutic environment. Students are placed in the program by their parents who contract with the program directly. The teachers in the program are required to have completed a certificate program at UCI. Both Bernard and Keir, who have 2004 seniority dates, have completed the certificate program and have the additional competency and requisite experience to teach in the UCI Program.

13. Respondent Michael A. Kashdan is a day school teacher in alternative education. His seniority date is January 17, 2003, and he holds a single subject credential in social science. The Department proposes to have Kashdan bumped by Jose John Maduena, a contract learning teacher in alternative education who has a seniority date of April 24, 2002, and a multiple subject credential. Respondent Kashdan's employment may be terminated pursuant to the reduction or discontinuance of particular kinds of services for next year, but, as of the date of the hearing in this matter, the Department was not planning to do so.

14. Respondent Krisha Kerr is a temporary certificated employee who teaches in the Access program in a contract learning position at Pacific Coast High School. Kerr claims that she should be classified as a probationary certificated employee as of August 6, 2006, was not persuasive. On October 16, 2006, Kerr was hired by the Department as a temporary teacher for the 2006-2007 school year to fill a position vacated by a permanent employee who had resigned. She was re-hired for the next two school years under temporary contracts. Under these circumstances, respondent Kerr is considered a temporary employee and may be released from her temporary position for the ensuing school year.

15. Respondent Wendy Michelle Wilson is an adaptive physical education teacher in special education. She has a seniority date of October 7, 2002, and holds a clear single subject credential in physical education, a clear adaptive physical education specialist credential, and a clear cross-cultural language and academic development credential. The Department proposes to have Wilson bumped by Steve Lloyd Gonzales, a Juvenile Court School teacher who has an earlier seniority date of September 9, 2002, and holds a clear adapted physical education specialist credential. As such, respondent Wilson's employment may be terminated pursuant to the Department's reduction or discontinuance of particular kinds of services for next year although the Department is not planning to do so but has not rescinded her layoff notice either.

16. Respondent John M. Wells is a certificated teacher at the Department's Juvenile Court School. His seniority date is August 16, 2004, and he holds a professional clear multiple subject credential in cross-cultural language and academic development and general subjects. Wells contends that his seniority date should be July 1, 2003, when he was first hired by the District as a long-term substitute. He argues that he worked all of the school days during the 2003-2004 school year and should be deemed to have worked a complete school year as a probationary employee under Education Code section 44918, subdivision (a). Wells, however, failed to prove that he, in fact, worked 75 percent of the

regular school days as a certificated teacher in the 2003-2004 school year or establish any terms of his employment contracts. In addition, the affirmative defenses raised in his Notice of Defense were likewise not established by the evidence. Respondent Wells' first date of paid service with the Department is the seniority date as determined by the Department and his employment may be terminated pursuant to the present reduction or discontinuance of particular kinds of services.

17. Respondent John Charlton is a day school teacher in the Access alternative education program at Magnolia Lyceum in Garden Grove in a 0.90 FTE position. He holds a professional clear multiple subject credential and the Department has proposed that he be bumped by a more senior teacher with the same credential. In this proceeding, Charlton disagrees with his seniority date of January 6, 2003, arguing that it should be November 1, 2001, when he began working for the Department as a long-term substitute. Charlton's argument is not persuasive. On June 18, 2002, he signed a temporary contract for the period from July 1, 2002, through December 31, 2002. However, he left the employ of the Department in August 2002 to complete his student teaching and with the understanding that he could have a new contract with the Department afterwards. It was not established that Charlton's earlier contract or hire date was guaranteed or continued to have ongoing force and effect when he left the Department on his student teaching stint. On January 6, 2003, Charlton began working anew with the Department in a contract position. Charlton's seniority is January 6, 2003, and he may be given notice pursuant to the current reduction or discontinuance of particular kinds of services.

18. Respondent Judith L. Kirchner is an Access day school teacher who has a first date of paid service with the Department of September 13, 2004, and holds a preliminary multiple subject credential. Kirchner teaches at the Project Hope School which serves students who are homeless or live in shelters or motels. Kirchner also helps to provide transportation to the students to enable them to attend school. While she laments that the homeless population in Orange County is rising and that the current reduction in force will terminate two of the four Project Hope School teachers, it was not established that the Department will not be able to meet its obligations with the two remaining teachers. Kirchner may be given notice that her services will not be needed pursuant to the current reduction of particular kinds of services.

19. Respondent Jacqueline A. Kriskey is a special education teacher in the Access Division with a seniority date of August 15, 2005. She holds a clear multiple subject credential, a clear cross-cultural credential, and a clear education specialist credential in mild and moderate disabilities. The Department proposes to bump her with a more senior teacher who also has a preliminary mild and moderate disabilities teaching credential. Kriskey contends that she should be retained because her credential is a clear credential and will not expire and she also speaks Spanish. Her claims do not prevent her from being bumped and she may be terminated by this current reduction in force.

20. Respondent Daryl Charles Mays is an Access day school teacher and is assigned to work at the parole office in Watts in Los Angeles. Mays has clear and

preliminary teaching credentials and a seniority date of May 9, 2005. However, he claims that his seniority date should be back-dated to August 2004 when he began working as a long-term substitute at the Westminster Lyceum and taught more than 75 percent of the 2004-2005 school year. Mays' claim is not persuasive, for he did not establish the specific details of his employment. Under these circumstances, his seniority will remain as determined by the Department and he may be given notice that his services will not be needed for the ensuing school year.

21. Respondent Dawn D. Shelley is an Access day school teacher who holds a clear bilingual and cross-cultural credential in Spanish and a professional clear credential in general subjects. Her seniority date is listed as April 21, 2003, and the Department proposes that she be bumped by a more senior certificated employee. Here, Shelley asserts that her seniority date should be April 29, 2002, when she assumed the classroom duties of a teacher who had died and she stayed in the same classroom thereafter. Shelley's claim is not persuasive, for she did not clearly show that she worked in a capacity other than as a para-educator before her April 2003 seniority determined by the Department. Shelly may be given notice that her services will not required due to the reduction of particular kinds of services for the next school year.

22. Respondent Julie Lynn Ames is a contract learning teacher in the Access Division and holds a clear multiple subject teaching credential. Ames disputes the seniority date of March 15, 2004, as determined for her by the Department. She asserts that her seniority date should be no later than January 12, 2003, when she worked as a long-term substitute. However, there is no evidence of the terms of Ames' employment before March 15, 2004. The evidence shows that, during this time period, Ames was employed and was paid for working as a para-educator, which was not necessarily a certificated teaching position with the Department.

23. Respondent Linda Gruber is a temporary certificated employee who teaches special education in the Access Division. She holds a clear cross-cultural credential and preliminary and clear education specialist credentials in mild and moderate disabilities. On July 28, 2008, Gruber signed a temporary contract for the period of July 1, 2008, through December 31, 2008, of the 2008-2009 school year. She worked 115 of the 121 available work days in the fall 2008 semester. On January 15, 2009, Gruber signed another temporary contract for the balance of the current school year. She was not employed as a long-term substitute. Under these circumstances, the evidence supports the conclusion that Gruber is a probationary employee for the current 2008-2009 school year under Education Code section 44916 because she was not notified of her employment status or salary on her first date of paid service with the Department this school year pursuant to *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal. 4th 911. Nevertheless, as a probationary employee, Gruber may still be terminated pursuant to the current reduction of particular kinds of services as long as she was given a preliminary layoff notice.

24. Respondent Christine Hall is an Access Division teacher at the Juvenile Court School. She holds a professional clear single subject teaching credential. The Department

has determined her seniority date to be January 20, 2004, and proposes to terminate her employment for the next school year pursuant to the current reduction of particular kinds of services. In this proceeding, Hall contends that her seniority date should be July 22, 2002, but her contention is not persuasive. In July 2002, Hall began working as a temporary employee and/or long-term substitute. In 2002 and 2003, she was an intake teacher at the Juvenile Court School and received training to be an administrator. For the 2003-2004 school year, Hall was initially deemed a temporary teacher with the Department. However, she had accepted her temporary contract on June 28, 2004, and the Department back-dated her first date of paid service to January 20, 2004. Respondent Hall did not establish that she had a contract or worked under certain terms of employment that would entitle her to have an earlier seniority date with the Department. Hall may receive notice that her services will not be required for the ensuing school year pursuant to the current reduction of particular kinds of services.

* * * * *

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Jurisdiction exists for the subject proceedings pursuant to Education Code sections 44949 and 44955, based on Findings 1 – 8 above. All notices, accusations, and other related papers and reports required by these Education Code sections have been provided in timely manner and, as such, the parties have complied with the statutory requirements.
2. Cause exists pursuant to Education Code sections 44949 and 44955 to reduce by 101.0 full-time equivalent positions the concomitant number of certificated employees of the Department due to the reduction or discontinuance of particular kinds of services, as set forth in Findings 1 – 24 above. With respect to those respondents whose employment have been found to be terminable by the District and any other certificated employees who received notices but did not request a hearing, the causes set forth in the Accusations relate solely to the welfare of the Department's schools and pupils within the meaning of Education Code section 44949.
3. Based on Findings 1 – 24 above, there is no certificated probationary or permanent employee with less seniority than any one of respondents or the certificated employees, who is being retained by the Department for the 2009-2010 school year to render

services which any one of respondents or certificated employees is certificated and competent to render.

4. Cause does not exist to release respondent Linda Gruber from employment with the District as a temporary certificated employee, based on Finding 23 above. Rather, it was established that respondent Gruber is a probationary certificated employee.

* * * * *

WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Department may give notice to respondents, and each of them, including temporary certificated employees and certificated employees who did not request a hearing, in the inverse order of seniority that their services will not be required for the ensuing 2009-2010 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

2. Before giving notice to respondents and the other certificated employees who did not request a hearing, the Department shall determine and take into account positively assured attrition among certificated employees in deciding how many and when certificated employees should be terminated before the ensuing 2009-2010 school year.

3. The Department is directed to determine the first date of paid service for respondent Linda Gruber as a probationary certificated employee⁴, based on Conclusion of Law 4, and determine her seniority and employment status in the current reduction or discontinuance of particular kinds of services for the ensuing 2009-2010 school year. After completing its layoff analysis, the Department may give notice to respondent Gruber that her services will not be required for the next school year, if proper.

Dated:

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings