

BEFORE THE
GOVERNING BOARD
NORWALK-LA MIRADA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

TANYA M. ALVAREZ and Other
Permanent or Probationary Certificated
Employees of the Norwalk-La Mirada
Unified School District,

Respondents.

OAH Case No. 2010031172

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 6, 2010, in Norwalk.¹ Complainant Dr. Ruth Pérez, Superintendent, Norwalk-La Mirada Unified School District, was represented by Elizabeth Zamora-Mejia, Attorney at Law. Respondents as named in the List of Respondents (Exh. 12), as amended, were represented by Richard J. Schwab, Attorney at Law.

At the conclusion of the evidentiary hearing, the record was held open until May 13, 2010, for the parties to submit a stipulation regarding the seniority date of a single certificated employee. On May 13, 2010, counsel for the Norwalk-La Mirada Unified School District filed a letter with attachments, which was marked as Exhibit 24. On March 14, 2010, counsel for respondents filed a reply letter, which was marked as Exhibit C. The parties' exhibits were admitted into evidence.

¹ On March 18, 2010, the Office of Administrative Hearings scheduled this matter for a hearing for April 7, 2010. On March 18, 2010, counsel for the Norwalk-La Mirada Unified School District filed a motion to continue the hearing. Respondents' counsel did not oppose the motion and the Office of Administrative Hearings continued the hearing to May 6, 2010. As a result, the statutory deadlines for issuing the proposed decision and for notifying certificated employees that their services are being terminated as prescribed by Education Code sections 44949, subdivision (c), and 44955, subdivision (c), respectively, were extended for the period of time equal to the continuance.

Documentary, oral, and stipulated evidence having been received and arguments heard, the Administrative Law Judge submitted this matter for decision on May 17, 2010, and finds as follows:

FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on April 7, 2010, the Accusation was made and filed by Dr. Ruth Pérez in her official capacity as Superintendent of the Norwalk-La Mirada Unified School District, State of California (District).

2. Respondents, and each of them, are employed by the District as permanent or probationary certificated employees.

3. The District is a unified school district comprised of four high schools, including a continuation high school, six middle schools, 17 elementary schools, an adult school, and a Head Start preschool. The District serves and educates approximately 20,000 students in the southeast area of Los Angeles County.

4. Due to the ongoing state budget crisis and its concomitant effect upon its budget, the District has determined that it must reduce expenditures to maintain a balanced budget and its reserve. Because human resources or labor costs are its highest expense, the District has determined to reduce expenditures by discontinuing particular kinds of services and laying off certificated personnel. The Assistant Superintendent of Business Services and the Director of Fiscal Services prepared a Second Interim Report for the 2009-2010 fiscal year with financial statements and projections. For 2009-2010, the District is projecting an operating deficit of \$5.8 million due to deficit spending arising from declining enrollment, reduced state revenues and the use of off-setting reserves, and the expenditure of general fund program funds carried over from the prior year. For the 2010-2011 and 2011-2012 fiscal years, the District projects that it will have operating deficits of \$15.6 million and \$16.7 million, respectively. While its reserve is currently \$25.3 million compared to a general fund budget of \$189 million, the District further projects that deficit spending in the next two fiscal years will cause its reserve to fall below the required minimum level. If its deficit spending continues, the District may be insolvent in future years.

5. On March 1 and 10, 2010, the Superintendent provided notices to the Governing Board of her recommendation not to re-employ 127 permanent or probationary employees and to give them notices that their services will not be required for the 2010-2011 school year. The Superintendent also recommended that “precautionary notices” be given to 16 permanent or probationary employees.

6. (A) On March 1, 2010, in Amended Resolution No. 0910-5, pursuant to Education Code sections 44949 and 44955 and based upon recommendation of the Superintendent, the Governing Board determined that it is in the best interests of the District and the welfare of its schools and pupils to reduce or discontinue certain particular kinds of

services no later than the beginning of the 2010-2011 school year and that, due to this reduction or discontinuance of particular kinds of services, it is necessary to decrease a corresponding number of certificated employees for the 2010-2011 school year pursuant to Education Code section 44955. The Governing Board resolved to reduce or discontinue particular kinds of services being rendered by certificated personnel for the 2010-2011 fiscal year by a total of 152.0 full-time equivalent (FTE) positions. The Governing Board directed the Superintendent and/or her designee to send appropriate notices to all employees “possibly affected by virtue of the reduction and elimination of particular kinds of services” and to take “all actions necessary and proper to the accomplishment of the purposes of this Resolution.”

(B) Earlier, on February 22, 2010, in Resolution No. 0910-6, the Governing Board also adopted a Determination of Seniority Among Certificated Employees with the Same Seniority Date, or a tie-breaker resolution, which sets forth tie-breaking criteria to be used in determining the order of termination or layoff of certificated employees who first rendered paid service to the District on the same date or have the same first date of paid service.

7. On or about March 9, 10, and 11, 2010, pursuant to Amended Resolution No. 0910-5 and the provisions of Education Code sections 44949 and 44955, the Superintendent gave written notices by personal service to 143 certificated permanent and probationary employees that their services will not be required for the ensuing 2010-2011 school year because the Governing Board had resolved to reduce or discontinue certain particular kinds of services not later than the beginning of the next school year and it is necessary to reduce certificated staff by a corresponding number. These preliminary notices included Amended Resolution No. 0910-5, the tie-breaking criteria, a blank Request for Hearing, and Education Code sections 44949 and 44955. The District executed proofs of service showing that it had served the preliminary notices by personal delivery upon the 143 certificated employees. Subsequently, 138 of the 143 certificated employees served with preliminary notices filed timely requests for a hearing to determine if there is cause for not re-employing them for the ensuing school year. These 138 certificated employees who filed requests for hearing were later served with an Accusation and are considered respondents in this layoff proceeding.

8. The District’s preliminary notices of layoff were sufficient in providing notice to respondents under Education Code sections 44949 and 44955. Respondents were not prejudiced by errors in the notices, if any, with respect to the spelling of their names, work site or business addresses, or any other matters. No claims or complaints were raised in the hearing that the preliminary notices or contents thereof were insufficient or deficient in any respect.

9. (A) On or about April 6 and 7, 2010, the District properly served all 138 respondents by registered or certified mail with an Accusation, Notice of Accusation, a list of respondents who had filed requests for hearing, the Superintendent’s recommendations that certificated employees not be reemployed for the following school year, Amended Resolution No 0910-5, tie-breaking criteria, a blank Notice of Defense, copies of Government Code sections 11506, 11507.5-11507.7, and 11520, and Notice of Hearing. The

District executed proofs of service that respondents had been served with the Accusation and accompanying documents by registered or certified mail.

(B) Subsequently, all 138 respondents filed timely Notices of Defense, objecting to the Accusation and requesting a hearing to determine if there is cause not to employ them for the ensuing school year. Earlier, on or about March 30, 2010, respondents had filed a joint Notice of Defense through their counsel. All prehearing jurisdictional requirements have been met by the parties.

10. On February 23, 2010, pursuant to Amended Resolution No. 0910-5 and its findings, the Governing Board resolved and took action to reduce or discontinue certain services or programs offered by the District for the 2010-2011 school years in the following FTE positions:

<u>Services</u>	<u>Full-Time Equivalent Positions</u>
K-5 Classroom Teaching Services	142.0
Elementary Counseling Services	2.0
Secondary Counseling Services	7.0
High School Home Economics Instruction	1.0

The reduction or discontinuance of the services set forth hereinabove constitute a total of 152.0 full-time equivalent positions.

11. The services set forth in Finding 10 above are particular kinds of services performed by certificated employees of the District which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Governing Board to reduce or discontinue these services is within its sound discretion and neither arbitrary nor capricious. The District demonstrated that the reduction or discontinuance of these particular kinds of services is related to the welfare of the District and its pupils and is necessary in order for the District to maintain a balanced budget for the next two school years, help conserve a sufficient reserve, and provide essential services.

12. The District prepared and maintains a Seniority List (Exh. 13) which contains the names of certificated employees and their seniority dates or dates of first paid service, current position titles and work site locations, FTE positions, employment status, employee numbers, and credentials and authorizations. The District applied the tie-breaking criteria to respondents who are affected by this layoff and first rendered paid service in a probationary position on the same dates, ranked them in order of termination, and prepared seniority tie-break charts. The District also prepared a Layoff Implementation Chart, indicating how the least senior respondents and certificated employees in the particular kinds of services that are being reduced or discontinued are affected by the District's implementation of the bumping and skipping process as well as attrition. As such, the District determined whether the least senior certificated employees hold credentials in other areas of service or teaching and are

entitled to bump other more junior employees and whether certain employees should be skipped and retained.

13. (A) Further, the District has obviated the need to reduce or discontinue all of the particular kinds of services described in Finding 9 above and to terminate the employment of all respondents given preliminary notices and accusations by taking into account the personnel changes and attrition of individual certificated employees of the District. The District prepared a list of temporary employees who are filling or working in positions of certificated employees on leaves of absence and a list of temporary employees in categorical-funded positions. The District has released these temporary employees effective at the end of the current school year. The District also received letters of resignation from 58 certificated employees as of April 28, 2010, and prepared a list of these certificated employees who will retire before or during the next school year.

(B) After negotiations with the teachers' association, the District further agreed that the pupil-teacher ratio in kindergarten through fifth grade classrooms would be modified to 28 to one and that, due to this class-size modification, 15 additional K-5 classroom teachers were needed for the next school year. Taking into account the modified classroom size modification and the need for additional elementary teachers needed for next year, the District determined that K-5 elementary teaching services would have to be reduced or discontinued by 110 FTE instead of the 142 FTE as resolved by the Governing Board. Later, the District decreased the number of K-5 elementary teaching services that have to be reduced or discontinued to 101 FTE.

(C) Subsequently, the District also rescinded the preliminary notices previously served upon 60 respondents and/or certificated employees. With these 60 rescissions, 78 of the 138 respondents who filed notices of defense remain as parties in this layoff proceeding. The District has further determined that 69 respondents must be laid off in this proceeding pursuant to the resolution to reduce or discontinue particular kinds of services.

(D) The District has reasonably determined and accounted for what will be positively assured attrition among its certificated staff for the ensuing 2010-2011 school year and reduced by corresponding number the number of certificated employees whose employment must be terminated due to the reduction or discontinuance of particular kinds of services.

14. (A) The District has a significant population of English language learner pupils who have specialized educational needs. In Amended Resolution No 0910-5, the Governing Board determined that the District has a specific and compelling need to employ and retain certificated employees who are authorized to teach English language learner pupils and decided to deviate from terminating certificated employees in order of seniority in this reduction or discontinuance of particular kinds of services due to this need. The Governing Board thus authorized the Superintendent and/or her designee to deviate from terminating those certificated employees in order of seniority where they possess a BCLAD certificates,

are currently assigned to teach bilingual or Spanish-English immersion classes under their BCLAD certificates, and will be assigned to those services next year.

(B) The District has bilingual and Spanish-English immersion classes at two schools: Edmondson Elementary School and Dollard Elementary School. Teachers in those two programs are required to have a BCLAD certificate to teach English language learner students and also receive additional in-service and professional development training. The District has decided to skip and to retain five elementary school teachers who hold BCLAD certificates and teach in the bilingual and immersion classes: Gabriella Barrera De Contreras, Conny D. Rodriguez, Wendy Cano, Cathy De Alba Velasquez, and Mayra V. Salguero. The District has determined that, in addition to BCLAD certificates, these five certificated employees have special skills and experience in bilingual and immersion classes and will be assigned to these programs next school year. The District's decision to skip these certificated employees comports with the welfare and needs of the schools and its pupils and is not arbitrary or capricious, for it has demonstrated a special need for bilingual and English-Spanish immersion classes and that these five teachers have the special training and experience necessary to teach in these programs. (Ed. Code, § 44955, subd. (d); *Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

15. (A) Respondents J'Lene Cave, Leya Naulls, John Blair IV, Jennifer Richter, and Genevieve Silebi are literacy coaches for the District and were served with preliminary notices and Accusations. Certified employee Monica Luther is likewise a literacy coach and was served with a preliminary notice but then declined to file a request for hearing. Cave and Silebi are assigned to elementary schools. Blair, Richter, and Luther are assigned to middle schools. Naulls is assigned to school operations. The District has determined to skip and retain these six literacy coaches on the grounds that the District requires literacy coaches and these six certificated employees possess special skills and experience necessary to provide that essential service.

(B) The District has established a district-wide goal that nine of 10 of its pupils read at grade level. To achieve this goal, the District has developed the position of literacy coaches who are required to train and support classroom teachers in implementing research-based reading practices with their pupils and to collaborate with classroom teachers in improving the pupils' reading ability. Literacy coaches are assigned to specific school sites rather than classrooms and work with teachers and pupils at those schools. To be selected as literacy coaches, the six respondents and/or certified employees were required to undergo a rigorous application and interview process and to conduct demonstration lessons with pupils.

(C) In this proceeding, respondents claim that there are a number of them with greater seniority than the six literacy coaches and are credentialed and competent to perform the duties of literacy coaches. Respondents contend that they should be able to bump the six literacy coaches from their positions and then be skipped and retained in lieu of the literacy coaches. For example, respondent Barbara J. Clendineng is a fifth grade teacher at Nuffer Elementary School. She possesses a clear multiple subject credential in general subjects and

a CLAD certificate. With a seniority date of September 2, 2003, Clendineng is senior to five of the literacy coaches who are proposed to be skipped. She contends that she can perform the duties of a literacy coach and is qualified and competent to train other teachers. She has a master of art degree in education with an emphasis in curriculum assessment and instruction. Three years ago, Clendineng received training to be a demonstration teacher, which she characterizes to be the same type of training that literacy coaches received, and then worked with fellow teachers and demonstration teachers to apply research and/or techniques in the classroom. Two years ago, she attended the writing academy. Clendineng did not apply to be a literacy coach. As set forth in Exhibit A, there are other respondents senior to the literacy coaches who have acted as demonstration teachers and/or attended the writing academy or AVID training.

(D) Respondent J'Lene Cave is one of the literacy coaches that the District has proposed to skip in this layoff proceeding and thus retain. She is assigned to Dollard Elementary School and possesses a clear multiple subject credential in general subjects and a CLAD certificate. Her seniority date is September 3, 2002. As established by Cave's testimony, literacy coaches have had to undergo a specialized eight-hour training session each month for the past two years to learn how to collaborate with, coach, and work with school staff. Only literacy coaches attend these monthly training sessions. Literacy coaches have been trained to analyze data and to impart information and lesson plans to teachers.

(E) Based on Findings 15(A) – (D) above, the District demonstrated that it has a specific need for literacy coaches and that the six literacy coaches have specialized training and experience necessary to be literacy coaches which other respondents with more seniority do not possess. The six literacy coaches that the District proposes to skip have undergone extensive training to perform as literacy coaches. The training for literacy coaches is different from and more specific to collaborating with and coaching classroom teachers to develop literacy among pupils than the training that other respondents may have received. In addition, the literacy coaches have experience in working in the field. The District's determination to skip and to retain the six literacy coaches is sound and related to the welfare of its schools and pupils. (Ed. Code, § 44955, subd. (d); *Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.) As such, it was not established that there are other more senior respondents or certificated employees who are certificated and competent to bump these six literacy coaches from their positions.

16. (A) At the outset of the hearing, the District dismissed for undetermined reason the Accusation against respondent Angelica Mercado, a seventh grade core teacher at Waite Middle School, who has a seniority date of September 5, 2006. Mercado possesses a clear multiple subject credential in general subjects and a BCLAD certificate.

(B) The parties stipulated that respondent Todd P. Munoz, a life science teacher at Corvallis Middle School, should have a first date of paid service, or seniority date, of September 3, 2008, and not November 18, 2009. Munoz is subject to being bumped from his middle school position by a more senior elementary school teacher.

(C) Respondents Rose Bakh and Melissa Patino are elementary school teachers who share the same seniority date of September 2, 2003, with several other respondents subject to layoff in this proceeding. After applying or re-applying the tie-breaker criteria, the District determined that Patino should have a higher ranking or seniority than Bakh due to having attained a bachelor of art degree on an earlier date. No other challenges or complaints were raised as to the District's application of the tie-breaking criteria to any other certificated employees who are tied with and have the same first dates of paid service.

17. (A) Respondent Andrew Phelan is a permanent certificated employee of the District and a classroom teacher at Sanchez Elementary School. He holds a clear multiple subject credential and a CLAD certificate. Phelan was served with a preliminary notice and Accusation as part of the reduction of elementary classroom teachers. According to the District's seniority list, Phelan has a first date of paid service of September 7, 2004, but he contends that his seniority date should be one year earlier.

(B) On August 23, 2004, Phelan signed a Contract of Temporary Employment to work as a temporary employee of the District for the 2004-2005 school year. On September 7, 2004, Phelan began teaching at Foster Road Elementary School pursuant to his temporary contract. Later that school year, on April 18, 2005, and after he had completed the requirements for a CLAD certificate, the District offered him employment in a regular position and as a probationary teacher. Phelan accepted the District's offer and the District made his first date of paid service as a probationary employee retroactive to the beginning of the school year, or September 7, 2004.

(C) However, one year earlier, on September 3, 2003, Phelan began working for the District as a long-term substitute teacher at a single school site. At the time of his hiring in September 2003, he was not provided with a written statement indicating his employment status, the temporary nature of his job, or the length of time for which he was employed. He did not sign a written contract that he was a long-term substitute teacher. Phelan worked the entire 2003-2004 school year as a long-term substitute teacher. It was not established that the District released Phelan from his employment before the end of the 2003-2004 school year or notified him of its decision not to reelect him for the next school year.

(D) Based on Findings 17 (A)-(C) above, respondent Phelan is deemed to have been a probationary employee for the 2003-2004 school year under Education Code section 44916 because the evidence did not establish that he was notified of his employment status as a substitute or temporary teacher at the time of his initial employment or first date of paid service with the District that first school year. (See *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911; *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2007) 145 Cal.App.4th 1260.) Moreover, even if he were to be first classified as a substitute employee for 2003-2004, because he served and performed the duties of a certificated employee for that full school year, was not shown to have been released at the end of that year, and was then employed as a probationary

employee for the following 2004-2005 school year, Phelan would be considered to have been a probationary employee for his year of service during 2003-2004 under Education Code sections 44918 and 44954. Therefore, Phelan is a permanent certificated employee of the District with a revised seniority date of September 3, 2003. He may still be laid off pursuant to the reduction or discontinuance of elementary teachers.

18. (A) Certificated employee Mariaelena Cleven is a Teacher on Special Assignment (TOSA) and assigned to be an English Language Learner coach at Lampton Elementary School. She provides English language support to teachers of students who are English language learners by imparting instructional strategies, information, and lessons. She is not assigned to a particular classroom and is not a classroom teacher at Lampton Elementary School. Cleven received training from the District in Systematic English Language Development (ELD) and is a Systematic ELD presenter and facilitator for the District. She holds a clear multiple subject credential in general subjects and a CLAD certificate and has a seniority date of September 7, 2004.

(B) For undetermined reasons, Cleven was not served with a preliminary notice and is not subject to layoff as part of this reduction or discontinuance of particular kinds of services. Presumably, the District determined to skip Cleven or found no certificated employee senior to Cleven who is able to perform her duties as a TOSA English Language coach and is entitled to bump her. However, no evidence was presented as to the District's special need for a TOSA English Language Learner coach for purposes of skipping under Education Code section 44955, subdivision (d), or as to any bumping process or rationale followed by the District.

(C) In fact, there are a number of respondents who have greater seniority with the District than Cleven and are certificated and competent to render the service as a TOSA English Language support person that Cleven provides to the District. These respondents also received the Systematic ELD training. The parties stipulated that the most senior of these respondents is Erica Soto, a fourth grade teacher at Gardenhill Elementary School. Soto holds a clear multiple subjects credential in general subjects and supplemental authorizations in civics and government as well as an ELD certificate. Like Cleven, Soto has a seniority date of September 7, 2004. During the hearing, the District on its own motion dismissed the Accusation against Soto and retained her for the ensuing school year.

19. (A) Certificated employee April L. Jolley is a language arts teacher at El Camino High School, the District's continuation high school. She has been assigned to the continuation high school for six years and has experience in teaching students who present with disciplinary histories at their home schools. Jolley holds a clear multiple subject teaching credential in general subjects, a supplemental authorization in English, and an ELD certificate. Her seniority date is September 7, 2004. Jolley was served with a preliminary notice but she is among those 60 certificated employees whose preliminary notices were subsequently rescinded by the District.

(B) It was not established why the District rescinded Jolley's preliminary notice and decided to retain her. Presumably, the District determined to skip Jolley or found no certificated employee senior to her who is certificated and competent to perform her duties as a continuation high school teacher and has bumping rights into her position. However, no evidence was presented as to the District's special need, if any, for a continuation high school teacher for purposes of skipping Jolley under Education Code section 44955, subdivision (d), or as to any bumping process or rationale followed by the District under Education Code section 44955, subdivision (b). Due to the rescission of her preliminary notice, Jolley will be retained as a certificated employee for the next school year.

(C) Respondent Marla D. McDonough is an eighth grade teacher at Waite Middle School. She holds a clear multiple subject credential in general subjects, supplemental authorizations in English and art, and a CLAD certificate. Her seniority date is November 20, 2003. The District determined that certificated employee Ivy Crawford-Johnson, a fourth grade teacher with a clear multiple subject credential in general subjects and ELD certificate, was entitled to bump McDonough from her position at the middle school. As a result of this bumping, McDonough is subject to layoff in this proceeding. McDonough testified at the hearing in this matter and the evidence established that McDonough teaches social studies as well as language arts to seventh and eighth grade pupils. Some of her pupils are "at risk" and "guidance" pupils that have had disciplinary problems at their home school or school districts. McDonough contends that she is not only credentialed but also competent and/or qualified to teach at the continuation high school.

(D) At the conclusion of the hearing, the parties stipulated that McDonough is the most senior of respondents who are certificated and competent to bump Jolley's position as a continuation high school teacher. Thereupon, the District on its own motion rescinded the preliminary notice and withdrew the Accusation issued to McDonough. Respondent McDonough will be retained as a certificated employee for the next school year.

20. No challenges or issues were raised with respect to the District's implementation of the reduction or discontinuance of the particular kinds of services in elementary and secondary counselors and home economics.

21. (A) Respondent Claudia C. Medina is a third grade teacher at New River Elementary School. She possesses a clear multiple subject credential in general subjects and a BCLAD certificate. Her seniority date has been determined by the District to be September 6, 2005. However, in this proceeding, Medina claims that her first date of paid service as a probationary employee with the District was August 15, 2005, and that her seniority date should be changed to such earlier date.

(B) On August 15, 2005, Medina attended a "Certificated Staff Development Inservice" at New River Elementary School in order to receive training on the Apple Macintosh computer. It was established by stipulation that Medina was paid by the District and received a portion of her regular pay for attending this training. While the Master Agreement between the District and the Teachers Association of the Norwalk-La Mirada

Area shows that there were no working days in August 2005, the District did have two voluntary staff development days that month. Regardless whether the training was deemed voluntary or mandatory, the evidence is irrefutable that Medina was paid for attending the training and then began teaching shortly thereafter as a probationary employee. Because she was paid for attending the training, respondent Medina's first date of paid service as a probationary employee must be August 15, 2006. Medina may still be released from employment pursuant to the reduction or discontinuance of elementary school teachers.

* * * * *

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 – 21 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 152 full-time equivalent positions the concomitant number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services, as set forth in Findings 1 – 21 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, if any, the causes set forth in the Accusations relate solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. Cause does not exist pursuant to Education Code sections 44949 and 44955 to terminate the employment of respondents and/or certificated employees Angelica Mercado, Erica Soto, and Marla D. McDonough due to the reduction or discontinuance of particular kinds of services inasmuch as the District withdrew or dismissed the Accusation against them, based on Findings 16(A), 18, and 19 above.

4. Cause exists to change the seniority dates and/or seniority rankings of respondents Todd P. Munoz, Rose Bakh, Melissa Patino, Andrew Phelan, and Claudia C. Medina, based on Findings 16(B), 16(C), 17, and 21 above.

5. Discussion -- In this matter, respondents contend that it is not sufficient that the District has withdrawn the Accusation against respondents Erica Soto because the certificated employee whom Soto should have bumped in the layoff process, Mariaelena Cleven, is not being laid off but retained in her employment. Respondents argue there are others in addition to Soto who are not only senior to Cleven but also certificated and competent to perform the duties or services of a TOSA English Learner Language coach. These other respondents have received the Systematic ELD training and/or performed duties of demonstration teachers, as set forth in Exhibit A. By not serving a preliminary notice upon and not bumping Cleven and thereby retaining her, respondents assert the District has not followed the proper procedure in identifying and noticing the certificated employees who must be laid off pursuant to the reduction of particular kinds of services. Since there are respondents who are senior to Cleven and certificated and competent to perform her duties as a TOSA English Language Learner coach, respondents contend that all of these respondents must be likewise retained under Education Code section 44955. Respondents' argument is not supported by the case law and is therefore not persuasive.

Education Code section 44955, subdivision (b), provides that, except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of section 44955 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 the event that a school district fails to follow the layoff procedure and retains a certificated employee to render a service who is junior to certificated employees certificated and competent to provide the same service, section 44955 does not set forth a remedy for the school district's oversight. Section 44955 does not mandate that all of the senior certificated employees must be retained in these circumstances.

Education Code section 44949, subdivision (c)(3), does state that non-substantive procedural errors committed by a school district does not constitute cause for dismissing the charges contained in an accusation for reducing particular kinds of services and releasing certificated employees unless the errors are prejudicial errors. A school district's oversight or error in retaining a junior certificated employee is not necessarily a non-substantive procedural error inasmuch as the layoff process is a matter of a school district following the proper procedure of discerning particular kinds of services to be reduced, the seniority and bumping rights of certificated employees, the skipping needs of a school district, and the special training and experience of certificated employees for purposes of skipping. Still, the reference to "prejudicial errors" in section 44949, subdivision (c)(3), indicates that certificated employees must suffer prejudice before an accusation can be dismissed for errors of a school district in a layoff proceeding. (See also *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) The Fifth District Court of Appeal in *Alexander v. Board of Trustees* further indicated that, when junior teachers are skipped but should have received preliminary notices, then a "corresponding number" of the most senior certificated employees who were not re-employed must have been improperly given notices and it is these senior certificated employees who may be found to have suffered prejudice from the school district's error. (*Alexander v. Board of Trustees, Ibid.*, 139 Cal.App.3d at 576.)

Here, the District did not serve Cleven with a preliminary notice. As a result, the District is required to retain Cleven, a junior certificated employee, to render the service as a TOSA English Language Learner coach that other and more senior respondents are certificated and competent to render. Because the District has improperly skipped and retained a single certificated employee, Cleven, then the corresponding number of respondents who is affected by the District's error is one respondent, that is, respondent Soto. If the District had properly reviewed Cleven's seniority, credentials, and job duties as well as those of respondent Soto at the outset, then the District would have allowed Soto to bump into Cleven's position and retained her instead of Cleven. As such, Soto is the one respondent who has suffered the most prejudice by the District's error in skipping Cleven. With the District's dismissal of the Accusation against Soto, the District has rectified its error and the District's method of correcting its error is reasonable. (See *Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App. 3d 831, 845.)

Accordingly, it can be found that, with respect to all respondents and services being reduced, there are no certificated employees with less seniority than respondents who are being retained by the District to provide services that respondents are certificated and competent to render.

* * * * *

WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusation issued against respondents and/or certificated employees Angelica Mercado, Erica Soto, and Marla D. McDonough must be dismissed, based on Conclusion of Law 3 above, respectively. These respondents may not be given notice that their services will not be required for the 2010-2011 school year.

2. The Accusation issued against all of the remaining respondents is sustained, based on Conclusions of Law 1, 2, and 5 above. The Norwalk-La Mirada Unified School District may give notice to 69 respondents, and each of them, in the inverse order of seniority that their services will not be required for the ensuing 2010-2011 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

3. The Norwalk-La Mirada Unified School District may give notice to any respondents and certificated employees, if any, who were served with preliminary notices and/or accusations that their services will not be needed next year but did not file requests for hearing or notice of defense, that their services will not be required for the ensuing 2010-

2011 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code sections 44949 and 44955.

4. Before giving notice to respondents, the Norwalk-La Mirada Unified School District shall further determine and take into account any additional positively assured attrition among certificated employees in deciding how many and when respondents should be terminated before the ensuing 2010-2011 school year. The Norwalk-La Mirada Unified School District shall also rescind any preliminary notices and “precautionary” preliminary notices issued to respondents whom the District has determined need not be laid off or released after effectuating the reduction or discontinuance of the 69 FTE of particular kinds of services and whose services will thus be required for the next school year.

Dated: May 17, 2010

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings