

BEFORE THE  
GOVERNING BOARD OF THE  
SAN JUAN UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED EMPLOYEES  
OF THE SAN JUAN UNIFIED SCHOOL  
DISTRICT,<sup>1</sup>

OAH No. 2012020571

Respondents.

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on April 11 through 13, 2012, in Carmichael, California.

Linda C. T. Simlick, General Counsel, represented the San Juan Unified School District. Paul Oropallo, Director, Human Resources, and Deann Carlson, Human Resources Analyst, were also present.

Michael N. McCallum, Attorney at Law,<sup>2</sup> represented all but one of respondent teachers. Sandra Galindo, Assistant Executive Director of the San Juan Teachers Association and Robin Thompson, Paralegal, were also present.

Respondent Rita Townsend appeared on her own behalf.

Evidence was received and the record was left open for the parties' written closing briefs to be received on or before April 23, 2012. The District's closing brief was received on April 18, 2012, and marked as Exhibit 27 for identification. Respondent teachers' closing brief was received on April 23, 2012, and marked as Exhibit AA for identification.

The record was thereafter closed, and the matter submitted for decision on April 23, 2012.

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<sup>1</sup> List of Certificated Employees of the San Juan Unified School District who were served with an Accusation. (Attachment A.)

<sup>2</sup> Michael N. McCallum, Attorney at Law, 5820 Landis Avenue, Suite 3, Carmichael, California 95608.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Annette Buckmaster, is the Assistant Superintendent of Human Resources for the San Juan Unified School District (SJUSD or District). She performed her duties solely in her official capacity.

2. Before March 8, 2012, Ms. Buckmaster determined that funding for the 2012-2013 school year would be reduced, thereby necessitating the reduction or elimination of certain particular kinds of services (PKS). Ms. Buckmaster's recommendation to eliminate and reduce teaching services was made solely for the welfare of the District's schools and the students thereof.

3. On February 28, 2012, the Governing Board of the SJUSD (Board) adopted Resolution No. 2594, providing for the reduction or elimination of PKS, resulting in the reduction or elimination of 458.07 certificated positions in the K-12 program. Areas identified for reduction or elimination included K-12 classroom instruction, continuation school, administration, counseling and nursing. The Board adopted Resolution No. 2595, specifying criteria to be used in determining the order of termination of certificated employees who first rendered paid service as a probationary teachers on the same date (tie-breaking criteria).

4. Also on February 28, 2012, the Board adopted Resolution No. 2596, providing for the reduction or elimination of particular kinds of services in adult education, resulting in the reduction or elimination of 26.44 administrator and non-administrative certificated positions. Resolution Numbers 2594 and 2596 authorized application of competency and skipping criteria as more fully set forth below.

The Board further adopted Resolution No. 2597, specifying tie-breaking criteria for adult education certificated employees.

5. At the time that the notices were sent to certificated employees as described in Finding 6 below, the following particular kinds of services were to be eliminated or reduced no later than the beginning of the 2012-2013 school year:

### K-12 PROGRAM

<b>Administrators, Central Office Support</b>	<b>FTEs</b>
Behavior Support Specialist*	(5.00)
Coordinator, Early Childhood Education (4, reducing from 12 to 11 months)	0.32
Coordinator, Early Childhood Education, 11-month	1.00
Director - Adult Ed/School to Career	1.00
Director - Early Childhood Education (reducing from 12 to 11 months)	0.08

Director - K-8 Teaching and Learning	2.00
Director - Secondary Education	1.00
Operations Coordinator Encina H.S.*	(1.00)
Principal on Special Assignment	1.00
Program Specialist - Foster Youth Services	1.00
Program Specialist - EL & Multicultural Education	1.00
Program Specialist - Special Education	1.00
Subtotal	9.40

(\*Classified management reduction but has teacher seniority for purposes of bumping)

<b>Administrators, Schools</b>	<u>FTEs</u>
Principal, Continuation High School	1.00
Vice Principal, Elementary	9.00
Vice Principal, Middle School	1.00
Vice Principal, High School	3.00
Subtotal	14.00

<b>K-12 Certificated, Non-Administrative Positions</b>	<u>FTEs</u>
Art	22.20
Business	0.16
Computers/Technology	11.20
Counselor	11.20
English	23.87
English Learner Instructional Specialist	27.80
German	0.20
Health	2.00
Literacy Support Teacher	25.20
Math	15.20
Multiple Subject/Self Contained	164.85
Music	20.40
Nurse	1.00
PAR/BTSA Consulting Teacher	1.00
Physical Education	32.88
Science: Biology/Life/Earth/Geo	14.24
School Social Worker	1.00
SCORE Academy	0.33
Severe Language Handicapped	1.00
Site Resource H.S.	1.00
Site Resource Elem/Title 1 Coach	21.65
Social Science	14.64

Spanish	2.25
Teacher - Continuation School	6.00
Teacher - Home/Hospital	2.40
Teacher - Resource Spec K/12	1.00
District Resource Teacher/TOSA - Assessment, Evaluation and Planning	1.00
District Resource Teacher/TOSA - Professional Learning and Innovation	2.00
District Resource Teacher/TOSA - Special Education	2.00
District Resource Teacher/TOSA - Student Learning and Assistance	1.00
District Resource Teacher/TOSA - Teaching American History Grant	1.00
District Resource Teacher/TOSA - Technology Services	2.00
Woods/Woodshop	1.00
Subtotal	434.67

<b>Total</b>	<b>458.07</b>
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#### ADULT EDUCATION

<b>Administrators, Schools</b>	<u>FTEs</u>
Principal – Adult Education	2.00
Vice Principal, Adult Education	0.50
Subtotal	2.50

<b>Adult Education Certificated, Non-Administrative Positions</b>	<u>FTEs</u>
Counselor	1.07
Teacher—Orange Grove	12.00
Teacher—Sunrise	10.87
Subtotal	23.94
<b>Total</b>	<b>26.44</b>

6. On March 8, 2012, Ms. Buckmaster served on persons affected by the reduction and elimination of PKS a “Preliminary Notice of Recommendation That Service Will Not Be Required” for the ensuing 2012–2013 school year (Layoff Notice or Notice). The Notice stated that the Assistant Superintendent of Human Resources had recommended to the Board that notice be given to respondents pursuant to Education Code sections 44949 and 44955, that their services would not be required for the ensuing school year. The Notice advised that the Board had passed Resolutions reducing or discontinuing particular kinds of services in order to reduce certificated staff, and included copies of the Resolutions identifying the PKS to be reduced or eliminated.

7. Respondents timely requested a hearing to determine if there was cause for not re-employing them for the ensuing school year.

8. The Assistant Superintendent made and filed Accusations against each of the 389 employees who requested a hearing. The Accusations, required accompanying documents, and blank Notices of Defense were timely served on those employees. Respondents numbering 386 individuals timely filed Notices of Defense to the Accusations.

*Paul Oropallo, Director of Human Resources*

9. Paul Oropallo is the Director of Human Resources for the District. He testified that the District is experiencing budget constraints that have necessitated a reduction in force of certificated employees and/or an elimination of PKS before the start of the 2012-2013 school year. The District needs to make significant budget cuts due to the District’s long term structural deficit, generated in large part by the continuing cuts to state education funding, but also due, to a lesser extent, to declining enrollment. In implementing the layoff, Mr. Oropallo attempted to assure that no certificated employee was retained to render any service for which there was a more senior employee who was certificated and competent to render the service. In the event that two or more certificated employees first rendered paid service as probationary teachers on the same date, tie-breaking criteria were employed. Mr. Oropallo explained the process by which the District implemented the layoff including provision of notice, verification of personnel records, competency criteria, skipping, tie-breaking, and bumping, as set forth more fully below.

10 *Verification of Personnel Records.* The District gave employees an opportunity to verify their personnel data. On or about November 29, 2011, the Human Resources Department sent letters by first class mail to every employee with their personnel data including credentials, status, and seniority date. The letter requested that employees review the data, correct any errors, sign, date and return the letter to Human Resources by December 14, 2011. Human Resources staff reviewed all responses, verified data, and made valid corrections. On February 9, 2012, the District sent an e-mail to all employees inviting them to review the final seniority lists at either the District Office or at the San Juan Teachers’ Association Office, both in Carmichael. Mr. Oropallo stated that the purpose of this verification was to ensure that the District was working with accurate data for implementation of potential layoffs. Contracts were also provided to employees in

September detailing information about their employment status on record with the District. Despite these efforts, not all corrections were returned or made known to the District as requested. Evidence of additional information was presented at hearing and is discussed below.

### *Stipulated Rescissions*

11. Prior to the layoff hearing, the District restored 117 certificated employees in the K-12 program and four teachers in the Adult Education program. During the layoff hearing, the District agreed to rescind layoff notices issued to the following certificated employees:

- Rae Vinette-Lynn 1.00 FTE in Introductory Social Science
- John Agostinelli 1.00 FTE in Social Science
- Dena Kauer 1.00 FTE in Mathematics
- George Bamber 1.00 FTE in Industrial and Technology Education
- Cletus Purinton 1.00 FTE in Mathematics
- Stephanie Floyd-Smith 1.00 FTE in Multiple Subject self-contained classroom
- Elissa Thibault 1.00 FTE in Introductory English

12. During the layoff hearing, the District also agreed to restore Andrea Mager for .80 FTE in Introductory English. She is still affected for .20 FTE. Since the layoff hearing, the District has restored Michael Lineback for .20 FTE.

### *Employment Status and Seniority Date Stipulations*

13. *Employment Status.* The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) “A certificated employee is classified as permanent, i.e., acquires tenure, if after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected for the following year.” (Ed. Code, § 44929.21, subd. (b).) “Regardless of the number of years that the employee may have served in a temporary status in a position with certificated qualifications, the employee must serve one year as a probationary employee before acquiring permanent status. (*Schnee v. Alameda Unified School Dist.* (2004) 125 Cal.App.4th 555, 564.) Substitute and temporary employees fill the short range needs of a school district and generally may be summarily released. (*Bakersfield Elem. School Dist. v. Bakersfield City School Dist. et al.* (2006) 145 Cal.App.4th 1260, 1278.)

The District stipulated to identifying Christine Buckmaster as a second year probationary employee.

14. *Stipulated Revisions to Seniority Dates.* Seniority is the relationship between the teachers within a school district. Layoffs of certificated employees classified as

probationary or permanent take place in accordance with seniority. If a school district seeks to terminate employment for economic reasons (such as a decline in daily attendance or discontinuance of services), probationary and permanent employees are entitled to certain procedural protections pursuant to Education Code section 44949. No permanent employee may be laid off if a probationary employee, or any other employee of less seniority, occupies a position the permanent employee is certificated and competent to fill. (Ed. Code, § 44955, subd. (b).) Also, “a probationary employee, may ‘bump’ another probationary employee with less seniority.” (*California Teachers Assoc. et al., v. Vallejo City Unified School Distr.* (2007) 149 Cal.App.4th 135, 145.) Seniority is determined as of the date the employee “first rendered paid service in a probationary position.” (Ed. Code, § 44845.) “Temporary employees, therefore, do not accrue seniority, and so must be released before probationary employees.” (*California Teachers Assoc. et al., v. Vallejo, supra*, 149 Cal.App.4th at p. 145.)

At hearing, the District took into account additional information received from respondents. The District stipulated to the following earlier seniority dates:

<u>Employee</u>	<u>New Seniority Date</u>
Larry Patterson	August 17, 2004
Paula Lloyd	August 17, 2007
Brad Ward	August 15, 2007
George Bamber	August 20, 2001

Mr. Ward believes that his seniority date should be even earlier and this is discussed below.

#### *Tie-Breaking Application*

15. The Board, in Resolution 2595, established tie-breaking criteria to be used in the event that the layoff affected employees with the same status and seniority date. Tie-breaking criteria were broken into three categories. Category I assigned points for certifications and experience. Category II assigned a value based on teaching experience within the District for service not under contract. If employees remained tied in ranking after application of Categories I and II, Category III authorized the District to conduct a lottery.

16. The District properly applied tie-breaking criteria to those certificated employees holding multiple subject/self-contained credentials who shared an August 19, 2002 hire date. After the District applied the first two tie-breaking categories, there remained a tie between Sarah Vogeli and Sarah Montero. The District conducted a lottery and Sarah Vogeli was saved for 1.0 FTE.

17. The District properly applied tie-breaking criteria to those “Counseling” certificated employees who shared an August 15, 2006 hire date. After the District applied the first two tie-breaking categories, Marilyn Hesse ranked first. There remained a tie for

second position between Martha Velasco and Catherine Daniels-Landeros. The District conducted a lottery and Martha Velasco was restored .20 FTE for counseling, but she is still affected for .80.

18. The District properly applied tie-breaking criteria to those certificated employees holding physical education credentials who shared an August 16, 2007 hire date. Breanna Parker ranked first. After the District applied the first two tie-breaking categories, there remained a tie between Karen Hanks, Jamie Masse and Catherine Wood. The District conducted a lottery and Catherine Wood, who was affected for 1.0 FTE physical education, was restored for .77 FTE. Ms. Wood is still affected for .23 FTE.

### *Competency Criteria*

19. The Board, in Resolution 2594, established “competency criteria” for the Regional Occupational Program (ROP), Career Technical Education (CTE), and Non-ROP/CTE teachers. The District decided to look at recent teaching experience to ensure that teachers are “certificated and competent” to teach the positions they are bumping into. The District included “highly qualified” status to comply with “No Child Left Behind” (NCLB) state and federal mandates. Such determinations generally “involve discretionary decisions which are within the special competence of the school districts.” (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 565.)

20. *Certificated and Competent.* Pursuant to Resolution 2594, for the ROP or CTE programs, a teacher is considered “certificated and competent” if that teacher:

- a) Holds a valid credential issued by the State of California which is associated with the course(s) being taught, and
- b) Has taught the course(s) for at least one semester in the current school year or either of the two preceding school years.

For Non-ROP/CTE positions, a teacher is considered “certificated and competent” if that teacher:

- a) Holds a valid credential issued by the State of California which is associated with the courses(s) being taught AND, for course(s) identified by NCLB (ESEA) as core curriculum, is NCLB (ESEA) Highly Qualified to teach the course(s) or
- b) If there is no credential issued by the State of California associated with the course(s) being taught, has taught the specific course(s) for at least one semester in the current school year or either of the two preceding school years.

21. For adult education positions, Resolution 2596 provides that teachers are deemed to be “certificated and competent” to teach any class in the Adult Education program if that teacher:

- a) Holds a valid credential issued by the State of California which is associated with the course(s) being taught or
- b) If there is no credential issued by the State of California associated with the course(s) being taught, has taught the specific course(s) for at least one semester in the current school year or either of the two preceding school years.

22. *No Child Left Behind/Highly Qualified Status.* State and federal mandates under NCLB require teachers to be “highly qualified” in specific core subjects (English, Math, Science, Social Science, Visual and Performing Arts (VAPA)). Districts are audited by state and federal Departments of Education and risk losing funding if found to be non-compliant. To acquire NCLB/HQ status, a teacher must possess a valid State issued credential in a core subject and show subject matter competency. Subject matter competency can be established by either passing a test in that subject or having earned a Bachelors degree in a single-subject major. If hired before July 1, 2002, HQ status can be gained through a process called HOUSSE which stands for High Objective Uniform State Standard of Evaluation. This is an approved Individual Professional Development Plan (IPDP) which assigns points for experience, Master’s degrees, leadership roles such as department chair positions, and training. Deann Carlson, Human Resources Analyst, testified that District teachers are over 90 percent compliant with NCLB standards for the assignments they are currently teaching.

23. Respondents do not contest the District’s ability to pass competency criteria requiring that a person only be allowed to bump into a NCLB Core Curriculum Course if the person is NCLB qualified to teach that course. Respondents instead criticize the District’s failure to be consistent in following this criterion when making all “assignments and reassignments.” Respondents contend that the District is not uniform in applying this criteria and that the District appears to be doing so only for purposes of bumping during a layoff.

Respondents made specific reference to Christine Buckmaster and Jennifer Seley as individuals who are not highly qualified and who are currently assigned to teach core subjects. Ms. Buckmaster and Ms. Seley were apparently terminated in a prior year’s layoff proceedings and then rehired by the District. Ms. Carlson explained that the District was compelled to rehire them into those positions per Education Code provisions relating to rehire. (See Ed. Code, §§ 44956 and 44957.) Interestingly, Education Code sections relating to bumping (Ed. Code, § 44955) and rehire rights use identical language prohibiting either the retention or the employment of certificated teachers with less seniority to render a service which said “employee is certificated and competent to render.” In this respect, the District is inconsistent as noted by respondents. One would expect the language “certificated and

competent” to be interpreted the same way by the District in making all teaching assignments, whether by bumping or by rehire.

Regardless, the appropriate inquiry in this case is much narrower. It is limited to whether the District abused its discretion in making “NCLB qualified” a part of the competency criteria for bumping into District core curriculum courses. Respondents concede that the District is authorized to do so. The District’s NCLB qualified requirement has a rational and reasonable relationship to the skills and qualification to teach core curriculum subjects. Such determination is a discretionary decision which is within the special competence of school districts to make. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565.) A governing board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff. (*Ibid.*) The District did so in this case. To the extent that NCLB competency criteria for bumping is at variance with District rehire practices, such matter is better addressed in context of challenging the District’s rehire practices.

24. *Experience Requirement for Non-credential Specific Courses.* Respondents urge that the District’s competency criteria is too narrow where it requires teachers to have taught the specific course(s) for at least one semester in the current school year or either of the two preceding school years when there is no credential issued by the State of California associated with the course(s) being taught. Respondents contend that this is not valid under *Duax* as it is not reasonably related to any special skills or qualifications that teacher may possess. In this case respondents holding multiple subject/self contained classroom credentials would like to bump into positions held by junior teachers assigned to English Learner Instructional Specialist (ELIS) positions and/or Literacy Support Positions.<sup>3</sup> Teachers currently providing ELIS and Literacy Support instruction were only required to hold a multiple subject credential. ELIS and Literacy Support teachers were originally identified for PKS reduction, 27.80 FTE and 25.20 FTE, respectively. The District subsequently restored 20.70 ELIS and 19.0 FTE Literacy Support positions. Respondent teachers holding multiple subject credentials would like to bump into junior ELIS and Literacy Support positions without also being required to have taught ELIS or Literacy Support in the past three years.

The ELIS position was described as teaching English and Learning skills to elementary and middle school students for whom English is a second language. Instruction is not provided in the home language of the student and it is not necessary to hold a BCLAD to be an ELIS teacher. Literacy Support is an instruction program designed to supplement reading at the elementary level. This is the first year that Literacy Support has been a specific assignment. It is therefore impossible for respondent teachers other than those currently teaching Literacy Support to have taught it before. The District identified neither ELIS nor Literacy Support teachers as positions to be skipped.

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<sup>3</sup> A similar argument is made by respondents holding multiple subject credentials seeking to bump junior teachers assigned to Advanced Path, Independent Study, Home and Hospital, Site Resource – IB Coordinator positions.

25. Respondents rely upon language in *Duax*, where the Kern Community College District established criteria for bumping such that teachers must have taught in the subject matter of the junior teacher for one year within the last 10 years. In upholding the criteria, the court noted that this standard “was established by resolution of the governing board and since it requires only one year of teaching in the last ten, not one in the last two or three, we are not persuaded that it too narrowly defines competency.” (*Id.* at p. 567.)

*Duax* suggested that requiring one year of teaching in the last two or three might too narrowly define competency. Here, the District has defined qualifying experience as one semester in the last three years. This may not be unreasonable when applied to credential specific District positions where one may alternatively establish competency by holding, for example, a single subject credential to teach a particular course or course of study. In this way a teacher may bump into such position whenever he or she holds a valid credential or has taught the specific course for at least one semester in the last three years. Viewed in this broader context, the District’s competency standard is not too narrowly defined.

26. However, the competency standard must be viewed in context of every possible assignment into junior positions, including those that are non-credential specific. Here, the requirement that respondent teachers holding a multiple subject credential must have also taught the specific course, too narrowly defines competency. This is true for at least four reasons.

27. First, the District is requiring that the teacher have taught the specific course. In *Duax*, the competency criteria provided that the teacher have taught in the same *subject matter*, not the specific course or courses. Teaching in the same subject matter is less restrictive than a requirement that the teacher have taught the specific course or courses.

Second, in the case of Literacy Support positions, only current teachers could meet this experience requirement because this is the first year that Literacy Support was made a specific assignment. This makes it impossible for all other multiple subject credential holders to bump into these positions. And because Literacy Support is a non-credential specific position, it is not clear whether even a teacher holding a single subject credential in English could even bump into Literacy Support positions.

Third, the competency criterion for teaching one semester in the current or preceding two school years is essentially what the *Duax* court suggested too narrowly defined competency.

28. Finally, there was substantial evidence that teachers holding multiple subject credentials who have not provided instruction in the specific course or courses do have the requisite knowledge, skill and experience to teach in ELIS or Literacy Support positions. Two teachers, Carolyn Hudson and Kathryn Zylstra, testified to their experiences which they opined were also common to other similarly situated multiple subject teachers.

29. Carolyn Hudson is a multiple subject teacher assigned to teach fifth grade at Mary A. Deterding Elementary School. She is not assigned to either an ELIS or Literacy Support position. Her District seniority date is October 10, 2005. Ms. Hudson went through the interview process for ELIS and was accepted into that pool of teachers. She was trained in the California English Language Development Test (CELDT) and has done the CELDT with students. Ms. Hudson has scored the tests, input and analyzed test data, set student goals and done English language instruction at two different sites for English language learners. She is willing to go through any additional training that ELIS teachers are currently receiving. As a Title I teacher, Ms. Hudson noted that she also has experience comparable to that of a Literacy Support teacher. She was responsible for teaching in the Balanced Literacy format. She has helped support classroom teachers implementing Balanced Literacy. She is familiar with the “Daily Five” program and has used Mondo literacy resources, Book Shop and I Push in her classroom. She has modeled and was responsible for coordinating and providing professional development on read-alouds and shared readings in small group settings. Ms. Hudson explained that her Title I position required that she provide literacy support to classroom teachers. She has done this over the past few years. She continues to use Balanced Literacy in her own classroom, as well as doing read-alouds, shared readings and sharing Mondo resource materials. Ms. Hudson opined that her experience is one that is shared by many other District multiple subject credential teachers.

30. Kathryn Zylstra also testified to how her experience as a multiple subject teacher qualifies her to teach in ELIS and Literacy Support positions. Ms. Zylstra has an August 15, 2007 District seniority date. She is a Title I site resource teacher assigned to Howe Avenue Elementary School. She interviewed for a Literacy Support position and was originally assigned to be a literacy teacher at two different sites. When a full time position became available at her current site, she chose that position. She had been placed in the pool of teachers qualified to teach literacy support.

Ms. Zylstra noted that she currently serves a support role similar to that performed by ELIS and Literacy Support teachers. She provides guided reading support, shared reading, Balanced Literacy and Mondo oral language. She went to the same Adria training received by ELIS teachers. She averred that she did work as an ELIS teacher and was trained fully as an ELIS teacher last year. She has also attended training similar to that received by Literacy Support teachers, particularly training in Balanced Literacy. She currently works closely with the Literacy Support teachers at her site planning trainings, and collaborates with them on implementing Balanced Literacy in the classrooms.

31. Literacy support teachers believe that the District’s experience and competency requirements for teaching in Literacy Support are appropriate. Megan O’Neal is a Literacy Support teacher. She testified personally and on behalf of eight Literacy Support teachers who received precautionary layoff notices.<sup>4</sup> Ms. O’Neal noted that all literacy

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<sup>4</sup> These Literacy Support teachers included Rebecca Loper, Barbara Harris, Cassandra Anderson, Nikki Cater, Joannie Chi, Lindsay Mole, Bethany Parsons and Evie Pierce.

support teachers have received training in the areas of comprehensive Balanced Literacy including read-alouds, shared reading, creation of anchor charts, test preparation through shared reading, interactive writing, think-alouds, scaffolding lessons for special populations and components of critical literacy. She noted that the majority of literacy support teachers took the time to apply and interview for the position because of their interest in the position. They believe that the District has “invested so much time into making us highly qualified for our specialized position.” Literacy support teachers serve as models for other teachers and assist all school sites to move in the direction of comprehensive Balanced Literacy, which is part of the District’s strategic plan. Ms. O’Neal is concerned that if multiple subject teachers are allowed to bump Literacy Support teachers, “the integrity of the literacy program will be jeopardized.” She believes that it would be beneficial to the students to allow the current literacy teachers to build on and improve the program “we have worked so hard to create and establish this year.”

32. The above matters all having been considered, it is determined that the District’s non-credential specific competency criteria, when applied to ELIS and Literacy Support positions, are too narrowly defined. Respondent teachers holding multiple subject credentials may bump into positions held by junior teachers assigned to ELIS and Literacy Support, notwithstanding their not having taught these specific courses for at least one semester in the current school year or either of the two preceding school years. In making this determination, the matters set forth in Findings 27 through 30, considered together, are found to be persuasive.

33. *Other Non-Credential Specific Positions.* The District did not allow respondents to bump into certain other courses without having taught the specific course within the last three years. These courses included: Advanced Path, Independent Study and Site Resource – International Baccalaureate (IB) Coordinator.<sup>5</sup> The District did not identify any teachers in these programs to be skipped.

Angela Damian testified on behalf of herself and two others who are assigned to Advanced Path positions and who received precautionary layoff notices.<sup>6</sup> Ms. Damian believes teachers should not be allowed to bump into Advanced Path positions because of the uniqueness of the program. Advanced Path partners with a private company to provide an online learning program for at risk youth. Advanced Path teachers received over 40 hours of training in the specific curriculum. They use APEX online, A Plus, and Edmond, a learning program that they use along with Zangle. She noted that the District has invested a lot of time and money into their training.

34. The Advanced Path, Independent Study and Site Resource–IB Coordinator (.20 FTE) positions do not require a specific credential and thus can be taught by multiple

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<sup>5</sup> A Home and Hospital position (.6 FTE) also fell within this category but no respondent expressed an interest in bumping into this position.

<sup>6</sup> The two other teachers are Monique Goldfried and Jennifer Dalton.

subject credential holders. The District's non-credential specific competency criteria, when applied to these three positions, are too narrowly defined. Respondent teachers holding multiple subject credentials may bump into positions held by junior teachers assigned to Advanced Path, Independent Study and Site Resource–IB Coordinator, notwithstanding their not having taught in these specific courses for at least one semester in the current school year or either of the two preceding school years.

35. *Precautionary Notices.* The District issued precautionary layoff notices to certain junior teachers currently assigned to teach in ELIS, Literacy Support, Advanced Path, Independent Study and Site Resource–IB Coordinator positions. Respondents contend that the District had no authority under the Education Code to issue layoff notices to certificated employees other than those directly affected by a specific PKS authorization, or who were being bumped by one directly affected by a specific PKS authorization. Essentially, respondents are suggesting that because the District adopted certain competency criteria for purposes of bumping into junior positions, the District cannot now also guard against such competency criteria being determined invalid. Respondents are mistaken.

The District reasonably issued precautionary layoff notices to junior teachers because it anticipated the very same competency issues now successfully being raised by respondents. Teachers who were issued precautionary notices were afforded notice and an opportunity to respond to such issues. The District correctly determined that these teachers could potentially be bumped by those directly affected by a specific PKS authorization. There was no evidence that the District noticed more certificated employees than what was identified on the PKS resolution approved by the Board. While the District did provide precautionary notices to more certificated employees than those teachers identified after the initial bumping process was conducted, the District was not legally precluded from doing so.

For the above reasons it was proper and reasonable for the District to issue precautionary layoff notices as it did in this case.

#### *Cross Bumping – Adult Education*

36. District employees at the Orange Grove Adult Education program work with adults with handicapping conditions.<sup>7</sup> Some of the classes employ assistants to help work with disabled adults. Students at the District's Adult Education Centers have multiple handicaps to varying degrees. Some "learning handicapped" students are able to learn life skills such as sewing. Others are so severely disabled that "self-maintenance skills" are the focus. The District has treated Adult Education program assignments as separate from the regular K-12 program assignments. Regular education employees who do not possess credentials that authorize them to work with handicapped adults cannot bump into Adult Education assignments. Adult Education administrators with appropriate credentials were able to bump into Adult Education classroom assignments.

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<sup>7</sup> Background information is taken from the District's 2011 reduction in force Decision.

37. Respondents believe that teachers in the Adult Education program should be allowed to bump into the regular K-12 program where they possess the requisite credentials and competence to do so. The District disagrees and has refused to do so. Four Adult Education teachers hold credentials that would otherwise allow them to bump junior teachers in the K-12 program. L. Lynn Starks holds single subject credentials in English and Art. Elizabeth Friend holds a single subject credential in Art, and a multiple subject elementary teaching credential. Susan Edelmayer holds a single subject credential in Social Science, and a Pupil Personnel Services (counseling) credential. Lyn Bartlett holds a standard secondary credential in History and English. All are Highly Qualified under NCLB. Numerous teachers and counselors are being retained in the K-12 program who are junior to these four Adult Education teachers.

38. The Adult Education program is a separate and discrete program. The Education Code creates two distinct teacher categories: day school (K-12) and evening school (Adult Education), and provides that service in one category may not be counted toward service in the other. (Ed. Code, §§ 44929.25 and 44929.26.) Thus, Education Code section 44929.26 provides in part: "... In case a teacher obtains permanent classification in the day school **by reason of having served the probationary period therein**, he or she shall be given his or her choice as to which he or she shall take. Notwithstanding any other provision to the contrary, service in the evening school shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee in the day school, ...” (Emphasis added. See also *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167; *Kamin v. Governing Board* (1977) 72 Cal.App.3d 1014.)

There are different tenure rules for Adult Education teachers and they are prohibited from holding permanent status in both programs simultaneously. No respondent teachers in the Adult Education program who are seeking to bump into the K-12 program indicated that they also had probationary or permanent status in the District’s K-12 program.

The District has always treated the Adult Education program as separate and discrete, including maintaining separate seniority lists for the Adult Education and K-12 programs. Respondents’ contention that senior Adult Education teachers should be allowed to bump more junior K-12 teachers must be rejected.

#### *“Perpetually Probationary” Part Time Teachers*

39. Respondents who are teaching on part time contracts whereby they are assigned to work three days or less each week have been classified by the District as probationary. Respondents complain that a “perpetually probationary” status arises in such cases because of the District’s flawed interpretation of Education Code sections 44918 and 44908.

40. Education Code section 44918, subdivision (a) provides:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

Education Code section 44908 provides that a probationary employee who has served “for at least 75 percent of the number of days the regular schools of the district in which he is employed are maintained shall be deemed to have served a complete school year.” Similarly, Education Code section 44914 relating to substitute and probationary employment in computation for classification as permanent uses the language: “at least 75 percent of the number of days the regular schools of the district were maintained.”

41. The District believes the plain reading of these statutes makes it clear that in order to qualify as service toward tenure acquisition, an employee must serve at least 75 percent of the *number of days* of a school year. For example, in a 180-day school calendar, a certificated employee would have to work at least 135 days in that school year to meet the 75 percent threshold.

42. Certificated employees working less than four days per week could never meet this threshold. For example, elementary school teacher Julie Finney has a District seniority date of August 19, 2002. She worked her first year as a full time employee, and was then reduced to half time. When she was reduced to half time she was told by a District human resources analyst that she would achieve tenure after two more years. She has attempted to correct her status in the past, including by testifying in the 2006 and 2011 layoff hearings. She has also requested that the District waive its interpretation of the Education Code in her case. Other similarly situated part time probationary teachers include Janet Nelson, Judith Jordan, Diana Hadzi-Antich and Alice Fellos. All testified that they were not told that working less than four days per week would result in their remaining perpetually probationary. Of these additional part-time probationary teachers, only Janet Nelson would be saved from layoff if she was made permanent. Ms. Nelson is a high school mathematics teacher with a District seniority date of August 22, 2003. Math teacher layoff seniority dates went back to August 16, 2007.

43. Teachers who serve a two-year probationary period but who teach less than full time may acquire tenure as part time employees. (*Holbrook v. Board of Education of Palo Alto Unified School Dist.* (1951) 37 Cal.2d 316, 331 (teacher tenured as to one-fourth of a position); *Crawford v. Board of Education* (1937) 20 Cal.App.2d 391, 397 (one-fourth tenure); *Ferner v. Harris* (1975) 45 Cal.App.3d 363, 368. (recognizing tenure to 13/45 of a position).)

Respondents contend that the District's interpretation is flawed because it fails to harmonize its construction of Education Code sections 44908 and 44929.1 with the relevant case law cited above, and with the purpose of the tenure system as enacted by the Legislature. Respondents note that having a mandatory probation period for teachers allows the District time to observe the teacher and make sure the teacher is qualified. (*Fleice v. Chualar Union Elementary School District* (1988) 206 Cal.App.3d 886, 891.) After this period, the Legislature has declared that a teacher is entitled to tenure and the accompanying greater protection against arbitrary termination. (*Id.* at p. 889.) Respondents also suggest that the District's interpretation of Education Code section 44908 is flawed, particularly with regard to the use of the term "served." According to respondents: "When viewed in light of case law confirming that teachers are entitled to part-time tenure and the purpose of the tenure statutes, 'serve' must mean, 'was employed by and able to provide service for.' This meaning is consistent with the accepted definition of the term." [Emphasis in original.]

44. This specific issue was raised in the previous year's layoff hearing and appealed to the Superior Court of Sacramento County. It was fully briefed and argued before Superior Court Judge Michael Kenny, in November 2011. In February 2012, Judge Kenny decided in the District's favor, agreeing that the express language of Education Code section 44908 requires that a probationary teacher work "at least 75 percent of the number of days the regular schools of the district in which he is employed are maintained" in order to have been deemed to have served a "complete school year." Judge Kenny found that the District did not abuse its discretion in refusing to confer permanent status on part time probationary employees. Importantly, respondents Finney and Jordan were parties to that appeal. The time to appeal this aspect of the Superior Court's decision has not lapsed. The proper remedy for respondents Finney and Jordan is to appeal the decision. The only respondent in this proceeding who might directly be affected, and who was not part of the earlier appeal, is Janet Nelson. She would still benefit indirectly from any appeal and reversal of the Superior Court decision.

For these several reasons, resolution of this particular issue should properly be determined through appeal of the Superior Court decision.

### *Skipping Criteria*

45. The Board, in Resolution 2594, established certain skipping criteria. "Junior employees may be given retention priority over senior employees only if they possess special skills or capabilities which their more senior counterparts lack." (Ed. Code, § 44955, subd. (d)(1); *Poppers v. Tamalpais Union High School Dist.* (1986) 184 Cal.App.3d 399, 405.) Resolution 2594 states that employees with the following special skills are to be skipped. Those who:

- a. Hold a valid credential authorizing special education service other than a Mild/Moderate Credential, Learning Handicapped Credential, Resource Specialist Certificate.

b. Hold a valid multiple subject credential AND a valid BCLAD (Bilingual Cross-cultural Language and Academic Development) in Spanish AND currently teach in a Dual-Immersion classroom;

c. Have experience teaching in a Montessori classroom for at least one semester in the current school year or either of the two preceding school years OR have Montessori training in the current school year or either of the two preceding school years. Such training must lead to certification by a program accredited by the Montessori Accreditation Council for Teacher Education (MACTE). On-line Montessori training does not meet this criteria.

*Program Skips Based Upon Training Received*

46. A number of respondents testified that they should also have been skipped because of extensive training they have received within their respective programs.

- Respondents Megan O’Neal, Rebecca Loper, Barbara Harris, Cassondra Anderson, Joannie Chi, Lindsey Mole, Bethany Parsons, Evie Pierce, Carolyn Hudson, Arlynn Goode, Amy Roval-Wieler, Karen Lack, Nikki Carter and Kathryn Zylstra have received training in Literacy Support or ELIS.
- Respondents Paula Ryken, Amy Ju-Nolan, Erin Cassady, Erin Hodge, Janine D’Angelo, Melissa McCormick, Karin Springer, Joann Darrow, Susan Simin, Julie Finney, Marcia Garrett, Gina Berry, Jarrett Trask, Hannah Verigin, Vikki Muro, Tricia Utley, Aaron Silberman, Larry Patterson, Mary Garrison, Lisa Hurst, Mary Robinson, Misty Lampshire, Debra Johnson, Mary Hughes, Brenda Kastl, Melissa Robertson, Kristen Register, Carolyn Hudson and Robyn Hamlin have received training in the Critical Literacy/Balanced Literacy Program.
- Respondents Sarah Swallow, Debra Olivarria-Matson, Nicole Garcia, Stephanie Bauman, Jamie Masse and Krista Filger have all received special training which is necessary to teach courses in the International Baccalaureate (IB) programs at the elementary and middle school levels.
- Respondent Vicki Warren has received unique training and qualifications related to the Sports Careers and Opportunities in Recreation (SCORE) program, and in connection with Casa Roble High School’s California Partnership Academy (CPA) grant. Ms. Warren is the SCORE grant coordinator.
- Respondents Angela Damian, Monique Goldfried and Jennifer Dalton have received special training and qualify as teachers assigned to positions in Advanced Path. (See Finding 33.)

47. It was apparent from testifying respondents that the District has invested time, energy and resources into the development of these fine programs. They were established at

significant financial and professional expense. Further, respondents have been committed to and have a high personal investment in their respective programs. This has been critical to the success and development of high achieving schools in the District. However, the courts have been equally clear that school districts have discretion to decide which PKS to reduce or eliminate in an economic layoff. It is the District's burden to demonstrate a specific need for personnel or services such that those qualifications may be skipped in the layoff process. (Ed. Code, § 44955, subd. (d), *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 135.) There was no evidence that any of the challenged PKS reductions are mandated by state or federal law. It was therefore within the District's discretion to identify the Literacy Support, ELIS, Critical Literacy/Balanced Literacy, IB, SCORE/CPA and Advanced Path program assignments for either reduction, or as assignments to be bumped into by teachers affected by PKS reductions. (See *Duax v. Kern Community College District, supra*, 196 Cal.App.3d at p. 565.)

#### *Individual Skipping Issues*

48. *Martha Velasco.* Martha Velasco is the District's only Spanish-speaking Counselor. She often provides counseling services to students and parents who do not speak English. She has assisted many at Encina High School in her role as a Spanish-speaking counselor. Respondents note that if the District provides counseling services for its students, it cannot do so only for those who speak English. Respondents suggest that if Ms. Velasco is not skipped, the District will essentially be denying counseling services to Spanish-speaking students. Respondents believe this would deprive Spanish-speaking students of their right to counseling services based on their language skills and place of origin, a right they contend is protected under the Equal Protection clause of the Constitution. (*Loving v. Virginia* (1967) 388 U.S. 1.) Students' constitutional rights are not implicated here and argument to the contrary is not persuasive.

The District is aware of the important service Ms. Velasco provides as a Spanish-speaking counselor. She is being retained for .20 FTE. It remains within the District's discretion to identify individuals such as Ms. Velasco for skip. The District has opted not to do so. Such was not an abuse of discretion by the District.

49. *Maria Alvarado.* Maria Alvarado is a Spanish language teacher at El Camino High School. She has a multiple subject credential and a single subject credential (Spanish). She is NCLB qualified for Spanish. She has a BCLAD credential. Her District seniority date is August 19, 2010. Respondents contend that Ms. Alvarado should be skipped because the only difference between Ms. Alvarado and the Dual Immersion teachers being skipped is that the skipped teachers are currently teaching in the Dual Immersion program. Ms. Alvarado has taught in comparable programs. She has experience teaching in bilingual schools over a period spanning six years, most recently in the Bay Area in 2005.

It is within the District's discretion to more narrowly define a skip as it did here to include only those who "currently teach in a Dual-Immersion classroom." However, this

does not preclude Ms. Alvarado from bumping into a position held by a junior teacher in the Dual Immersion program if she demonstrates that she is certificated and competent to do so.

50. Ms. Alvarado has demonstrated that she satisfies the District's competency standard to teach in the Dual Immersion program. Ms. Alvarado holds valid credentials issued by the State of California which are associated with the course being taught (Single Subject Spanish and BCLAD credentials) and is NCLB Highly Qualified to teach the course. There is no additional requirement that she actually have taught one semester in the current school year or either of the two preceding school years because the Dual Immersion program is credential specific. Ms. Alvarado testified that she has six years experience teaching bilingual elementary level classes in the Bay Area.

A junior teacher in the Dual Immersion program is being retained. Karina Gutierrez is a probationary teacher at Thomas Edison Elementary School with a District seniority date of August 19, 2011. The District offered no evidence that Ms. Gutierrez or any other teacher in the Dual Immersion program have special training and experience necessary to teach in the Dual Immersion program which Ms. Alvarado, a teacher with more District seniority than Ms. Gutierrez, does not possess. (Ed. Code, § 44955, subd. (d)(1); *Bledsoe v. Biggs Unified School Dist.*, *supra*, 170 Cal.App.4th at p. 135.)

For the above reasons, Ms. Alvarado should be retained and her layoff notice rescinded.

51. *Margery Shunk*. Margery Shunk has an August 25, 1994 seniority date. She is being reduced 1.0 FTE pursuant to the "Site Resource Elem/Title 1 Coach" PKS reduction. The District has Ms. Shunk bumping into positions held by junior multiple subject teachers Elisa Bryant (.35 FTE, District Seniority Date 9/20/02) and Jennifer Misner (.65 FTE, District Seniority Date 9/10/02.) Ms. Shunk holds a multiple subject credential. She also holds a Specialist Severe Handicapped credential. Because this special education credential would have allowed her to be skipped under Resolution No. 2594, respondents contend that the District should have simply skipped her, thus allowing Ms. Bryant and Ms. Misner to be retained.

The District shall make assignments and reassignments in such a manner that certificated employees shall be retained to render any service which their seniority and qualifications entitle them to render. (Ed. Code, § 44955, subd. (c).) However, these are discretionary decisions and the District is entitled to make a teaching assignment even where an alternative assignment might prevent junior employees such as Ms. Bryant and Ms. Misner from being noticed for layoff. (*Duax v. Kern Community College District*, *supra*, 196 Cal.App.3d 555; *Martin v. Kentfield School District* (1983) 35 Cal.3d 294; *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016.) Here, Ms. Shunk is currently assigned to a Site Resource elementary school teacher position. The District may properly determine not to assign her to a special education position if it wishes to retain her instead in positions held by junior multiple subject teachers. The District did not abuse its discretion by

failing to skip Ms. Shunk based upon her special education credential, and by choosing instead to have her bump into junior multiple subject positions.

52. *Molly Silva.* Molly Silva is a 1.0 FTE employee who holds a multiple subject teaching credential. She is NCLB qualified to teach in a self-contained classroom. Her District seniority date is August 20, 2003. The District did not identify her for layoff under the “Multiple Subject/Self Contained” PKS because this year she is acting as a Peer Assistance and Review/Beginning Teacher Support and Assessment (PAR/BTSA) consultant. The District believed that she would also serve in this capacity next school year. There was mixed testimony on this point, but it now appears that Ms. Silva’s term as a PAR/BTSA consultant will expire at the end of this school year. As a result, she will be returning to the classroom for the 2012-2013 school year. Ms. Silva holds only a multiple subject credential and will likely be returning to the classroom.

Multiple subject/self contained layoff seniority dates go back to an August 19, 2002, more than a year prior to Ms. Silva’s date of hire. Respondent’s correctly contend that Ms. Silva was improperly “skipped” in that the District, by her return to the classroom, will be retaining a junior employee to teach in an area in which senior employees are subject to layoff. Ms. Silva’s 1.0 FTE position should go to the most senior multiple subject teacher subject to layoff, and that teacher’s layoff notice should be rescinded.

53. *Kathryn Zylstra.* Kathryn Zylstra is a site resource elementary teacher whose position was eliminated. Her District seniority date is August 15, 2007. She testified that she had applied for and was offered a Literacy Support teacher position. On that basis she believes she should be skipped. As noted earlier, Literacy Support teachers were identified for PKS layoff and were not skipped. The fact that Ms. Zylstra had been offered a position as a Literacy Support teacher does not entitle her to be skipped.

54. *Heidi Umemoto.* Heidi Umemoto has an August 14, 2008 District seniority date. She applied for Montessori training but was not allowed to receive such training because she had been slated for layoff last year. Ms. Umemoto believes that she should now be skipped under the criteria allowing for skips of those who have received Montessori training in the current year or either of the two preceding school years. Equitable considerations notwithstanding, Ms. Umemoto did not meet criteria for Montessori training and is therefore not entitled to be skipped.

#### *Bumping Application*

55. Deann Carlson testified that the District implemented the layoff by first identifying the positions known to be affected by reduction or elimination. The District then identified the most junior persons in each position up to the target FTE. The District next determined if any of the more senior affected employees were qualified to bump into positions held by less senior employees. The District sought to follow the language of the law, referring to Education Code section 44955, subdivision (b). Ms. Carlson was also guided by the competency criteria set forth in Resolution No. 2594. Thus, during the

bumping process, if a more senior teacher did not hold a corresponding credential for the subject, the District looked at whether the teacher had taught that course for at least one semester in the current or two preceding years. Individual bumping issues are discussed below.

56. *Robert Lyda.* Robert Lyda is an Adult Education teacher at Orange Grove, the center that serves adults with disabilities. His District seniority date is August 8, 1989. He holds a Designated Subjects Adult Education credential authorizing him to teach the following subjects: Education, English & Speech Arts, Psychology, Adult Basic Education and Fine and Applied Arts. The District rescinded 4.0 FTE of layoff notices for Adult Education because it is restoring four positions at Orange Grove. The District rescinded the notices for the three most senior adult teachers at Orange Grove – Daniel Gilmour, Lynn Andres and Daniel DeMasi. It then allowed Marta Kinney, a teacher from the Sunrise Tech Center, to bump two teachers from Orange Grove – Mr. Lyda for .5 FTE and Mark Korte for .5 FTE. Because Mr. Lyda’s position was also reduced .5 FTE, his position is being eliminated, he is subject to 1.0 FTE layoff.

Mr. Lyda teaches golf, geography, history, keyboarding and music. Ms. Kinney has a multiple subject/self contained classroom (General Subjects) and a Specialist Learning Handicap credential. Respondents contend that Ms. Kinney’s credential would not allow her to teach the “specialized courses” taught by Mr. Lyda. In the alternative, respondents argue that if the District’s competency criteria are to remain in effect, it precludes a teacher from bumping into a core subject area, such as history, without being Highly Qualified.

57. Deann Carlson explained that Ms. Kinney would be providing instruction to adults with disabilities and that her learning handicapped credential allows her to provide instruction in any area. Resolution No. 2596 relating to Adult Education does not require Adult Education teachers to be NCLB Highly Qualified to provide instruction in Adult Education. The District should confirm that Ms. Kinney’s Specialist Learning Handicap credential authorizes her to teach the subjects being taught by Mr. Lyda. Assuming Ms. Carlson is correct, Ms. Kinney may properly bump into Mr. Lyda’s position at Orange Grove.

58. *David Wilson.* David Wilson is a full time independent study teacher at El Sereno High School. He holds a single subject social science credential, and is NCLB highly qualified. His District seniority date is September 3, 2002. Mr. Wilson is senior to Brian Borba. Mr. Borba’s District seniority date is August 21, 2006. He is assigned to teach geography and world History at Bella Vista High School. Mr. Wilson is also senior to Steven Coburn whose District seniority date is September 13, 2002. Mr. Coburn is assigned to economics, international relations and world history at Bella Vista High School.

Given that junior employees are being retained to teach in an area in which Mr. Wilson is certificated and competent to teach, his layoff notice should be rescinded.

59. *Bumps Resulting From Improper ELIS Rescissions.* The District reduced ELIS positions by 27.80 FTE positions. The PKS did not separately identify ELIS positions in elementary and middle schools. The District identified all ELIS employees going back to a September 1, 1978 seniority date, and issued notices to those affected. In April 2012, the District determined to rescind most ELIS reductions, and limit the ELIS layoff to 5.90 FTE positions. When it rescinded corresponding ELIS notices, the District did not simply remove the most senior ELIS employees from the layoff process. Rather, the District decided to retain ELIS employees who were assigned to elementary schools, and continue reductions of ELIS employees assigned to secondary schools. This resulted in the District removing junior ELIS employees from the layoff process, while senior ELIS teachers were still being reduced.

Deann Carlson explained that when ELIS layoff notices were rescinded, the only criteria used in making the decision was the student population (elementary or secondary) with which they worked. Neither Ms. Carlson nor Mr. Oropallo provided additional detail. The District, for example, did not indicate whether ELIS program funds were restored only for particular school sites. The District did not articulate any specific need for certain ELIS teachers to teach at the elementary school level, and the District did not articulate any special training and experience possessed by elementary ELIS teachers that were not possessed by secondary ELIS teachers.

60. It was not a proper exercise of the District’s discretion to depart from the usual seniority process when it rescinded the ELIS notices. Had the District correctly identified the 5.90 FTE of ELIS employees with the least seniority, different employees would be subject to layoff.<sup>8</sup>

The following more senior employees should not have been involved in the layoff process due to their greater seniority, and therefore should not have bumped other junior respondent employees from their positions:

Ann Billington (9/27/91)	.20 FTE	Bumped Tanner Lohse (English .20 FTE)
Mary Iratene (8/24/95)	.80 FTE	Bumped Brad Ward (Soc. Sci. .80 FTE)
Suzanne Frier (7/22/02)	1.0 FTE	Bumped Karen Lack (ELIS .50 FTE)
Svetlana Frankenberger (9/3/02)	1.0 FTE	Bumped Joan Livermore (French .20 FTE); Barry Roth (English .40 FTE) and Teresa Tolbert (English .40 FTE)

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<sup>8</sup> The following employees should have received notice corresponding to the 5.90 FTE reductions: Elisha Jones (1.0 FTE, 8/27/08), Christina Pannu (.40 FTE, 8/15/07), Karen Lack (1.0 FTE, 10/16/06), Rafael Prado (1.0 FTE, 8/18/06), Lila Rilea (1.0 FTE, 10/1/04), Oleg Petrik (1.0 FTE, 8/18/04), and Stephanie King (.5 FTE, 8/18/04).

61. As a result of the above bumps, there is 1.0 FTE in English which should go to the most senior English teacher still slated for layoff; .80 FTE in Social Science which should go to the most senior social science teacher slated for layoff; and .20 FTE in French which will save Joan Livermore, the only French teacher who received a preliminary layoff notice.

62. *Matthew Cole and Matthew Rowland.* Matthew Cole was reduced by .60 FTE under the Computers/Technology PKS. He teaches .80 FTE in technology courses. Mr. Cole is junior to Matthew Rowland, another teacher affected by the Computers/Technology PKS reduction. Mr. Rowland is teaching two classes in the Computer/Technology area: a Computer Application course for .20 FTE, and a Technology Exploration course for .20 FTE. He also teaches a Media course which the District believed was included in the Computers/Technology PKS reduction. However, other Media courses taught by District teachers, including one taught by Matthew Cole, were not included in the Computers/Technology PKS reduction. Therefore, the maximum Computers/Technology reduction for Matthew Rowland should be .40 FTE, and not the .80 FTE reduction initiated by the District.<sup>9</sup>

The .40 FTE Computers/Technology reduction for Matthew Rowland should be further reduced by .20 FTE because the District failed to account for an additional Computers/Technology course being taught by junior employee Matthew Cole. This would leave Mr. Rowland with a net reduction of only .20 FTE.

63. The District had Mr. Rowland bumping into Mary Garrison's Multiple Subject elementary school position for .80 FTE. That bump should now be reduced to .20 FTE. The remaining .60 FTE should go to the most senior multiple subject teacher still subject to layoff.

#### *Date of Hire Issues*

64. *Aris Wilson.* Aris Wilson teaches kindergarten at Thomas Edison Elementary School. Her District seniority date is August 14, 2007. She would like this changed to August 22, 2006, based upon earlier service within the District's home and hospital program. She was paid on an hourly basis. Respondents aver that because Ms. Wilson did not sign a contract, she was a probationary employee from August 22, 2006, and this should therefore be her date of hire. (Ed. Code, § 44916.) Ms. Wilson simply did not recall signing a contract. She did not testify that she did not sign a temporary contract with the District in August 2006. For this reason, Ms. Wilson did not establish that her District seniority date should be changed to the earlier date.

65. *Brad Ward.* The District stipulated to change his seniority date to August 15, 2007. (Finding 14.) Mr. Ward believes his date should be further adjusted to account for

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<sup>9</sup> Mr. Rowland also teaches two Earth Science course which would not fall within Computers/Technology reduction.

AVID training that he attended on July 16, 2007. He taught AVID classes during the 2007-2008 school year. In the alternative, Mr. Ward believes that his seniority date should be changed to August 14, 2007, to reflect his attendance at staff training that same date. He had been contacted by the secretary of the principal, Monty Muller, and directed to attend that training. He does not know whether he was paid for this training. The District adjusted Mr. Ward's seniority date to reflect his attendance at training provided on August 15, 2007. No documentation was provided to support Mr. Ward's attendance at, or compensation related to the earlier trainings. Mr. Ward did not establish that his District seniority date should be further adjusted at this time.

66. *Ellen Vojnovic.* Ellen Vojnovic worked as a long-term substitute teacher on October 24, 2011, two days per week. On February 1, 2012, she began working five days per week and was made a probationary employee on February 17, 2012. Last school year she had two temporary contracts which totaled 167 days. This comprised more than 75 percent of the days of the previous school year. Ms. Vojnovic now wishes her seniority date to be changed to August 18, 2010, citing in support of her request the Memorandum of Understanding between the District and the San Juan Teachers Association (MOU).

Education Code section 44918, subdivision (a) provides: "Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year."

Ms. Vojnovic has satisfied the terms of both the MOU<sup>10</sup> and Education Code section 44918 for being deemed to have served a complete school year as a probationary employee for the 2010-2011 school year. She is currently a probationary employee this school year. Her District seniority date should be adjusted to reflect these matters.

67. *Ariana Santillanes.* Ms. Santillanes has a District seniority date of August 14, 2008. She was employed by the District to work at El Camino High School as both an English teacher, and as student activities director. Prior to the start of the 2008-2009 school year, she attended a summer camp with students between August 4 and 6, 2008. She chaperoned students who were to be involved in student government the upcoming school year. She avers that it was a school requirement for her to have participated. Ms. Santillanes was not specifically paid for this activity, but believes that as an activity director she received an additional stipend to cover the extra work required of her over the course of the school

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<sup>10</sup> Paragraph 1 of the MOU provides as follows: "When the DISTRICT confers probationary status upon a certificated employee who has previously served the DISTRICT as a temporary certificated employee for at least 75 percent of the number of days of the immediately preceding school year, the seniority date of the certificated employee shall be the first date upon which the employee rendered paid service in the immediately preceding school year of temporary employment."

year. Ms. Santillanes entered into a contract for a temporary position with the District on July 11, 2008. It indicated that her employment was to commence August 14, 2008.

Ms. Santillanes did not establish that her District seniority date should be adjusted at this time.

68. *Linda Goltz and Kim Battistessa.* Ms. Goltz and Ms. Battistessa both have an August 16, 2007 seniority date. They were asked by their principal, Judi McGuire, to work the week of August 13 through 16, 2007, at Orangevale Elementary School, essentially unpacking boxes and setting up a new classroom. They were paid via time cards to perform this work. They wish to have their seniority dates changed to August 13, 2007.

Ms. Goltz and Ms. Battistessa were required by their principal to report earlier to prepare and set up their classrooms. They were moving into classrooms being vacated by retired teachers. Classroom supplies and materials were in need of unpacking, and the classroom needed to be readied for instruction under new teachers Ms. Goltz and Ms. Battistessa. The District seniority dates for Ms. Goltz and Ms. Battistessa should therefore be changed to August 13, 2007, to reflect these required activities, and for which both teachers received additional compensation.

#### *Miscellaneous Individual Issues*

69. *James Neal.* Mr. Neal is a mathematics teacher at Will Rogers Middle School. His District seniority date is August 14, 2008. He is being bumped by four others who also hold a single subject mathematics credential. Mr. Neal teaches two periods of STEM engineering, a project-based elective class for underperforming students in math and science. The course creates ways to integrate math and science into building projects; such as cars, home design and Styrofoam boats. Mr. Neal has received special training on project-based learning and he helped design the curriculum. He does not believe a new teacher would have these same abilities. The STEM engineering program does not require an engineering or other special credential. It does appear that a new teacher with a mathematics credential would be certificated and competent to teach the STEM engineering course.

70. *Michael Lineback.* Mr. Lineback is an English teacher at Mira Loma High School where he also serves as the International Studies Coordinator for one period (.20 FTE). There is no specific credential associated with the international studies coordinator position. As noted in Finding 12, the District has restored Mr. Lineback for .20 FTE as an international studies coordinator, but he is still subject to being laid off for .80 FTE English.

71. *Jill Stewart.* Ms. Stewart is probationary with a seniority date of August 19, 2010. She started teaching for the District on September 25, 2009, at Sunrise Tech Center. She then started working as a long term substitute teacher at Sylvan Middle school from September 28, 2009, to October 27, 2009. From October 30, 2009, to January 29, 2010, she worked under a part-time temporary contract at Orangevale Elementary School. From

February 1, 2010, to the end of the 2009-2010 school year, she taught six to seven classes a day, five days a week, as a traveling teacher at Cottage and Sierra Oaks.

Respondents agree that Ms. Stewart did not work more than 75 percent of the number of days in the 2009-2010 school year. Respondents contend rather that Ms. Stewart should be a permanent employee because she taught 75 percent of the *school year*. This particular issue is similar to that which may be considered on any appeal of the Superior Court decision of Judge Michael Kenny. Judge Kenny issued a ruling in February 2012 that specifically addressed respondents' and the District's contentions relating to interpretation of the 75 percent calculation under Education Code section 44918. However, it was in context of part time employees. (Finding 44.) Here, Ms. Stewart is a full time teacher. She should be bound by the more specific language in the statute requiring her to serve at least "75 percent of the number of days the regular schools of the district were maintained in that school year..." (Ed. Code, § 44918, subd. (c).) She has not done so and her argument that she should be made a permanent employee at this time is rejected.

72. *Stephanie Bauman*. Ms. Bauman is a physical education teacher at Winston Churchill Middle School. She noted that Education Code section 51222 requires that students receive 400 minutes of physical education every 10 school days, and that her school is non-compliant in this respect. Ms. Bauman believes that the layoff will only worsen this situation. As physical education is a mandated service, respondents contend that the District should not reduce any physical education teachers.

It is within the Board's discretion to reduce physical education instruction as it has, provided it also insure that students receive minimum physical education instruction as required under the Education Code. There was no evidence that the Board abused its discretion when it identified physical education for PKS reduction in this case. It remains incumbent upon the District to provide minimum physical education instruction with reduced staffing.

73. *Tammi Shelton*. Tammi Shelton holds a multiple subject credential and is subject to layoff. Her District seniority date is January 16, 2003. She contends that she should be identified as highly qualified to teach English because at the time she was working on her credential program the only test she could take was the RICA, which she took in October 2002. Additionally, she was initially hired at a Title I school, and was required to be highly qualified for that position. If Ms. Shelton is found to be highly qualified to teach English she would like to bump into positions held by junior English teachers.

Ms. Shelton received her credential after July 1, 2002, so she cannot qualify for a HOUSSE certificate. She has not taken the CSET examination even though the District offered to pay for that examination. She has neither taken the CSET training nor the CSET examination since June 2011. Ms. Shelton's contention that she should be found to be highly qualified is without merit.

### *Other Issues Raised by Respondents*

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

## LEGAL CONCLUSIONS

### *Jurisdiction*

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of Factual Findings 1 through 8. All notices and other jurisdictional requirements of sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (Ed. Code, §§ 44949, subd. (a), and 44955, subd. (c); *Bakersfield Elementary Teachers v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1272.)

2. The services listed in Board Resolution Numbers 2594 and 2596 are particular kinds of services that can be reduced or discontinued under Education Code section 44955. The description of services to be reduced, both in the Board Resolutions and in the notices, adequately described the particular kinds of services identified for reduction or elimination. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838.)

### *Competency Criteria*

3. Determinations related to whether employees are “certificated and competent” to render a particular service “involve discretionary decisions which are within the special competence of the school districts.” (*Duax v. Kern Community College District, supra*, 196 Cal.App.3d at p. 565.) The District’s actions will not be overturned unless shown to be “arbitrary and capricious.” (*Fair v. Fountain Valley School Dist.* (1979) 90 Cal.App.2d 180.)

Competency criteria used by the District were legally valid, except as noted in Findings 24 through 34 relating to non-credential specific courses. In this case, the District’s non-credential specific competency criteria, when applied to ELIS and Literacy Support positions, were too narrowly defined. Respondent teachers holding multiple subject credentials may bump into positions held by junior teachers assigned to ELIS and Literacy Support, notwithstanding their not having taught these specific courses for at least one semester in the current school year or either of the two preceding school years.

Similarly, The Advanced Path, Independent Study and Site Resource–IB Coordinator (.20 FTE) positions do not require a specific credential and thus can be taught by multiple subject credential holders. The District’s non-credential specific competency criteria, when applied to these three positions, were too narrowly defined. Respondent teachers holding multiple subject credentials may bump into positions held by junior teachers assigned to

Advanced Path, Independent Study and Site Resource–IB Coordinator, notwithstanding their not having taught in these specific courses for at least one semester in the current school year or either of the two preceding school years. (Findings 33 and 34.)

### *Bumping Issues*

4. Cross bumping between the Adult Education and K-12 programs was properly disallowed. The Adult Education program is a separate and discrete program. The Education Code creates two distinct teacher categories, and provides that service in one category may not be counted toward service in the other. (Ed. Code, §§ 44929.25 and 44929.26.) Education Code section 44929.26 provides “service in the evening school shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee in the day school, ...” There are different tenure rules for Adult Education teachers and they are prohibited from holding permanent status in both programs simultaneously. No respondent teachers in the Adult Education program who are seeking to bump into the K-12 program indicated that they also had probationary or permanent status in the District’s K-12 program.

The District has always treated the Adult Education program as separate and discrete, including maintaining separate seniority lists for the Adult Education and K-12 programs. Respondents’ contention that senior Adult Education teachers should be allowed to bump more junior K-12 teachers must be rejected. (Findings 36 through 38.)

5. Individual bumping applications were considered in Findings 55 through 63, and resulted in the following changes:

- a. The layoff notice to David Wilson (1.0 FTE) should be rescinded. (Finding 58.)
- b. The bumps resulting from the improper rescission of ELIS notices impacted junior teachers in such manner that 1.0 FTE in English should go to the most senior English teacher still slated for layoff; .80 FTE in Social Science should go to the most senior social science teacher slated for layoff, and .20 FTE in French should go to Joan Livermore, the only French teacher who received a preliminary layoff notice. (Findings 59 through 61.)
- c. The adjustments to the PKS reduction of Matthew Rowland (.80 FTE reduced to .20 FTE), and his bumping into Mary Garrison’s position, has the following effect: The original bump into Ms. Garrison’s Multiple Subject elementary school position for .80 FTE should now be reduced to .20 FTE. The remaining .60 FTE should go to the most senior multiple subject teacher still subject to layoff. (Finding 63.)

### *Skipping Issues*

6. Skipping criteria used by the District were appropriate. A school district may deviate from terminating a certificated employee in order of seniority when, “The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide service authorized by a service 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.” (Ed. Code, § 44955, subd. (d)(1); *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 137)

7. A number of respondents testified that they should also have been skipped because of extensive training they have received within their respective programs. School districts have discretion to decide which PKS to reduce or eliminate in an economic layoff. It is the District’s burden to demonstrate a specific need for personnel or services such that those qualifications may be skipped in the layoff process. (Ed. Code, § 44955, subd. (d), *Bledsoe v. Biggs Unified School Dist.*, *supra*, 170 Cal.App.4th at p. 135.)

There was no evidence that any of the challenged PKS reductions are mandated by state or federal law and it was therefore within the District’s discretion to identify the Literacy Support, ELIS, Critical Literacy/Balanced Literacy, IB, SCORE/CPA and Advanced Path program assignments for either reduction, or as assignments to be bumped into by teachers affected by PKS reductions. (See *Duax v. Kern Community College District*, *supra*, 196 Cal.App.3d at p. 565.)

8. Individual skipping issues were considered in Findings 48 through 54, and resulted in the following changes:

a. The layoff notice issued to Maria Alvarado should be rescinded. (Findings 49 and 50.)

b. As a result of junior teacher Molly Silva, who did not receive a layoff notice, returning to a classroom as a multiple subject teacher, her 1.0 FTE position should go to the most senior multiple subject teacher subject to layoff occupying 1.0 FTE, and that teacher’s layoff notice should be rescinded. (Finding 52.)

### *Seniority Dates*

9. The “manifest intent of the Legislature is that discontinuance of a position must result in termination of the most junior qualified employee.” (*Poppers v. Tamalpais Union High school Dist.* (1986) 184 Cal.App.3d 399, 406.) With the exceptions noted above, the District appropriately employed bumping to ensure that subject to economic layoff, no permanent employee was terminated who possessed the seniority and qualifications which would entitle him or her to be assigned to another position. (Ed. Code,

§ 44955, subd. (b); *Bledsoe v. Biggs Unified School District*, *supra*, 170 Cal.App.4th at p. 136.)

As set forth in Factual Findings 14, 66, and 68, the seniority dates for respondents Larry Patterson, Paula Lloyd, Brad Ward, George Bamber, Ellen Vojnovic, Linda Goltz and Kim Battistessa must be adjusted.

#### *Other Matters*

10. As set forth in Factual Finding 35, the District reasonably issued precautionary layoff notices to junior teachers because it anticipated some of the very same issues that were successfully being raised by respondents. Teachers who were issued precautionary notices were afforded notice and an opportunity to respond to such issues. The District correctly determined that these teachers could potentially be bumped by those directly affected by a specific PKS authorization. There was no evidence that the District noticed more certificated employees than what was identified on the PKS resolution approved by the Board. While the District did provide precautionary notices to more certificated employees than those teachers identified after the initial bumping process was conducted, the District was not legally precluded from doing so.

It was therefore proper and reasonable for the District to issue precautionary layoff notices as it did.

11. As set forth in Factual Findings 39 through 44, the status of perpetually probationary part time teachers is better resolved through appeal of the Superior Court decision.

#### *Cause for PKS Reductions*

12. Cause exists for the District to reduce or discontinue the particular kinds of services listed in Board Resolutions 2594 and 2596 at the end of the 2011-2012 school year. Cause relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. With the exception of employees identified in these Factual Findings and Legal Conclusions, no employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render.

Where two or more teachers first rendered paid service to the District on the same date, the District was required to establish criteria to "determine the order of termination solely on the basis of needs of the district and the students thereof." (Ed. Code, § 44955, subd. (b).) As set forth in Factual Findings 15 through 18, the District's tie-breaking criteria and application of tie-break criteria were appropriate.

13. The District shall rescind the preliminary notices of layoff to respondent teachers identified above, and any other employees after the above adjustments to seniority

dates are made, to comply with rights afforded certificated employees as a matter of law. Pursuant to the stipulation set forth in Factual Findings 11 and 12, the District shall also rescind the preliminary notices of layoff to those listed certificated employees.

14. The District's Governing Board may give the remaining respondents whose preliminary notices have not been rescinded final notice before May 15, 2012, that their services will not be required for the ensuing school year, 2012-2013.

#### RECOMMENDATION

Cause exists for the reduction of certificated positions within the San Juan Unified School District at the end of the 2011-2012 school year. After making the adjustments set forth in the Factual Findings and Legal Conclusions, notice shall be given to the remaining respondents that their services will be reduced or will not be required for the ensuing school year, 2012-2013, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: May 2, 2012

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JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings