

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

In the Matter of the Reduction or Elimination
of Particular Kinds of Services and the
Employment Status of:

CERTAIN PERMANENT OR
PROBATIONARY, CERTIFICATED
EMPLOYEES,

Respondents.

OAH No. 2012031021

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter at the Merced County Office of Education District Office, Merced, California, on April 20, 2012.

Todd A. Goluba, Attorney at Law, of Atkinson, Andelson, Loya, Rudd and Romo, a Professional Corporation, Attorneys, represented the Merced County Office of Education. Eva Chavez, Associate Superintendent for Human Resources and Personnel (the Associate Superintendent), appeared on behalf of the Merced OE.

Ernest H. Tuttle, III, Attorney at Law, Tuttle and McCloskey, A Professional Corporation, Attorneys, represented all respondents.

The matter was submitted on April 20, 2012.

FACTUAL FINDINGS

1. Steven L. Gomes, Merced County Superintendent of Schools (the Superintendent) made and filed the Accusation in his official capacity as the Superintendent of the Merced County Office of Education (Merced OE). At all times relevant to this Decision, the Associate Superintendent acted as the Superintendent's duly authorized designee.

2. Respondents are, and at all times relevant to this Decision were, permanent and/or probationary certificated employees of the Merced OE.

3. On or just before March 12, 2012, in accordance with Education Code sections 44949 and 44955, the Associate Superintendent notified the Superintendent of the Merced OE in writing of the Associate Superintendent's recommendation that certain particular kinds of services would have to be reduced or eliminated for the upcoming school year. The Associate Superintendent's notice specified the particular kinds of services to be reduced or eliminated, as set forth below. The Associate Superintendent also notified the Superintendent that a corresponding number of certificated employees of the District would have to be laid off to effectuate the reduction or elimination of the particular kinds of services. The Associate Superintendent notified the Superintendent that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the Merced OE would not be required for the upcoming school year was not related to their skills or abilities as teachers.

4. The Superintendent adopted Resolution of the Merced County Superintendent of Schools Regarding the Reduction or Discontinuance of Particular Kinds of Services (Certificated Layoff) number 2012-05 (the Resolution) on March 12, 2012. In the Resolution, the Superintendent resolved to reduce or eliminate 18.69 full time equivalent ("FTE") particular kinds of services currently being offered by the Merced OE. The Resolution authorized and directed the Associate Superintendent to give notice to an equivalent number of certificated employees of the Merced OE that their services would not be required for the upcoming school year in order to effectuate the reductions/eliminations. The Resolution authorized the elimination of the following services now being offered in the Merced OE:

Special Education Teaching Services	
Deaf and Hard of Hearing Teaching	4.00 FTE
Career and Technical Education Teaching Services	
Accounting/Comp. Office Tech Instructor	1.0 FTE
Office Tech/Marketing/Customer Service Instructor	1.0 FTE
Warehousing/Logistics Instructor	.47 FTE
Business Occupations Instructor	.47 FTE
Marketing/Sports and Entertainment Instructor	.25 FTE
Medical Occupations Instructor	.50 FTE
Home School Charter School Teaching Services	
Charter School Teacher	1.0 FTE
Independent Study Teaching Services	
Independent Study Teacher	3.0 FTE

Court and Community School Teaching Services

Middle School Teacher	3.0 FTE
High School Math Teacher	2.0 FTE
High School Science Teacher	.33 FTE
High School Social Science Teacher	.50 FTE
High School Elective (Leadership) Teacher	.167 FTE
Teacher on Special Assignment	eliminated no FTE red.

Total FTE Reduced or Eliminated 18.69 FTE

5. The Associate Superintendent caused 22 respondents to be served with a written Notice of Intention to Dismiss (Preliminary Notice) on March 12, 2012. The Associate Superintendent also caused 13 additional respondents to be served with a written Precautionary Notice of Intention to Dismiss (Precautionary Notice) on March 12, 2012. The written Preliminary and Precautionary Notices advised each of the respondents of the Superintendent's adoption of Resolution 2012-05, and that their services would not be required or would be reduced for the upcoming school year. The Preliminary and Precautionary Notices advised each respondent of the reasons for the action.

6. Many but not all respondents receiving a Preliminary Notice or a Precautionary Notice timely filed written Requests for a Hearing to determine if there was cause for not reemploying them for the upcoming school year. The Associate Superintendent timely served Accusation packages with required attachments on each respondent who timely filed a Request for Hearing. Each remaining respondent timely filed a Notice of Defense to the Accusation. All prehearing jurisdictional requirements were met.

7. The nine respondents upon whom a Preliminary Notice of Layoff was served and who requested a hearing are as follows (with their respective positions on the Merced OE Seniority List and dates of hire):

1. Janette Alvarado (47, but First Year Probationary Status -June 22, 2001);
2. Laura Andrews (64-January 21, 2004);
3. Elizabeth Avila Aviz (100-September 12, 2006);
4. Christy Bronson (99-August 28, 2006);
5. John Chavez (49-June 22, 2001);
6. Crandell Farmer (42-August 16, 2000);
7. Christopher Lewis (139-September 1, 2011);
8. Melissa Madeiros (71-August 23, 2004); and
9. Anna Miller (93-July 25, 2006).

8. Five respondents receiving a Precautionary Notice of Layoff also requested a hearing; they are as follows:

1. Alan Armas;

2. Candy Moua;
3. Maria Villanueva;
4. Lucile Westrope; and
5. Bonita Wynn.

9. The Associate Superintendent also caused to be served on three of the respondents, Anna Miller, Laura Andrews and Melissa Madeiros, a Notice of Selection Regarding Layoff (Notice). The Notice sought the recipient respondents' consent to either taking an assignment as an Independent Study Teacher (at a reduced pay rate), or an assignment as a Home School Charter School teacher in the upcoming school year, or both, in lieu of being laid off. The Notices advised that, in order to exercise displacement rights into one of the two possible positions, the certificated employee in question must consent to either or both of the alternative education assignments in question.

10. Respondents Ms. Medeiros and Ms. Andrews both consented to being assigned to either the Home Charter School or Independent Study assignments for the upcoming year. Ms. Miller consented to being assigned to the Home Charter School, but declined to consent to an Independent Study assignment for the upcoming year. Ms. Miller confirmed in her testimony that she declined to consent to an Independent Study assignment.

11. The Merced OE is facing multi-faceted financial pressure that has put the Merced OE into a projected significant operating deficit for the upcoming school year. The Associate Superintendent testified that the Merced OE programs are "richly staffed," and that, "we cannot afford this." She testified that the Merced OE receives a significant number of its students as placements by referrals from other regular education program school districts in Merced County, and that those placing school districts are retaining a higher percentage of their students in recent times, rather than referring students to the Merced OE, resulting in a decline in enrollment. Merced OE does not expect to operate with a balanced budget in the upcoming school year, and is not projected to come into balance within any of the next three school years absent significant reductions in services.

12. The Associate Superintendent testified that the Adult Regional Occupational Program (ROP), (identified in the Resolution as the Career Technical Education Program) offered by the Merced OE has been funded in previous school years by a local grant. The status of that local grant was in question at the time the Resolution was adopted and notices were issued, so, as a precautionary measure, the reduction and elimination of particular kinds of services in the Resolution included the ROP Career Technical Education positions funded by this local grant. After the issuance of the Preliminary and Precautionary Notices of Layoff, the Merced OE received notice that the local grant will again provide funding in the upcoming school year. This local grant funding permitted the Merced OE to rescind the Preliminary Notices of Layoff issued to the personnel providing the adult ROP services in the Career Technical Education Program, as well as 1.0 FTE of the Deaf and Hard of Hearing Program slated for layoff; a total rescission of 4.50 FTE. None of the respondents still seeking a hearing are challenging the reductions, eliminations, assignments and

reassignments in either the Special Education-Deaf and Hard of Hearing Program or the Adult ROP-Career Technical Education Program.

13. The Associate Superintendent, on behalf of the Merced OE, considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

14. There was no evidence that the Merced OE proposes to eliminate any services that are State or federally mandated.

RESPONDENTS STILL AT ISSUE-BUMPING AND SKIPPING IN THE HOME SCHOOL CHARTER SCHOOL/INDEPENDENT STUDY/COURT AND COMMUNITY SCHOOL PROGRAMS

15. The issues remaining at the time of the evidentiary hearing focused specifically on “bumping” and “skipping”¹ with respect to as many as eight certificated employees of the Merced OE, some of whom had not been served with Preliminary or Precautionary Notices of Layoff. The core issues of the hearing revolved around the basis upon which the Merced OE skipped certain employees more junior in seniority than those served with Preliminary Notices of Layoff, and prevented those more senior respondents from being able to bump into positions that appear to be assigned to more junior employees in the upcoming school year.

16. The respondents who have been served with Preliminary Notice of Layoff who are seeking to bump into positions are Janette Alvarado, Laura Andrews, John Chavez, Crandell Farmer, Melissa Medeiros, and Anna Miller. As noted above, Ms. Alvarado has first year probationary status with the Merced OE, despite her long service. The remaining five respondents are all permanent employees. The Merced OE skipped employees Mark Pintor, Crystal Souza and Paul Sanchez. Of the three employees skipped, Mr. Pintor has first year probationary status, and Ms. Souza and Mr. Sanchez have permanent status. The Associate Superintendent testified that Mr. Sanchez has “special status.” She did not explain what she meant by “special status.” None of the three skipped employees were served with Preliminary or Precautionary Notices of Layoff. None of the other Merced OE employees served with a Preliminary Notice of Layoff and an Accusation raised issues or challenged the Merced OE action during this hearing.

17. The Resolution, Sections 2-5, resolved, in pertinent part, as follows:

¹ “Bumping” permits a senior certificated employee to displace a more junior employee if that senior employee is “certificated and competent” to provide the service the junior employee is being retained to provide. Education Code section 44955, subdivision (b), *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 571. “Skipping” permits a school district to “skip,” or retain a more junior employee over one more senior, under certain conditions set forth in section 44955, subdivisions (b) and (d). *Id.*

[¶] ... [¶]

2. That for the purposes of implementing this Resolution, a more senior employee is defined as “competent” for a reassignment into a position currently held by a more junior employee pursuant to Education Code section 44955, subdivision (b), if the employee:

(A) currently possesses clear or preliminary credential(s) authorizing the subject(s) to be taught in an alternative education program to which the employee will be assigned at the beginning of the 2012-2013 school year, and

(B) has taught the subject(s) and taught in the alternative education program to which he/she will be assigned at the beginning of the 2012-2013 school year for at least one complete school year in the past five (5) school years, and

(C) has highly qualified teacher status under the No Child Left Behind Act (NCLB) in the subject(s) he/she will be assigned to teach in the alternative education program to which he/she will be assigned at the beginning of the 2012-2013 school year, and

(D) for an assignment in the Home School Charter School, the employee has [a] single subject credential(s) such that he/she may serve as a subject matter expert in the subject(s) to which he/she will be assigned at the beginning of the 2012-2013 school year, and

(E) for an assignment to a classroom teaching position in the 2012-2013 school year, the employee has taught in a classroom (not independent study or small group) setting for at least one complete school year in the past five school years, and

3. That due to the specific need of the County Office to retain teachers in its Home School Charter School who possess [a] single subject(s) credential such that they may serve as subject matter experts in this alternative education program, the Superintendent or designee is authorized to deviate from terminating certificated employees in order of seniority (“skipping”) in instances where the less senior employee possesses one or more single subject credential(s) and the more senior employee does not possess such credential(s).

4. That due to the specific need of the County Office to retain teachers in its Independent Study Program who possess authorization(s) (i.e. VPSS Housse) such that they have “highly qualified teacher” status under the No Child Left Behind Act (NCLB) in the broadest range of subject(s) which are taught in this alternative education program, the Superintendent or designee is authorized to deviate from terminating certificated employees in order of

seniority (“skipping”) in instances where the less senior employee possesses more such authorizations and the more senior employee possesses fewer such authorization(s).

5. That due to the specific need of the County Office to retain teachers in its Court and Community School program who possess [a] single subject credential(s) or supplemental authorization such that they may serve as subject matter experts in this alternative education program, the Superintendent or designee is authorized to deviate from terminating certificated employees in order of seniority (“skipping”) in instances where the less senior employee possesses one or more single subject credential(s) and the more senior employee does not possess such credential(s).

[¶] ... [¶]

18. Sections 2-5 of the Resolution quoted above set forth the criteria by which the Merced OE and the Associate Superintendent determined which junior employees the Merced OE would “skip” in carrying out the reduction and or elimination of the particular kinds of services set forth in the Resolution regarding the Home School Charter School, Independent Study and the Court and Community School. It also determined which, and under what circumstances, more senior employees of the Merced OE currently serving in assignments in one of these three programs would be able to (or be prevented from) exercising “bumping” rights against the junior employees the Merced OE had decided to “skip” in one of those three programs.

19. It was not disputed that the programs and services offered by the Merced OE in the Home School Charter School, Independent Study, and Court and Community School Programs, and the respondents serving in them, at issue in this matter, are all alternative education services, within the meaning of Education Code section 44865.

*OE PROGRAMS UNDER REVIEW-
COURT AND COMMUNITY SCHOOL (VALLEY CONTINUATION SCHOOL),
INDEPENDENT STUDY, AND
HOME SCHOOL CHARTER SCHOOL PROGRAMS*

20. The Merced OE operates the three programs that are at issue in this matter, the Court and Community School, commonly referred to as the Valley Continuation School (addressed in the Resolution, part 5, above), the Home School Charter School (Resolution, part 3, above) and the Independent Study Program (Resolution, part 4, above). None of the other PKS reductions or eliminations and respondents staffing them or receiving Preliminary or Precautionary Notices of Layoff remained at issue in this matter.

VALLEY COURT AND CONTINUATION SCHOOL

21. Valley Continuation School (Valley), formally known as the Court and Continuation School, operates on three campuses throughout Merced County, with a main campus in Merced, and branch campuses in Los Banos and Atwater. As the title implies, the Merced OE provides continuation educational services at Valley through both a court-ordered program and a standard continuation school program.

22. The students receiving services at Valley through the court program are either in or out of custody but under the supervision of the Merced County Juvenile Court system, and remain subject to the Juvenile Court's jurisdiction. Services at Valley in the court school program are delivered to some of these juveniles in custody in the County juvenile detention facility under the supervision of Sheriff's Department officers (the Detention and Rehabilitation Center Program, known as DRC) while others not in custody are served at a Valley campus. Some of these out-of-custody juvenile probationers served in the Valley DRC program wear ankle monitors, and some not, but all remain subject to the jurisdiction of the Merced County Juvenile Court.

23. The non-court based Valley Continuation School Program is provided primarily on the Valley main campus in Merced, as well as at the branch campuses, to problem students who generally have been expelled from another Merced County school district providing a regular educational program, or have been suspended multiple times. The students typically have serious behavioral and self-control problems as well as substantial deficits in educational process and learning. Most are exceptionally resistant to authority and are often violent and disruptive. Students served at Valley, whether in the court or the regular continuation school program, are generally in the process of experiencing their last chance at receiving anything resembling a classroom education.

24. The student population at Valley, in both the court and continuation school programs, is highly transitory, with some students staying only a few days or weeks. Often students switch back and forth between the court and continuation school programs within Valley itself. Based on evidence adduced from the testimony of some of the respondents, it appears rather uncommon that any respondent providing services in the court or continuation school programs has any given student in attendance from the beginning to the end of any given school year.

25. The Valley educational program, whether court or continuation school, combines middle school and high school level classroom teaching services to this transitory student population. Most of the educational services delivered to the students is remedial. Certificated employees of the Merced OE serving in the Valley educational program, whether court school or continuation school, must be able to teach all subjects to students, similar to what is required of a multiple subject self-contained classroom teaching assignment in a middle school, and additionally structure and restructure delivery of the educational content to a constantly shifting landscape of students at varying grade levels whose attendance in the class is constantly in flux. Respondents serving in this Merced OE

alternative education program at Valley, whether DRC or continuation school, are required to provide flexible and adaptable educational services in attempting to meet the needs of a highly transitory, troubled, often educationally challenged and disruptive student population. The focal point of the Valley program is to assist students in obtaining a GED or high school diploma or equivalency. The Valley educational program is not a college preparatory program.

INDEPENDENT STUDY

26. The Independent Study Program appears to be small and getting smaller in the Merced OE. Respondents serving in the Independent Study Program meet with students typically once per week, obtain and provide assignments, counsel students and monitor their work product and progress. The evidence was not clear whether the Independent Study Program involves students strictly in grades nine through 12, or also includes some middle school students as well. What was clear was that Merced OE certificated employees assigned to teach the Independent Study Program were required to teach all subjects to all students and monitor their progress. The Merced OE Independent Study Program also appears to be largely remedial and not college preparatory. Classroom teaching, as that term is commonly understood, does not take place within the Independent Study Program.

HOME SCHOOL CHARTER SCHOOL

27. The Home School Charter School Program has at least some students who are potentially college-bound. As with most other details regarding the Merced OE's programs under review here, the evidence was vague regarding what percentage of the students involved in the Home School Charter School Program are college-bound, and whether the Home School Charter School Program is exclusively a grades nine through 12 program, or whether the program admits and serves middle school students as well.

28. The Home School Charter School Program is similar to in two senses to Independent Study; first, both programs appear to be shrinking rapidly, and second, a respondent assigned to serve in the Home School Charter School Program meets with students generally once per week to monitor progress, provide and assess assignments, answer questions and to counsel students. However, unlike the Independent Study Program, there are occasionally group teaching programs offered, and most distinct, the parents or guardians of students in the Home School Charter School Program tend to be actively involved in the educational program with the student. Parents or guardians usually meet regularly with the respondents providing the Home School Charter School services, and actively participate in implementation of the educational services provided to enrolled students. Again, aside from the occasional group activity, it did not appear that classroom teaching as understood in the usual sense occurs within the Home School Charter School Program, as most of the educational activity takes place within the student's home.

LEGAL PROVISIONS GOVERNING ACTION

29. Education Code section 44955 provides, in pertinent part, as follows:

(b) ... [W]henever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, ... and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee *is certificated and competent* to render.

[¶] ... [¶]

(c) *As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof.*

[¶] ... [¶]

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach *a specific course or course of study*... 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.

[¶] ... [¶] (Italics added)

SECTION 44955 "CERTIFICATED AND COMPETENT" LANGUAGE GENERALLY

30. A teacher's seniority rights are limited, generally, by what he or she is certificated and competent to teach and by the courses a district has chosen to offer. Subject to these limitations, a teacher, generally, has a right to be terminated according to his or her seniority. Seniority cannot be used to determine the order of termination of teachers who

have the same date of hire because they all have the same seniority. In this matter, there are no such situations; all respondents and all employees skipped have different seniority dates.

31. Section 44955 treats employees with the same seniority date very differently than those with different seniority dates. Among teachers with different dates of hire, the Legislature provided very specific standards that a school district or a County Office of Education must respect. Where there are employees all with the same seniority dates, the Legislature gave school districts a free hand to establish the order of termination according to any criteria or preferences the governing board or the County Superintendent chose, so long as the criteria are based on needs of the district and students.

32. The Legislature also has provided a few justifications for terminating a senior teacher while retaining a junior teacher.² A school district or a County Office of Education may not create additional justifications for terminating a senior teacher while retaining a junior teacher. Creating additional justifications for terminating a senior teacher while retaining a junior teacher would deprive the senior teacher of his or her seniority rights.

33. The Legislature has provided two limitations on a *permanent* teacher's right to be retained over a probationary or junior teacher. First, the teacher must be *certificated* to render the service the probationary or junior teacher is rendering. Second, the teacher must be *competent* to render the service.³ A subsequent provision that limits the rights of both permanent and probationary employees speaks in terms of the services their "qualifications" entitle them to render.⁴

34. A teacher either is or is not *certificated* to render a service. A school district or a County Office of Education may not require a higher certification than the law requires. Creating a super-certification requirement for a senior teacher who is certificated to render a service would deprive the teacher of his or her seniority rights.

35. The question of whether a teacher is *competent* to render a service has to do with his or her specific training and experience as they relate to the duties of a position. In determining whether a teacher is competent to render a service, a district or a County of Office of Education may exercise its discretion. But a district or a County of Office of Education may not, based on policy, or its preferences, not focused on competency, determine that a senior teacher is not competent. To permit a district or a County of Office of Education to base its decisions regarding a teacher's competence to render a particular service on policy or preferences that do not relate to his or her specific training and

² Education Code section 44955, subdivision (d).

³ *Id.* at subdivision (b).

⁴ *Id.* at subdivision (c).

experience as they relate to the duties of any particular position, would deprive the teacher of his or her seniority rights.

36. As noted above, when there are teachers among whom there is no seniority issue (employees have the same seniority date), a district or a County Office of Education has a rather free hand in ranking such employees for termination, so long as the criteria are based on needs of the district or office of education and its students. As among teachers with different employment dates, however, the Legislature has specified the criteria that must be the focus of decisions that prefer less senior employees over more senior employees, such as those under review here. The criteria Legislature has specified are: (1) the requirement to have a teacher who is certificated to render a service, (2) the requirement to have a teacher who is competent to render a service, and (3) an identified and expressed need to have a teacher who has special training and experience necessary to teach a course for which a district demonstrates a specific need.

THE ROLE OF SENIORITY IN ECONOMIC LAY OFFS

37. As set forth in section 44955, subdivision (b), a teacher with more seniority typically has greater rights to retain employment than a junior teacher. That subdivision prohibits a school district from terminating a permanent employee while retaining a probationary employee to render a service the permanent employee is certificated and competent to render. That subdivision also prohibits a school district from terminating a permanent employee while retaining any other employee with less seniority to render a service the permanent employee is certificated and competent to render. A district or a County Office of Education has an affirmative obligation pursuant to Section 44955, subdivision (b) to reassign senior teachers who are losing their jobs into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions.

38. The displacement of a junior teacher by a senior teacher is known as “bumping.” The seniority rule is not absolute, however, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. In order to depart from a seniority-based economic layoff by “skipping” a more junior employee, section 44955, subdivision (d)(1), requires the District to “demonstrate a specific need for personnel to teach a specific course or course of study... and that the certificated employee (to be skipped) has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

COMPETENCY AND EXPERIENCE CRITERIA-BUMPING ISSUES

39. As discussed above, section 44955 expresses a legislative intent to protect the seniority rights of certificated employees within the context of economic layoffs. The second paragraph of section 44955, subdivision (c), does not add to teachers’ seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their seniority

and qualifications entitle them to render. As noted above, it is reasonable to interpret the term “qualifications” as meaning “certificated and competent.” Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher’s courses, the district must reassign the senior teacher to render that service. This is commonly referred to as bumping. The district must then either reassign or terminate the junior employee.⁵

40. Consequently, school districts may not erode the statute’s seniority protections by imposing unreasonable competency requirements on the ability of senior employees to bump into positions held by junior employees. Under the statute, a senior employee wishing to bump a junior employee must establish both that he holds the appropriate certificate for the position and that he is “competent.” Section 44955 does not define “competent”; however, from its use of the disjunctive, it is apparent that the term “competent” means more than merely holding the certificate necessary to teach a position held by a junior employee.

SKIPPING

41. In Code section 44955, subdivision (d), the Legislature has established four justifications for a school district’s or County Office of Education’s skipping over a junior employee, not terminating him or her, but terminating a more senior employee. That is, the Legislature has established four justifications for deviating from terminating employees according to their seniority. Only the first one of those four applies here:

a. A district or County Office of Education may skip over a junior teacher and terminate a senior teacher if “the district demonstrates a specific need for personnel to teach a specific course or course of study.”

42. A school district or County Office of Education may not create justifications for skipping. The only permissible justifications are the four listed in Code section 44955, subdivision (d). Creation of other justifications for skipping would deprive teachers of their seniority rights.

43. Education Code section 44865 provides as follows:

A valid teaching credential issued by the State Board of Education or the Commission for Teacher Preparation and Licensing, based on a Bachelor’s degree, student teaching, and special fitness to perform, *shall be deemed qualifying for assignment as a teacher in the following assignments*, provided

⁵ The second paragraph of section 44955, subdivision (c), speaks of the duty of a school board to make assignments in such a manner that employees will be retained to render any service “their *seniority* . . . [entitles] them to render.” (Italics added.) A teacher’s entitlement to bump a junior teacher out of his or her assignment derives from the senior teacher’s *seniority*. *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555,568.

that the assignment of a teacher to a position for which qualifications are prescribed by this section shall be made only with the consent of the teacher:

- (a) Home teacher;
- ¶ ... ¶
- (e) Continuation schools;
- (f) Alternative schools;
- (g) Opportunity schools;
- (h) Juvenile court schools;
- (i) County community schools; and
- ¶ ... ¶ (Italics added)

UNDISPUTED FACTS

44. The Associate Superintendent acknowledged that the following facts are true:
- a. All programs offered by the Merced OE are alternative education services as defined by the Education Code. Any person possessed of any credential is lawfully able within the law of the State of California and its Education Code to teach in any of the three programs at issue in this layoff proceeding;
 - b. Each and every one of the respondents listed above being laid off are possessed of an appropriate credential within the law of the State of California and its Education Code to provide a service in any and all possible assignments within the scope of any one of those three programs as those programs will be offered in the upcoming school year;
 - c. There are at least four means by which a certificated employee serving in an alternative education (California law)/ “Special Situation in Education” (NCLB definition) position, can attain Highly Qualified (HQ) teacher status in any given subject. These equally acceptable options include:
 - 1. Earning or possession of a single subject authorization in the particular subject for which HQ status is sought;
 - 2. Passing the CSET examination in the subject for which HQ status is sought;

3. Attaining a Verification Process in Special Settings (VPSS) certification in the particular subject for which HQ status is sought; or finally

4. Possessing a multiple subject credential (MS) receiving certification in the subject matter for which HQ status is sought through the House program (being “Housed”).

d. The Associate Superintendent and counsel for the Merced OE specifically disclaimed that the Merced OE was making any *Bledsoe*⁶-based contention that any junior certificated employee was being retained because that more junior employee was possessed of specialized background, training and/or experience required to provide any particular service that any more senior employee being laid off did not possess. The Associate Superintendent and the Merced OE contend the Resolution competence and skipping criteria addresses only employee competence defined exclusively by possession of certifications and HQ authorizations, or experience serving in any assignment sought within the previous five school years;

e. Between certificated employees with different seniority dates, there exists no State or federal legal requirement that requires a County Office of Education to retain an employee possessed of a single subject authorization in a particular subject over an employee possessed of HQ authorizations such as a VPSS certification, or a multiple subjects credential who has been “Housed” in that same subject;

f. Between certificated employees with different seniority dates, there exists no state or federal legal requirement that requires a County Office of Education to only retain an employee if that employee has taught within a given assignment in one of the previous five school years;

g. Up to the date of service upon respondents of the Preliminary Notices of Layoff, which included a copy of the Resolution provisions quoted above, none of the respondents had ever been told by anyone in authority at the Merced OE that a single subject authorization would be preferred over a VPSS certification, a CSET certification, or a MS credential with a House certification in that same subject, or that one type of certification was better or more valued by the Merced OE than any other. The Associate Superintendent confirmed several times in her testimony that the Merced OE strongly encouraged and provided compensation for all certificated employees to obtain one or more VPSS certifications or to become Housed in one or more subjects, but she agreed that never at any time were any employees told that the Merced OE valued or preferred one certification over another, or that a single subject authorization was to be preferred over any other subject matter certification, nor was any employee ever told by anyone in authority at the Merced OE that if the employee failed to attain at least one VPSS certification, single subject credential, pass at least one CSET test, or become Housed in at least one subject, that that

⁶ *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127 (Rehrg. Den Jan. 12, 2009, Review den. Apr. 15, 2009).

employee would lose his or her position in favor of another less senior employee who did have at least one such certification at the end of the 2011/2012 school year.

h. When the Associate Superintendent used the word “competence” in her testimony, she was referring exclusively to the definition of “competence” set forth in Section 2 of Resolution 2012-05 quoted above, and as that definition is applied to identify specific needs of the OE authorizing deviation from seniority and skipping in Sections 3-5 of the Resolution.

i. The Associate Superintendent acknowledged that the provisions of Resolution 2012-05, Sections two through five, quoted above, defining competence and authorizing deviation from seniority for skipping based on claimed specific need, expresses the Merced OE’s preferences for certain authorizations and certifications over others, or none, is the only reason that respondents are not deemed by the Merced OE competent to bump junior employees being retained to provide services in any one of the three alternative education programs at issue in this matter.

j. None of the respondents and none of those employees being skipped have the same seniority dates.

k. Resolution 2012–05 contains separate provisions that express the identical competence definition and special needs preferences as set forth in sections two through five, to be applied to employees with the same seniority date to break ties.

RATIONALE FOR RESOLUTION PREFERENCE PROVISIONS

45. The Associate Superintendent explained that the Merced OE seeks to retain teachers with “the most expertise in their subject matter areas.” Sections 2-5 of the Resolution reflect the manner in which the Merced OE sought to carry out its preference for retaining teachers with the most expertise in their subject matter areas. The Merced OE skipped certain junior teachers, as well as prohibited the six more senior respondent teachers named above from being able to bump, in accordance with this rationale. She testified:

We want to retain teachers with the most expertise in the subject matter area. It’s all about the quality of education and our instructors ... We believe that retaining single subject credential holders is superior to retaining those holding the VPSS certifications in the same subject We are striving to have the best quality for our kids. ... These are quality issues and we are trying to grow our program. We are very concerned to retain more qualified persons.

46. She continued along the same line when she was asked about why specific pairs of employees, after identifying their credentials and certifications, were being skipped or being barred from bumping:

VPSS won't work, we have to have persons delivering these services [referring to secondary education services specifically in the Home School Charter School Program] who have single subject credentials ... We call a person with a single subject credential a subject matter expert. ... We can get away with saying or, in the VPSS is okay at secondary. [Although not clear, presumably referring to services delivered at Valley Court and Continuation School]. ... We want the broadest range of credentials possible in Independent Study because they have to teach in all areas of instruction. ... The Resolution is the reason the classroom teachers cannot bump into Independent Study and the Home School Charter School positions [where junior employees are being skipped] and the reasons why are listed in the Resolution.

47. The Merced OE failed to prove that it has the specific needs it claimed it has in Sections 3-5 of the Resolution in the three major divisions of its educational activities described in those sections. These three provisions of the Resolution purport to authorize skipping of junior employees on the basis of claims of specific needs of the OE for certain authorizations and certifications within each of those three divisions, in derogation of the seniority of other certificated employees who possess less of those authorizations or certifications than more junior employees. The evidence was neither persuasive nor credible that the specific needs claimed exist in other than a general preference and global sense, as the claims and evidence above in support of those claims was evaluated against the meaning of "specific needs" as that term is used in Section 44955, subdivision (d). The three provisions of the Resolution authorizing skipping junior employees was not proved to be other than what it appears and what the Associate Superintendent said it was quoted above; a general, global expression of the preference of the Merced OE to "upgrade" generally the quality of education and educator in the OE. Regardless of the superficial merit of such an undertaking in the three identified divisions of the OE, a general and program wide effort to upgrade the quality of education and educator in an OE, all alternative education setting where any credential holder is presumptively certificated and competent to teach in any offering within the meaning of section 44955, subdivision (b), is not what Section 44955, subdivision (d) exempts from the general preference of subdivision (b) for seniority. There was no evidence offered regarding a specific need for a specific set of qualifications for a specific class or offering proved, where there was evidence presented supporting a direct correlation between the claimed special need and any specific class or offering, just general expressions of desires and preferences. To permit what is sought by the skipping authorizations of Sections 3-5 of the Resolution would deprive respondents of their seniority rights without legal justification.

48. All of the services offered by the Merced OE under review and in dispute in this matter, as offered by the Merced OE, constitute "alternative education services," within the meaning of the provisions of section 44865 set forth above. Section 44865 expands the meaning of the terms "credentialed and competent" in section 44955, subdivision (b) to permit any properly credentialed employee, regardless of type of credential or presence or absence of supplemental authorizations or certifications, to be considered competent to teach

in any of the alternative education settings identified in section 44865. Section 44865 provides that possession of “any credential” issued by the Commission on Teacher Credentialing (CTC) qualifies any credential holder to teach in any of the Section 44865 enumerated situations, and that all of the assignments offered by the Merced OE identified in this matter fall under the provisions of those enumerated services. Therefore, all of the certificated employees serving in the Merced OE, including, but not limited to, respondents, are presumptively “certificated and competent” to teach in any of the educational settings in any of the three Merced OE programs under review in this matter within the meaning of Section 44955, subdivision (b). In that all respondents are possessed of the minimum credentialing requirements of section 44865, in that each of them has been issued a valid teaching credential by the CTC, all respondents subject to this action are “certificated and competent,” within the meaning of section 44955, subdivision (b), as the “certificated and competent” requirement is modified for alternative education settings by Section 44865. The Merced OE failed to prove any of the six respondents being laid off identified below was not certificated and competent within the meaning of section 44955, subdivision (b).

THE SKIPPING AND BUMPING CHART

49. The details of respondents being displaced by the retention of a junior employee being skipped was assessed and evaluated in Exhibit 16, the Merced County Office of Education 2012 Certificated Layoff Implementation Chart, also known as a bumping and skipping chart. In this bumping and skipping chart, the Associate Superintendent attempted to graphically display how the decisions were made to skip certain junior respondents and retain them, while the six identified more senior respondents were prohibited from bumping those or other certificated employees junior to themselves. Each of the individual respondents, Farmer, Alvarado, Chavez, Andrews, Medeiros and Miller, are being laid off despite the fact that there exists one or more certificated employee less senior than themselves being retained to provide a service in one of the three programs identified above in the upcoming school year. These more senior employees are being displaced by virtue of a conscious decision made by the Merced OE, based upon the rationale set forth in the Resolution, sections 3-5, to skip one or more employees with less seniority than those more senior employees being laid off, as set forth above. The Resolution-based rationale underlying the conscious decisions of the Merced OE to displace each of these six more senior employees being laid off, to skip more junior employees, and to prevent any one of those six to bump a more junior employee being retained, is based upon the Resolution-expressed claims of specific need, discussed above, are actually expressions of general preferences for certain types of authorizations, certifications and, in one instance, previous experience within a set time frame. The net result is the Merced OE’s conclusion that these six respondents are not competent to serve in the positions for which the junior employees are being retained because the six identified respondents did not have enough of, or the right type of authorizations and certifications and/or do not have the preferred amount of previous experience.

SPECIFIC SKIPS

50. According to the Implementation Chart, Ann Miller (93-July 7, 2006) is being laid off because Crystal Souza (123-August 24, 2009) is being skipped. Melissa Medeiros (71-August 23, 2004) is being laid off because Paul Sanchez (88- September 6, 2005) and Bonita Wynn (85) are being skipped. The parties agreed Bonita Wynn is not relevant to this analysis because she is possessed of a Special Education credential none of the others have, and she will be reassigned accordingly. Janette Alvarado (47-October 23, 2000) and Crandell Farmer (42-August 16, 2000) are each is being laid off because Mark Pintor (56-January 1, 2007) is being skipped. Mr. Farmer is being bumped by a more senior employee from his current assignment, and that is why the skip of Mr. Pintor becomes relevant. Laura Andrews (64-January 21, 2004) is being laid off because Mr. Pintor is being skipped as well, as she is also being bumped by another employee more senior to herself. As set forth above and below, these skips unlawfully deprive these identified respondents employees of their seniority rights, and cannot stand.

DENIAL OF BUMP

51. Mr. Chavez (49-June 22, 2001) is not being laid off because anyone is being skipped. But he is being denied the opportunity to bump any one of several less senior employees being retained because he is “not HQT to teach in H/S or in IHS.”

MILLER AND SOUZA

52. Certificated employees Anna Miller (number 93 on the seniority list), and Crystal Souza (number 123 on the seniority list) became an exemplar during the hearing for comparison of a junior employee being skipped and a more senior respondent employee being denied the opportunity to bump, due to application of the preferential prioritization of authorizations and certifications criteria in the Resolution. Ms. Miller, although senior to Ms. Souza, is being laid off due to the reduction in the Home School Charter School Program. Because one position is being eliminated in the Home School Charter School Program, only one of these two employees can be retained in the Home School Charter School Program for the upcoming year. Both employees were evaluated regarding a possible reassignment to a position at the Valley Court and Community School.

53. It was not disputed that the position available at the Valley Court and Community School is a traditional classroom teaching type setting, unlike the Home School Charter School Program, which is far more like Independent Study and involves very little traditional classroom teaching. Presumably there is only room in the Merced OE’s budget for one such employee to move to the Valley Court and Community School.

54. The comparison of these two employees produced several ironies. Ms. Miller and Ms. Souza are currently teaching in the same program, performing the same services as one another, during the current school year. The Associate Superintendent’s earlier testimony in a different context vigorously articulated her concern that Merced OE be able

retain, preserve and augment the highest possible level educational services provided by its employees and its pressing need to retain “subject matter experts,” which she equated to possession of a single subject authorization. She pointed out that it was especially important to retain subject matter experts in the Home School Charter School, the only program the Merced OE offers that provides a college preparatory program, where one would presumably want one’s highest quality, most credentialed and certified, and even presumably its most experienced teachers. Yet the Merced OE has deemed Ms. Miller competent to perform these presumably high-skill college preparatory teaching services in the Home School Charter School program throughout each of her six continuous school years of service to the Merced OE, up to the present.

55. Ms. Souza was hired three full school years after Ms. Miller, and thus has considerably less experience teaching in the Home School Charter School Program. Ms. Souza is possessed of two single subject authorizations that Ms. Miller does not have. But Ms. Miller has four VPSS certifications, two in the same subject matter areas as Ms. Souza’s single subject authorizations, and in two additional subject matter areas. The Associate Superintendent and the Merced OE have, as of March 12, 2012, determined that Ms. Miller is, “not competent to teach at Valley HS,” (where she would be presumably providing instruction to largely remedial students rather than what she offers her college preparatory students at the Home School Charter School), per the notation Exhibit 16, the Merced OE Implementation Chart.

56. The Associate Superintendent contended in her testimony that Ms. Miller is less “competent” than Ms. Souza, based solely and exclusively upon the Resolution’s preference for Ms. Souza’s single subject authorizations over Ms. Miller’s multiple VPSS certifications, plus the fact that Ms. Miller has not taught at the Valley Court and Continuation School in any of the last five years. The Associate Superintendent also testified that one of the two Resolution-supported reasons that Ms. Souza is being skipped is that Ms. Miller has no previous experience teaching at Valley Court and Continuation School in the last five years. That particular point was not disputed, because in the previous six years of her service to the Merced OE, Ms. Miller was teaching the presumably higher level of education provided in the Home School Charter School program, where her multiple subject credential and her four VPSS certifications in mathematics, English, science, and social studies indisputably qualified her as legally competent for the purposes of both state and federal law to perform those services. The Associate Superintendent also interjected twice her concern that, “there would only be one employee with subject matter expertise remaining to teach in the Home School Charter School program if Ms. Souza was laid off.” She expressed her opinion that it would be “highly undesirable” for the Merced OE to have only a single employee serving in the Home School Charter School program with such “subject matter expertise,” which she equated to being possessed of at least one single subject authorization. This testimony was curious in light of the fact that Ms. Souza was not served with either a Preliminary or a Precautionary Notice, despite the fact that she is one of the least senior employees of all employed by Merced OE (number 123 of 144), and is just this school year finishing her third year of service with the Merced OE. Since Ms. Souza was not given notice, she cannot be laid-off, regardless of the outcome of these proceedings, and

concerns about what the adverse effects the Merced OE might sustain if Ms. Souza was laid off appear to have been substantially misplaced. As explained above, the Merced OE is not permitted to create justifications for skipping. Therefore, whether the Merced OE demonstrated a need for the purported authorizations and certifications as a basis for skipping junior employees is irrelevant.

57. Ms. Miller expressed how upset and disappointed in the Merced OE she and her colleagues were when they first read the preferential criteria provisions of the Resolution quoted above that are at issue here. She testified, “We were never told these criteria would be prioritized or would result in someone losing their job.” She testified, “We were never told by anyone in a position of authority by at Merced OE that a single subject authorization would ever become an issue, or that the OE would value it over a VPSS certification.” She testified, “We were told by Merced OE Human Resources officials two years ago that VPSS, CSET, single subject and being Houssed were all acceptable alternatives to meeting the highly qualified criteria, and we all knew that these alternatives work in a special educational setting, but we all knew that the Merced OE is all alternative education.”

MR. FARMER

58. Mr. Farmer is the most senior respondent facing layoff. He was hired in 2000 and occupies position number 42 on the Seniority List. He teaches the DRC in-custody students at the County’s Juvenile Hall in Los Banos. He has served in this capacity for the past 10 consecutive years. In his first two years working for the Merced OE, he served in the Independent Study Program. Mr. Farmer confirmed on the record that he consents to serving in and being reassigned to the Independent Study Program again, if need be.

59. Mr. Farmer processes into the County juvenile custodial facility in Los Banos each school day and teaches all subjects, at the middle school program level, to juveniles being held in custody. He typically has a student anywhere from three days to two months. He observed that absolutely everything takes place in his classroom, including lunch, as the juvenile detainees are not allowed to be outside the immediate supervisory presence of a Deputy Sheriff custodial officer.

60. Mr. Farmer has a MS credential. He does not possess any VPSS or Housse certifications. Mr. Farmer testified that he has always been assured that he is “fully compliant” with all legal requirements to continue to teach in his assignment by his principal at Valley Court and Continuation School. He took exception to the Associate Superintendent’s comments in her testimony that “all” certificated Merced OE employees were offered Merced OE paid time and tuition to obtain as many VPSS certifications as necessary or desired. Mr. Farmer credibly and persuasively testified that he was never offered an opportunity to obtain a VPSS certification or be Houssed by anyone affiliated with or in a position of authority with the Merced OE, and was never informed of the need to do so by anyone in a position of authority at the Merced OE before his receipt and review of the March 12, 2012, Preliminary Notice with the Resolution attached.

61. Mr. Farmer expressed disappointment at the manner in which the layoff process took place. He testified that when he received his Preliminary Notice, he assumed that he received the notice because his program/position at the DRC was being eliminated. He observed that he is the only person who has taught the DRC program in the Merced OE at the Los Banos facility for the past three consecutive school years. Between the time of his receipt of the Preliminary Notice and the evidentiary hearing, he discovered that his DRC program will be offered again in the upcoming school year at Los Banos, and will be assigned to a less senior person being retained.

62. Mr. Farmer is being bumped by a more senior employee, Mr. Ray. According to the Implementation Chart, the Merced OE intends that Mr. Ray will continue to teach the assignment he had in the current school year, teaching .67 FTE at Valley Court and Continuation School at the middle school level, and .33 FTE of social science at Valley Court and Continuation School at the high school level. Mr. Farmer is being laid off in favor of skipping Mr. Pintor, who occupies position 56 and taught social sciences and foundational math in the past. Mr. Pintor was on a “special assignment,” the nature of which was not disclosed, for the past several years.

63. Despite his high position on the seniority list, Mr. Pintor actually has no seniority. Mr. Pintor has first year probationary seniority status. Mr. Pintor is currently unassigned, as the special assignment has been eliminated due to the PKS reductions and eliminations. Skipping Mr. Pintor, a probationary employee, in favor of laying off Mr. Farmer, a permanent employee, presumptively violates the seniority requirements of section 44955, subdivision (b).

64. The Implementation Chart states that Mr. Farmer is “not HQT to bump less senior Valley H/S Teacher or into IHS.” If Mr. Pintor cannot be legally skipped in order to lay off Mr. Farmer, whether and why Mr. Farmer is unable to bump anyone is irrelevant.

MS. ALVARADO

65. Jeanette Alvarado acknowledged that she is properly classified as a first-year probationary employee of the Merced OE. She is possessed of a multiple subjects credential as well as an administrator’s authorization. She occupies seniority list position number 47, and because she spent most of her career with the Merced OE as an administrator, even though she was hired in 2000, she is still a first-year probationary employee. The current school year was her first school year back in the classroom, teaching a combined FTE of high school mathematics and middle school multiple subjects at Valley Court and Continuation School. Although she is not possessed of permanent status such that she is in a position to exercise any bumping rights against a permanent employee, nevertheless, as set forth above, the Merced OE did not serve Preliminary or Precautionary Notice upon, and thus intends to retain Mr. Pintor, who is also a probationary first-year employee, but with indisputably less seniority than Ms. Alvarado. Between the two, Alvarado and Pintor, Ms. Alvarado must be retained.

MR. CHAVEZ

66. Mr. Chavez is one of the most senior Merced OE certificated employees facing layoff. Hired in 2001, he occupies position number 49 on the Seniority List. Mr. Chavez teaches middle school classes at Valley Court and Continuation School. He is possessed of a MS credential, but is not HQ in any subject and has not been Housed. As set forth above, no one is being skipped specifically in order to lay off Mr. Chavez. But he is being denied the opportunity to bump numerous other junior employees due to the competence criteria of the Resolution. The Implementation Chart, similar to that regarding Mr. Farmer, denies Mr. Chavez the opportunity to bump any of these junior employees being retained because Mr. Chavez is “not HQT to teach in H/S of IHS.” Mr. Chavez confirmed in his testimony that he consents to teach in any assignment in the upcoming school year.

67. As per the notation in the Implementation Chart and the Associate Superintendent’s testimony, Mr. Chavez is being deemed not competent to bump into any of the positions held by junior employees in the upcoming year due to the Resolution language seeking to redefine section 44955, subdivision (b) “competence” by augmenting the definition with the Merced OE’s preferences for certain additional authorizations and certifications Mr. Chavez does not possess. As discussed above, the Resolution’s augmented definition of competence may not be used to deprive Mr. Chavez of his seniority rights to and preclude Mr. Chavez from bumping to take any of the positions that he might otherwise be certificated and competent to teach. Pursuant to the definition of “competent” in an alternative education setting set forth in section 44955, subdivision (b) relaxed by section 44865, Mr. Chavez is competent to teach in any one of the three programs under review in this action. The Merced OE contention that Mr. Chavez cannot bump any junior employee cannot be sustained.

MS. ANDREWS

68. Ms. Andrews is another rather senior permanent employee member of the Merced OE staff facing layoff, occupying a position number 64 on the OE Seniority List, being hired in 2004. She currently teaches PE, US History and World History at the Valley Court and Continuation School. She is possessed of a single subject authorization in social science, an administrative authorization, and, although not noted on the District Seniority list or the Implementation Chart, she has a Master’s Degree in Education.

69. According to the Implementation Chart, Ms. Andrews is being bumped by a person senior to her, but she is being denied the opportunity to bump Mr. Pintor, who, as set forth above, is a first-year probationary employee. In addition, Ms. Andrews testified credibly and persuasively that she is being denied the opportunity to bump junior employees who are being retained to serve in the Independent Study or the Home School Charter School due to the recency of experience feature of the Resolution, which she contends arbitrarily punishes employees who have faithfully served for lengthy periods of time in other assignments, and unfairly limits employees with seniority and experience in other Merced OE programs from bumping junior employees.

70. Ms. Andrews' contentions have merit. As set forth above, Ms. Andrews may not be laid off, as she is being skipped in favor of a probationary employee. In addition, the same reasoning as set forth above regarding Mr. Chavez and the application of the Resolution competence criteria to deprive Mr. Chavez of the opportunity to bump applies equally to Ms. Andrews.

MS. MEDEIROS

71. Melissa Medeiros currently serves as a middle school teacher at Valley Court and Continuation School. She has served Merced OE continuously since 2004 and is number 71 on the Seniority List. She is possessed of a MS credential with a VPSS certification in English. She is being laid off in favor of Mr. Sanchez (number 87), who the Merced OE skipped because of the Resolution competence criteria preference for his single subject authorization in English. The Associate Superintendent testified in accord with the Implementation Chart that Ms. Madeiros is precluded from bumping any one of several less senior employees being retained because, "Others less senior have more VPSS's." The Associate Superintendent testified twice that Mr. Sanchez has a "special situation," but she did not elaborate. As set forth above, Ms. Medeiros may not be laid off because the Merced OE may not skip a less senior employee, Mr. Sanchez. The Merced OE also failed in its burden to explain what the special situation is that might justify its skipping him.

REMAINING RESPONDENTS

72. The other Merced OE employees not specifically identified above that received either Preliminary or Precautionary Notices were not possessed of sufficient seniority to permit them to bump any other employee, and it was not proved that any one of them were skipped in favor of any more junior employee.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied. The Merced OE has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the Preliminary Notices of Layoff served on the respondents still contesting the layoff are factually and legally appropriate.⁷ As set forth in detail in the Factual Findings and below, the Merced OE failed to meet this burden with respect to certificated employees Anna Miller, Crandell Farmer, Janette Alvarado, John Chavez, Lisa Andrews and Melissa Medeiros. Preliminary Notices of Layoff served by the Merced OE on these six certificated employees shall be rescinded, and Final Notices of Layoff may not be given to these employees for the upcoming school year, as they have been improperly noticed for layoff and are deemed rehired for the upcoming school year. With respect to all the other respondents receiving Preliminary Notice of

⁷ Education Code section 44944.

Layoff, the Merced OE successfully met its burden, those Preliminary Notices of Layoff shall be sustained and Final Notices of Layoff may be served on these employees that their services will not be required for the upcoming school year.

2. The services the Merced OE seeks to eliminate in this matter are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Superintendent’s decision to reduce or discontinue these particular kinds of services was not demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion. The reduction/elimination of particular kinds of services identified in Resolution 2012-05 shall be affirmed.

3. Other than what is set forth below, the reduction or discontinuation of particular kinds of services related to the welfare of the Merced OE and the students who receive the services offered by the certificated employees of the Merced OE. The Merced OE is facing a significant projected deficit, for the upcoming school year and for the two school years following. State law prohibits the Merced OE from operating in a continuous state of deficit and the Merced OE is legally required to make reductions and eliminations of services necessary to bring its budgets into balance. The reduction in particular kinds of services proposed is necessary to bring the Merced OE’s operating budget out of deficit in the upcoming school year and forward.

4. The provisions of Resolution 2010-05, Sections 2-5, inclusive, quoted in the Factual Findings above, impermissibly encroach upon the seniority rights of the six respondents, Farmer, Alvarado, Chavez, Andrews, Medeiros and Miller, and thus violate section 44955, subdivision (b). Section 2 of the Resolution unlawfully attempts to expand and enlarge the Section 44955, subdivision (b)’s statutory “certificated and competent” language with the Merced OE’s own particular preferences in an effort to alter the general seniority rule. The Merced OE is perfectly at liberty to exercise its discretion to express its preferences in this matter with respect to employees with the same seniority date. All of the respondents in this matter have different seniority dates.

5. As set forth above in the Factual Findings in detail, the Merced OE failed to prove the claimed specific needs supporting Sections 3-5 of the Resolution. The claimed specific needs fail to support the Merced OE’s skipping of certain junior employees in derogation of the seniority rights of respondents Farmer, Alvarado, Andrews, Medeiros and Miller and the Merced OE’s proposed skips of certain junior employees are legally invalid. The same criteria are invalid as a basis to deny Mr. Chavez an opportunity to bump into any one of several positions to be filled in the upcoming school year by an employee junior to himself. The junior employees the Merced OE seeks to skip or prevent Mr. Chavez from bumping are being retained to perform services that the six more senior respondent employees are certificated and competent to provide within the meaning of section 44955, subdivision (b), read together with section 44865. Application of the Resolution’s Section 2 redefinition of competence, and Section 3-5’s claims of specific needs authorizing skipping junior employees resulted in the issuance of Preliminary Notices of Layoff to respondents Crandell Farmer, Jeanette Alvarado, John Chavez, Laura Andrews, Melissa Medeiros or

Anna Miller. As a result, the Preliminary Notices of Layoff issued to those employees are invalid and must be rescinded.

6. Legal cause exists pursuant to Education Code section 44949 and 44955 for the Merced County Office of Education to reduce or discontinue 18.69 FTE of particular kinds of services, as set forth in the Merced OE's Resolution 2012-05, less the rescission of 4.50 FTE of the discontinuance action that took place following the service of Preliminary Notices of Layoffs and the adoption of the Resolution. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and the pupils thereof.

7. As set forth above in the Legal Conclusions, legal cause does not exist to sustain the Accusations against Crandell Farmer, Jeanette Marie Alvarado, John Joseph Chavez, Laura Jean Andrews, Melissa Marie Madeiros, and Anna Miller. Preliminary Notices of Layoff issued to these enumerated employees cannot be sustained, and must be rescinded. Each of these enumerated employees are deemed rehired for the upcoming school year.

8. In all other respects, with all other respondents upon whom Preliminary Notices of Layoff and Accusations were served, legal cause exists to sustain the Accusations against each of the remaining unenumerated respondents, and Final Notice may be given of layoff to these respondents. The County Superintendent may give those remaining respondents and only those remaining respondents, Final Notice that their services will not be required by the Merced OE in the upcoming school year, in inverse order of seniority.

ORDER

The Accusations against respondents Crandell Farmer, Jeanette Marie Alvarado, John Joseph Chavez, Laura Jean Andrews, Melissa Marie Madeiros, and Anna Miller, are **DISMISSED**. Preliminary Notices of Layoff issued to each of these named respondents are **RESCINDED**, and Final Notice of Layoff may not be given to any of these respondents.

With respect to all other respondents, the Accusations are **SUSTAINED**.

The Merced County Office of Education action to reduce or eliminate 18.69 FTE of particular kinds of services for the 2012-2013 school year is **AFFIRMED**.

Final Notice may be given only to respondents against whom Accusations were sustained, by the Merced Office of Education that their services will not be required for the upcoming school year. Notice shall be given in inverse order of seniority.

DATED: May 03, 2012

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings