

BEFORE THE  
GOVERNING BOARD  
WILLOWS UNIFIED SCHOOL DISTRICT  
COUNTY OF GLENN  
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

DIANNA ABOLD, LAUREN ALBERT,  
CATHRYN FLEMING, and MELANIE  
PERRIN,

OAH No. 2010031120

Respondents.

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Dian M. Vorters, Office of Administrative Hearings, State of California, on April 30, 2010, in Willows, California.

Matt Juhl-Darlington, Attorney at Law,<sup>1</sup> represented complainant, Steve Olmos, Ed.D., Superintendent, Willows Unified School District.

Ted Lindstrom, Attorney at Law,<sup>2</sup> represented respondents who are identified in Appendix A, attached.

The matter was submitted on April 30, 2010.

**FACTUAL FINDINGS**

*General Findings Concerning Statutory Requirements*

1. Respondents are certificated district employees.

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<sup>2</sup> Ted Lindstrom, Attorney at Law, Langenkamp Curtis & Price, LLP, 1331 Garden Highway, Suite 300, Sacramento, California 95833-9773.

2. On March 4, 2010, the governing board of the district resolved to reduce or discontinue particular kinds of services. To that end, the board adopted Resolution 2009-10-14 (Layoff Resolution). Within the meaning of Code section 44955, the services are “particular kinds of services” that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

3. Not later than March 15, 2009, the superintendent of the district caused the governing board of the district and respondents to be notified in writing of his recommendation that preliminary notice be given respondents, pursuant to Education Code sections 44949 and 44955, that the district would not require their services for the 2010-2011 school year. The notice stated the reasons for the recommendation. In recommending reductions in certificated staff, the superintendent considered the district’s declining student enrollment and the qualified condition of the district’s budget. The recommendation was not related to respondents’ performance as certificated employees.

4. A Notice of Non-reemployment was delivered to each respondent, by personal delivery and by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondents’ last known address.

5. The notice advised each respondent of the following: She/he had a right to a hearing. In order to obtain a hearing, she/he had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.<sup>3</sup> And the failure to request a hearing would constitute a waiver of the right to a hearing.

6. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a Notice of Defense within five days after being served with the accusation.<sup>4</sup> Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

#### *Positively Assured Attrition*

7. The board must allow for positively assured attrition such as voluntary resignations and retirements which occur during the “computation period.” (*Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School Dist.* (1981) 116

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<sup>3</sup> Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing “shall not be less than seven days after the date on which the notice is served upon the employee.”

<sup>4</sup> Pursuant to Government Code section 11506, a party on whom an accusation is served must file a Notice of Defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher reduction in force cases, the Notice of Defense must be filed within five days after service of the accusation.

Cal.App.3d 831, 847.) The district must “consider evidence of positively assured attrition, involuntary retirements for the [upcoming] school year which were known to the board when it made its preliminary determination on 15 March ... and when it made its final determination on 15 May.” (*Lewin v. Bd. of Trustees of Pasadena Unified School Dist.* (1976) 62 Cal.App.3d 977, 983.)

8. The governing board considered all positively assured attrition which has occurred to date, that is, all deaths, resignations, retirements, and additional attrition which may occur before the start of the 2010/2011 school year in reducing these services and but for the attrition already assured and the attrition anticipated would have found it necessary to reduce additional kinds of service.

9. On April 23, 2010, the district notified Cathryn Fleming that her notice (reducing her assignment from 1.0 FTE to 0.66 FTE), had been rescinded and her 1.0 FTE position would be fully reinstated at Willows Intermediate School

10. On April 23, 2010, the district notified Melanie Perrin that her notice of layoff for her Elementary Teaching position (1.0 FTE), had been partially rescinded and she would be reassigned to Willows Community High School at 0.66 FTE.

*Services the District Intends to Reduce or Discontinue*

11. The governing board of the district determined, in the Layoff Resolution, that because particular kinds of services were to be reduced or eliminated, it was necessary to decrease the number of permanent employees in the district by 7.60 full-time equivalents (FTE). The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

**Counseling Positions**

Counseling at Willows Elementary, Willows Intermediate, Willows High School, Willows Community High School	2.6 FTE
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**Teaching Positions**

Kindergarten at Murdock Elementary	1.0 FTE
Multiple Subject at Murdock Elementary	1.0 FTE
Physical Education (PE) at Murdock Elementary	1.0 FTE
Willows Community Day School, K-6 Grades	
Willows Intermediate School	1.0 FTE
Willows Community Day, 7-12 Grades,	
Willows Continuation High School	1.0 FTE

Total Certificated Reductions	7.6 FTE
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### *Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students*

12. Pursuant to Education Code section 44955, subdivision (b), the governing board of the district established, in Resolution 2009-10-13 (Tie-Breaking Resolution), criteria for determining the order of termination as among employees who first rendered paid service on the same day. The board authorized that in the event of a tie in seniority dates, the “order of employment will be based solely on the needs of the District and the students thereof.”

### *Skipping/Bumping/Seniority*

13. Skipping describes the process by which the district may deviate from the order of seniority when there is an identified need for a particular type of service, there is a junior employee who is uniquely qualified to provide that service or teach a subject, and there is no senior employee who is certificated and competent to provide the service. (Ed. Code, § 44955, subd. (d)(1).) The district employed skipping to achieve a proper list of employees to receive layoff notices.

The district determined it was necessary to retain the services of certificated employees who possess a BCLAD (Bilingual, Cross-cultural, Language, And Academic Development) authorization or a Mathematics Credential and/or Certification and/or Supplement. The board initially included possession of a CLAD (Cross-cultural, Language, and Academic Development) authorization as a skipping criteria. Dr. Olmos testified that the board subsequently amended the Layoff Resolution by deleting CLAD authorization as a skipping criteria. He believes a BCLAD authorization is important to give non-English speaking students every opportunity to learn English and facilitate communication with parents. He believes this cannot be done without bi-lingual teachers.

14. Bumping describes the process by which the district identifies those employees who are more senior and who are competent to perform a particular kind of service or teach a particular subject. The district employed bumping to achieve a proper list of employees to receive layoff notices.

15. Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the district gives a greater legal entitlement to a position. Seniority is defined as the date upon which an employee first rendered paid services in a probationary position. (Ed. Code, § 44845.)

Education Code section 44955, subdivision (b), provides that no senior employee may be terminated while any less senior employee is retained to render a service which the more senior permanent employee is “certificated and competent” to render. “It [is] the district’s obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possess[es] the seniority and qualifications which would entitle him/her to be assigned to another position.” (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4<sup>th</sup> 127, 137.)

16. Superintendent Olmos testified that the district maintains a seniority list of all certificated employees. The seniority list was distributed to all employees prior to the March 4, 2010 board meeting. Employees were advised to review and update the list. All valid corrections and updates were incorporated into the final seniority list that was used to identify teachers for layoff. This final seniority list was adopted by the board on March 4, 2010, in the Tie-Breaking Resolution.

#### *Reduction of Positions at Murdock Elementary School*

17. At the elementary school level, the governing board determined it was necessary to reduce 1.0 FTE Kindergarten teaching position, 1.0 FTE Multiple Subject teaching position, and 1.0 FTE Physical Education (PE) teaching position for a total of 3.0 FTE at Murdock Elementary School. (Factual Finding 11.) The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render a particular kind of service, were retained over those with less seniority.

18. To reduce 1.0 FTE K-5 Kindergarten Teaching Position, the district skipped Cristina Cameron with a seniority date of August 18, 2003, because she possessed a BCLAD. Wendy Farmworth had seniority date of August 19, 2002. She was reassigned to Willows Intermediate School, bumping Cathy Fleming. Cathy Fleming was reassigned to a different grade at Willows Intermediate School, bumping Melanie Perrin. Ms. Perrin was reassigned to Willows Continuation High School, bumping Kim Welch whose position was a 0.66 FTE assignment. Ms. Welch was the proper recipient of a layoff notice.

19. To reduce 1.0 FTE Multiple Subject Teaching Position, the district noticed Maureen Calonico. She has a seniority date of August 25, 1999, and was assigned to teach Kindergarten at Willows Elementary. She holds a clear standard elementary credential, a supplemental social science credential, and a CLAD authorization. The district has since rescinded the notice to Ms. Calonico and she will no longer be reassigned.

20. To reduce 1.0 FTE PE Teaching Position, the district sent a notice of reassignment to Jack Townley. He has a seniority date of August 10, 2000, and was assigned to teach PE at Murdock Elementary. Mr. Townley holds a professional clear single subject social science credential, a supplementary authorization in introduction to PE and a CLAD authorization. Mr. Townley bumped Lauren Albert. Ms. Albert has a seniority date of August 16, 2004, and teaches history and comparative literature at Willows Intermediate School.

Respondents argued that elementary PE is a mandated service and as such, the district cannot lawfully eliminate the position. Respondents cited no authority for this contention. “As long as the required services will be provided, the district can properly change the manner of their provision and reduce or eliminate the existing particular kind of service used

to provide them.” (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 640; *Gallup v. Alta Loma School Dist.* (1996) 41 Cal.App.4th 1571, 1585-1586.) The district may properly identify elementary PE as a particular kind of service to be reduced or eliminated.

#### *Reduction of Teaching Positions at Willows Intermediate School (K-6)*

21. The governing board determined it was necessary to reduce 1.0 FTE Teaching Position at Willows Community Day School, Kindergarten through sixth grades. The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render a particular kind of service, were retained over those with less seniority.

22. To reduce 1.0 FTE Teaching Position, the district sent a notice of reassignment to Mike Buckley. Mr. Buckley has a seniority date of August 6, 2001, and is currently assigned to Willows Community Day School, grades one through six. He holds a professional clear single subject credential in health sciences, a supplementary credential in food and nutrition (home economics), a preliminary multiple subject authorization, and a CLAD authorization. He bumped Mike Rutherglen. Mr. Rutherglen has a seniority date of August 28, 2004. He teaches liberal studies at Willows Community High School, grades nine through 12. Mr. Buckley is more senior and qualified to teach liberal studies at the high school level. Mr. Rutherglen was the proper recipient of a layoff notice.

#### *Reduction of Teaching Positions at Willows Continuation High School (7-12)*

23. The governing board determined it was necessary to reduce 1.0 FTE Teaching Position at Willows Continuation Day School (High School), seventh through 12 grades. The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render a particular kind of service, were retained over those with less seniority.

24. To reduce 1.0 FTE Continuation High School Teaching Position, the district sent a notice of reassignment to Sharon Busler. Ms. Busler has a seniority date of September 20, 2004, and is currently assigned to Willows Community Day School, grades seven through 12. She was the proper recipient of a layoff notice.

#### *Reduction of Various Counseling Positions*

25. The governing board determined to lay off 2.6 Counseling Positions at the Elementary, Intermediate, and High School levels. The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials.

The district identified Connie Funke (0.6 FTE), Sarah Wiggett (1.0 FTE), and Amy Steele (1.0 FTE), as the appropriate school counselors to receive layoff notices. Ms. Steele was reassigned to teach at Willows Elementary. Ms. Steele bumped Dianna Abold for this position.

#### *Issues Concerning Retention of BCLAD Authorized Teachers*

26. Dr. Olmos testified that the district's non-English speaking student population has grown dramatically in the last ten years. In 1998, there were only 35 Spanish speaking students. By 2010, the district had over 300 English Language Learners (ELL) who speak Spanish (261), Laotian (6), Hmong (36), and Russian. The majority of ELL students are enrolled at Murdock Elementary and comprise 209 of the 644 enrolled elementary students. Willows Intermediate has 67 ELL students out of a total of 491 enrolled students. Willows High School has 36 ELL students out of a total of 459 enrolled students. The numbers tend to decline as grade level increases because students are transferred out of the ELL program as they become more proficient in English.

For funding purposes, the district submitted census data to the State Department of Education, which shows the district's highest growth in the Latino student population. This population comprises 47 percent of the children at Murdock Elementary, 43 percent of the children at Willows Intermediate, and 36 percent of the children at Willows High School. It is noted that ethnicity and language skills are different demographics.

27. The district has a total of five BCLAD teachers, all of whom are bi-lingual in Spanish. Murdock Elementary School has three teachers with a BCLAD authorization, Willow Intermediate has none, and Willows High School has two teachers with a BCLAD authorization. The district also employs six bi-lingual Spanish speaking classroom aides. The high school and middle school have one aide each and the remaining four aides are located at the elementary school. The district employs no certified teachers or aides who speak Hmong, Laotian, or Russian. The district is in "program improvement" and as such, has implemented an ELD program at every school site. A teacher funded through Title I is assigned to "pull-out" elementary students and work with them on acquiring English.

28. Dr. Olmos agreed that a teacher with a CLAD authorization can deliver effective instruction to ELL students. He stated that possession of a BCLAD is "preferable" to a CLAD because being bi-lingual assists teachers in communicating with students and parents of ELL students.

29. Three teachers, Melanie Perrin, Dianna Abold, and Lauren Albert, possess CLAD authorizations and received layoff notices, though each was more senior to a similarly credentialed teacher holding a BCLAD authorization. These respondents challenged the board's use of a BCLAD authorization as a skipping criteria.

a. Ms. Perrin has a seniority date of August 18, 2003, and teaches sixth grade at Willows Intermediate. She holds a professional clear multi-subject credential and a

CLAD authorization. She has provided instruction to Spanish, Laotian, and Hmong language students. But for the BCLAD provision, Ms. Perrin would have been qualified to bump Gricelda Lozano-Trujillo and tie Cristina Cameron.

Ms. Trujillo has a seniority date of October 9, 2006. She is an ELD (English Language Development) teacher at Murdock Elementary School. She holds a multi-subject authorization and a BCLAD. Ms. Cameron has a seniority date of August 18, 2003 and teaches Kindergarten. She holds a multi-subject credential, a single subject Spanish credential, and a BCLAD.

b. Ms. Abold has a seniority date of August 28, 2003 and teaches English, art, and journalism at Willows Intermediate. She holds a professional clear multiple subject credential, a supplemental authorization in English, and a CLAD authorization. She stated that depending on the situation, she utilizes a Spanish speaking aid, a Spanish speaking Vice Principal, Ron Bazan, or other teachers. But for the BCLAD provision, Ms. Abold would have been qualified to bump Ms. Lozano-Trujillo. Further, Ms. Abold was bumped by a counselor, Amy Steele, when her position was eliminated. But for the BCLAD provision, Ms. Steele would have bumped a different teacher, Eric Owen. Mr. Owen has a seniority date of August 10, 2009, and teaches English and history at Willows High School. He holds single subject social science, English, and Spanish credentials and a BCLAD authorization.

c. Lauren Albert has a seniority date of August 16, 2004, and teaches history and comparative literature at Willows Intermediate. She holds a professional clear multiple subject credential, a supplementary authorization in science, single subject credentials in English and social science, and a CLAD authorization. She has provided instruction to Spanish, Russian, Laotian, and Hmong language students. She has utilized bilingual aides to facilitate instruction. But for the BCLAD provision, Ms. Albert would have been qualified to bump Eric Owen and Ms. Trujillo. Ms. Albert has been trained in SDAIE (Specially Designed Academic Instruction in English) strategies. SDAIE is a methodology or set of strategies that teachers employ to help English learners understand core subjects (such as social studies, science or literature).

d. Ms. Perrin, Ms. Abold, and Ms. Albert all teach at Willows Intermediate where there are no BCLAD teachers. All three have had ELL students of Spanish, Russian, Laotian, and Hmong heritage. All three denied any prior difficulty providing competent instruction to or communicating with ELL students or their parents. There is not evidence to the contrary.

30. The Bi-lingual/Bi-cultural Education Act of 1976 (Education Code section 52161, et seq.) specifically addresses the provision of instruction to children of limited English proficiency. If the language census indicates that any school within a district has ten or more pupils of limited English proficiency with the same primary language in the same



grade level or age group, the district must offer language program instruction to meet the specific ELL need. (Ed. Code, §§ 52163, 52165.)

31. In order to meet student needs, the district prepared a Master Plan for English Language Learners (updated February 2010). Willow's Board Policy, Section BP 4111, recognizes that student achievement is advanced by instructors who possess specific skills, knowledge, and abilities to meet an identified need. The Master Plan is a detailed outline for legal compliance, program implementation, and staff development. Ms. Olmos confirmed that for purposes of job recruitment, bi-lingual teaching is preferred though not required. For ELD positions, the district's job flyers provide that bilingual language skills are "preferred."

32. Tie-breaking criteria to be applied to teachers who first rendered paid service on the same date, can be based "solely" on the needs of the district and the students. (Ed. Code, § 44955, subd. (b).) Skipping is distinctly different and affects layoff determinations despite seniority. Tenured teachers possess vested rights in being retained. (*Alexander v. Board of Trustees of Delano Joint Union High School Dist.* (1983) 139 Cal.App.3d 567, 572.) The district may retain junior employees who are "certificated and competent to render services which more senior employees are not." (*Id.* at p. 571.) There is no dispute that the district has a need to provide ELL program instruction to non-English speaking students. There is a dispute, however, as to whether senior teachers within the district are "competent" to teach ELL students. Upon determining a need for a reduction in the number of permanent employees, a school district is required to comply with the lay-off procedures enumerated in section 44955. (*Id.* at p. 570.)

33. The *Alexander* case referenced and considered statutes relevant to the Bilingual-Bicultural Education Act of 1976. (Ed. Code, § 52160 et seq.) These sections address teacher training and financial assistance to school districts. Education Code section 52172 states:

Teachers and teacher aides who are not bilingual-crosscultural teachers and aides, as defined by ... Section 52163, shall not be permitted to teach in programs authorized pursuant to subdivision (a), (b), or, unless waived by the board, (c) of Section 52613. It is the intent of the Legislature that the provisions of Section 44955 shall apply to this section. However, in no case shall a school district dismiss a fully certificated teacher, who previously taught in the bilingual-bicultural program pursuant to a waiver granted under Section 52178, solely on the basis that such waiver has expired. Even if such person is unable to qualify for a bilingual credential or bilingual-crosscultural certificate of competence, he or she shall retain his or her status, seniority, and rights as a probationary or permanent employee, as the case may be, for the purpose of serving as a monolingual teacher in other programs offered by the school district.

For purposes of teacher layoff proceedings, the district must demonstrate that more senior teachers do not possess the special training and experience necessary to teach a particular course or course of study. (Ed. Code, § 44955, subd. (d)(1).) The three teachers, Ms. Abold, Ms. Albert, and Perrin, who were displaced by more junior teachers, each have up to six and seven years of experience teaching the district's ELL students. All three employees teach at Willows Intermediate School where there are no teachers with BCLAD authorizations currently assigned. The district employs no bi-lingual Hmong or Laotian certificated employees or aids. Yet, ELL instruction is provided to these students by teachers possessing CLAD and BCLAD authorizations. The district conceded that a teacher possessing a CLAD authorization can deliver effective instruction to ELL students. A statement that a BCLAD is "preferable" to a CLAD authorization falls short of evidencing that the senior teachers identified for layoff at Willows Intermediate lack the "special training and experience" necessary to teach ELL students. In fact, the evidence is to the contrary, that Ms. Abold, Ms. Albert, and Perrin, have provided competent instruction to ELL students in their present teaching assignments. As such, their layoff notices are not proper and the accusation must be dismissed as to them.

34. 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

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional prerequisites required by those sections were satisfied.

2. The services the district seeks to eliminate in this matter, as set forth in the Layoff Resolution, are the particular kinds of service that may be reduced or discontinued within the meaning of Education Code section 44955. The board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of the board's discretion. Pursuant to Education Code sections 44949 and 44955, legal cause exists for the district to reduce or discontinue the particular kinds of services set forth in the Layoff Resolution. The reduction or discontinuance of these identified particular kinds of services relates solely to the welfare of the district and its pupils.

3. With the exception of Dianna Abold, Lauren Albert, and Melanie Perrin, no certificated employee with less seniority than any respondent is being retained to render a service that any respondent is certificated and competent to render. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents final notice that their services will not be required for 2010-2011 school year.

4. Dianna Abold, Lauren Albert, and Melanie Perrin are certificated and competent to teach at their current assignments. They are senior to employees being retained

to teach at Willows Intermediate School. Pursuant to Education Code section 44955, the accusations as to Ms. Abold, Ms. Albert, and Ms. Perrin must be dismissed. (Factual Finding 33.)

#### RECOMMENDATION

1. The Willows Unified School District's action to reduce or eliminate the particular kinds of services identified in Layoff Resolution 2009-10-14, for the 2010-2011 school year is **AFFIRMED**.

2. The accusation as to Dianna Abold, Lauren Albert, and Melanie Perrin is **DISMISSED**. They are considered reemployed for the 2010-2011 school year.

3. The Accusation against the remaining respondents is **SUSTAINED**. The Willows Unified School District may give final notices to respondents, with the exception of Ms. Abold, Ms. Albert, and Ms. Perrin, that their services will not be required for the 2010-2011 school year. Notices shall be given in inverse order of seniority.

DATED: May 5, 2010

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DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings

## **APPENDIX A**

### 2010 Willows Unified School District – List of Respondents

	<b>Last Name</b>	<b>First Name</b>	<b>Procedural Status</b>
1	Abold	Dianna	
2	Albert	Lauren	
3	Fleming	Cathryn	Notice rescinded
4	Perrin	Melanie	