

BEFORE THE GOVERNING BOARD  
SANTA CRUZ CITY SCHOOLS DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Termination of Services  
of:

OAH No. 2008030615

Erin Asamoto  
Constance "Connie" Bertuca  
Chris Carey-Stronck  
Luke Dahlen  
Marissa Ferejohn-Swett  
Katharine Garkey  
Michelle Hubbard  
Bob Hudson  
Matthew Mohulski  
Diana Nieves  
Damian Pawlowski  
Karen Quinn  
Lisa Storer  
Miguel Valladolid  
Holly Woolbright  
Anne Zachan  
Portia Zavitsanos

Respondents.

**PROPOSED DECISION**

Administrative Law Judge M. Amanda Behe, State of California, Office of Administrative Hearings, in Soquel, California, on April 24, 2008.

Sarah Levitan Kaatz, Attorney at Law, Lozano Smith, Attorneys at Law, represented the Santa Cruz City Schools District.

Respondent Constance "Connie" Bertuca represented herself. Respondents Erin Asamoto, Chris Carey-Stronck, Luke Dahlen, Marissa Ferejohn-Swett, Katharine Garkey, Michelle Hubbard, Bob Hudson, Matthew Mohulski, Diana Nieves, Damian Pawlowski, Karen Quinn, Lisa Storer, Miguel Valladolid, Holly Woolbright, Anne Zachan, and Portia Zavitsanos withdrew their Notices of Defense and Requests for Hearing.

## FACTUAL FINDINGS

1. Alan Pagano is the Superintendent of the Santa Cruz City Schools District.
2. Respondent Constance "Connie" Bertuca is a certificated employee of the District.
3. On August 26, 2005, State Superintendent of Public Instruction Jack O'Connell wrote to the state's school districts regarding the settlement of *Williams, et al., vs. State of California, et al.*, a class action lawsuit concerning equal access to instructional materials and qualified teachers. The letter noted legislation enacted to implement the settlement, including statutory requirements that County Offices of Education annually audit school districts for misassignments, i.e., assignments of certificated staff to positions where they do not hold a proper authorization to teach. Superintendent O'Connell wrote that:

There is no numerical trigger and no percentage of students needing particular English learner services that determines a misassignment. If one or more of the students in the class needs English learner services or requires instruction in a subject area, the teacher providing the English learner services must hold an appropriate English learner credential or authorization.

Since 2005 the District has worked to comply with the demands of the *Williams* settlement and related legislation through a Plan To Remedy<sup>1</sup> and efforts, described more fully hereinbelow, to avoid misassignments by bringing teachers into compliance with the CLAD requirements. The District has experienced declining enrollment while the number of English Learners has grown significantly over the past few years, particularly at Harbor High School.

4. Tanya Krause, Assistant Superintendent for Human Resources, described that in January 2008 the District knew about the anticipated reduction in funding proposed in the Governor's budget and that reductions in teaching staff would be required. At that time the content areas to be reduced, and the number of full-time equivalent (FTE) positions involved, were not known. Ms. Krause surveyed school principals and special projects and confirmed the percentage of English Learners. The current student demographics indicate that at least one English Learner would be present in every secondary class in 2008-2009, with a higher percentage at Harbor High School.

Typically in January the District accelerates planning for the upcoming school year, including establishing the master schedule from which students sign up for classes. In the first quarter of the calendar year there is no way for the District to know the number of

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<sup>1</sup> The Plan To Remedy is a compliance program through the State Department of Education which, among other matters, allows individuals working to earn a CLAD or BCLAD certificate to teach English Learners.

signups for each class or in which classrooms students will end up in the fall of 2008. Ms. Krause persuasively testified that because it is not yet known what the composition of classes will be, it is impossible to say that there will be classes without at least one English Learner in the 2008-2009 school year. Nonetheless, based on the graduation required sections and current enrollment and demographics, Human Resources identified potential reductions in teaching staff which would accommodate the anticipated budget reductions.

5. On February 27, 2008, Superintendent Pagano and Ms. Krause recommended to the Governing Board, in accordance with Education Code sections 44949 and 44955, that 14.77 FTE certificated employees be notified that their services would not be required for the ensuing school year. The recommendation was prompted by declining enrollment, financial difficulties, and data regarding the number of graduation required sections and student demographics.

6. On February 27, 2008, the Board adopted Resolution No. 18-07-08, captioned "RESOLUTION OF INTENTION TO DISMISS CERTIFICATED EMPLOYEES," which stated that it had determined that it was necessary to reduce or discontinue particular kinds of service. Specifically, the Board Resolution provided for the reduction or elimination of the following particular kinds of services:

Particular Kind of Service	Full-Time Equivalent Position
English	4.4
Multiple Subjects	3.0
Social Science	2.4
Home School	1.0
Math	.77
Spanish	.77
French	.57
Independent Studies	.40
TAM Program	.33
Health	.20
Music	.20
Applied Arts / Wood Shop	.20
Continuation	.20
Biological Science	.33
<b>TOTAL</b>	<b>14.77 FTE</b>

The Board also directed Superintendent Pagano or his designee to send appropriate notices to all affected employees.

7. On February 27, 2008, the Board adopted Resolution No. 198-07-08, captioned "DETERMINATION OF DISTRICT NEEDS FOR 2008-2009," pursuant to Education Code section 44955, subdivision (d), which authorized the Board to establish needs in order to deviate from seniority in termination of employees. Specifically, the Board Resolution identified "hard to fill" subject areas as follows:

Special Education, K-12  
Physical Sciences  
Experienced Teachers in Dual Language Immersion  
Special Credentials – Bilingual (BCLAD) or equivalent  
(BLCOC), CLAD at the secondary level

8. On February 27, 2008, the Board adopted Resolution No. 20-07-08, captioned "DETERMINATION OF TIE-BREAKING CRITERIA FOR 2008-2009," establishing criteria for determining seniority for those employees with the same first date of paid service. The Board found the criteria were necessary to meet the needs of the District and its students, and established the following priority order:

#### CRITERION #1 – SPECIAL CREDENTIALS

- A. Cross-cultural Language and Academic Development (CLAD)
- B. AB 2913 Certificate
- C. SB 1969 Certificate
- D. SB 395 Certificate
- E. BLCOC Certificate

#### CRITERION #2 – BREADTH OF CREDENTIALING

Holds multiple preliminary and/or clear credentials in core, graduation requirement subject areas.

#### CRITERION #3 – ADDITIONAL YEARS OF SERVICE

Years of temporary, probationary or permanent certificated service in the District prior to seniority date in District.

The resolution further provided that any ties remaining after application of the criteria would be resolved by lottery.

9. Ms. Krause was responsible for implementing the Board's resolutions. She considered the anticipated enrollment for 2008-2009, expected budget reductions, the number of graduation required sections, the number of subject areas to be reduced, student demographics and the seniority list.

The District maintains a Seniority List which identifies employees' seniority dates (first date of paid probationary service), current assignments and site, credentials, and certificates. District staff took steps to ensure the accuracy of the data on the seniority list, and received the assistance of Mr. Kirschen in that effort. At hearing the Seniority List was

corrected to reflect that Margaret Kline has a CLAD certificate. The District had that information before March 15, 2008.

Respondent Bertuca is correctly identified on the Seniority List as occupying 0.60 FTE, with a seniority date of August 25, 2003, and tenure in 0.60 position. She is currently assigned to Harbor High School where she teaches Intensive English and English Language Development. She does not hold a CLAD or a BCLAD certificate.

Using the Seniority List, District staff began implementation of the reduction of particular kinds of services approved by the Board, and identified the incumbent employees in the areas to be reduced. Generally, a senior certificated employee whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. District staff determined if the affected incumbents had rights to bump junior employees, and applied the tie-breaking criteria adopted by Board in certain content areas, none of which affected respondent Bertuca.

Known resignations and retirements were taken into account before establishing the number of employees to receive notice to produce the reduction in particular kinds of services.

Ultimately five certificated employees received layoff notices related to the 4.4 FTE reduction in English. They were respondents Bertuca (0.6 FTE), Anne Zachan (0.8 FTE), Holly Woolbright (0.8 FTE), Erin Asamoto (1.0 FTE) and Lisa Storer (0.6 FTE).

10. On March 13, 2003, by depositing in the United States registered mail, postage prepaid and addressed to the employee's last known address, the District served affected employees with written notice that it had been recommended that notice be given pursuant to Education Code sections 44949 and 44955 that their services would not be required for the ensuing school year and setting forth the reasons for the recommendation. Included with the notice each employee received was a copy of Resolution 18-07-08 and copies of sections of the Education Code.

Each notice further advised the employee of his/her right to a hearing, including that such a request must be delivered in writing to the person sending the notice of termination on or before March 26, 2008, and that the failure to request a hearing would constitute the waiver of the right to a hearing.

11. On behalf of all respondents Barry Kirschen, President of the Greater Santa Cruz Federation of Teachers, filed a timely request for hearing.

12. On April 4, 2008, pursuant to the agreement of the District and the Greater Santa Cruz Federation of Teachers, Superintendent Pagano filed a single Accusation packet on Mr. Kirschen on behalf of respondents he represented. The packet consisted of the Accusation, copies of sections of the Education Code, a blank Notice of Defense form, and

Notice of Hearing. The Accusations noted that a Notice of Defense must be filed within five days. Superintendent Pagano's letter noted that the titles of the documents are required by law, and the District's regret that California's budget crisis has forced the layoffs.

13. By two separate filings on March 21, 2008, Mr. Kirschen filed Notices of Defense on behalf of respondents, including respondent Bertuca.

14. Ms. Krause described the efforts Human Resources made in the last year and a half, working with the Board and the Greater Santa Cruz Federation of Teachers, to bring teachers into compliance with the CLAD requirements. Teachers were provided three different pathways to obtain a CLAD certificate, and full reimbursement for the training or classes they obtained. The District hoped that with its concerted effort and financial assistance teachers would obtain the required credentials.

When the District began its intensive effort there were approximately 70 non-special education teachers who did not have a CLAD certificate. As of the date layoff notices were issued all but three of those teachers had obtained a CLAD certificate. Of those, two have completed two-thirds of the CLAD requirements and will have their CLAD certificates by the fall of 2008; they teach in areas not affected by the reduction in particular kinds of service. The other employee who has not obtained a CLAD certificate is respondent Bertuca.

15. Although she does not hold a CLAD or a BCLAD certificate, respondent Bertuca has been allowed to teach English Language Development in the current school year because until June 2008 school districts have been allowed to work on a Plan To Remedy. That option is not available for the 2008-2009 school year because the Commission on Teacher Credentialing has determined that, given the availability of other routes to earn an authorization to serve English Learners, it will no longer accept enrollment in a local Plan To Remedy as an appropriate alternative to holding a CLAD or BCLAD

Respondent Bertuca testified that: "The Board's last minute resolution did not give me sufficient time to get my CLAD certificate" and that she was denied due process. The evidence did not support her assertion. In fact, in response to statutory changes and the Williams case the District's Human Resources staff engaged in extensive communications with the Greater Santa Cruz Federation of Teachers and with respondent Bertuca individually regarding the requirement for a CLAD certificate. The District's communications provided respondent Bertuca with more than enough time to secure a CLAD or equivalent authorization, as demonstrated by the letters and e-mails identified below.

16. On March 1, 2007, District Program Coordinator Leslie Barrow wrote to all District teachers, including respondent Bertuca, who did not have a CLAD, BCLAD or CLAD equivalent stating that compliance was an issue of immediate importance. Her letter noted the requirement of No Child Left Behind that:

*all* teachers with English learners in their classes must have the appropriate English Learner Authorization. Unlike NCLB

which only identifies ‘core subjects’ as being in need of compliance, the Williams decision does not exempt any subjects from EL compliance.

Ms. Barrow’s letter further noted that “Any class that has an English learner in it, *requires* a teacher that holds an appropriate EL authorization.” At that time teachers could obtain authorization by taking the CTEL examination or complete the approximately 45-hour AB 2913 training. Ms. Barrow stated the District’s intent to help teachers to obtain the required authorization, and various avenues the District was exploring for in-house training and a five-to-seven day training in the summer. She wrote that the District would pay for teachers’ time during the summer session and/or for a substitute during the school year.

Ms. Barrow’s letter included a survey on which teachers were to identify their preferences for training from among the choices of summer CLAD training, fall CLAD training, Weekend training, and Other [a blank to be completed by the teacher]. She also asked that the teachers sign an enclosed letter signifying their understanding and agreement to become CLAD certified for the 2007-2008 school year.

17. On March 19, 2007, Ms. Barrow sent a follow-up letter to all District teachers, including respondent Bertuca, lacking a CLAD, BCLAD or CLAD equivalent who had not returned the survey form and acknowledgement letter. She reiterated the information in her earlier letter, including that “English Learner Authorization is required for all teachers who have any English Learners in their classroom, regardless of subject matter.” She requested that each teacher return the survey form and acknowledgement letter as soon as possible, and offered additional copies if needed.

Respondent Bertuca first testified that she did not receive Ms. Barrow’s March 19, 2007, follow-up letter. She then testified that she may have received it but never read it. Her testimony that she never received the letter was not credible. Moreover, the letter was a reiteration of information provided earlier by Ms. Barrow to all District teachers, including respondent Bertuca, lacking a CLAD, BCLAD or CLAD equivalent. The information that English Learner authorization was required for all teachers who have any English Learners in their classroom, regardless of subject matter, was included in later letters and e-mails as well.

18. On March 21, 2007, respondent Bertuca wrote to Ms. Barrow that she had taken Italian 1 and 2 at Cabrillo College, had taken classes towards her CLAD at UCSC<sup>2</sup>, and had participated “in the training for the CLAD test at the COE.” She included her UCSC transcript and test results from Cabrillo College. Respondent Bertuca also wrote:

As you can see, my attempts to get the certification sort of mirror the information about the certificate; you need it, you don’t . . . Anyhow, I’m hoping you can take these pieces and put together the equivalent of a CLAD certificate.

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<sup>2</sup> Respondent Bertuca attached a copy of her transcript with the classes highlighted. The nature and number of classes was not identified at hearing.

Contrary to the assertion in her letter, no credible evidence established that respondent Bertuca was ever advised that she did not need a CLAD certificate. Her enrollment in the classes at UCSC and Cabrillo College established that she was aware of the CLAD requirements even if she did not follow through and complete the certification process.

As of the date of her letter respondent Bertuca had been repeatedly and clearly advised of the requirement for, and specific pathways to obtain, a CLAD certificate. None of the available pathways included sending Ms. Barrow a transcript and test results with a letter telling Ms. Barrow to assemble that information into the equivalent of a CLAD certificate. Moreover, as the earlier mailings from the District clearly stated, a CLAD certificate is issued by the state Commission on Teacher Credentialing rather than the District's Human Resources department.

19. On March 28, 2007, Ms. Barrow wrote to respondent Bertuca that she did not have the "authority to decide whether or not what you have completed thus far will satisfy the CCTC (California Commission on Teacher Credentialing)." Ms. Barrow noted that from her research respondent's CLAD test scores were too old to apply any longer, because scores are only good for five years.

Ms. Barrow returned respondent Bertuca's transcripts and other documentation with the direction that she send that documentation to the CCTC for evaluation of whether the transcripts could be considered for CLAD certification. Ms. Barrow included the website address of the CCTC, which she described as a source of a great deal of helpful information. Ms. Barrow also noted that she would be sending information regarding training options to secure a CLAD within the next week or so.

20. On April 3, 2007, Ms. Barrow wrote to all District teachers, including respondent Bertuca, lacking a CLAD, BCLAD or CLAD equivalent. She reiterated the information in her earlier letters, including that "the *Williams* lawsuit decision required that all students be taught by highly qualified teachers which means that, in addition to being NCLB compliant, all teachers with English Learners in their classes must have the appropriate English Learner authorization. Any class that has an English learner in it, requires a teacher that holds an appropriate EL authorization."

Ms. Barrow's letter described that the District had been researching ways for the teachers to achieve CLAD compliance, and enclosed information including the options available to each teacher and the costs the District would reimburse. She wrote that teachers were to give the options immediate consideration because some had deadline dates, and to commit to a particular pathway, with notification to Human Resources, not later than April 30, 2007.

The pathways to CLAD compliance described in Ms. Barrow's April 3, 2007, letter were:

- a) Passing all three sections of the California Teachers of English Learners (CTEL) exam, and submitting test scores with the appropriate application and fee to the Commission on Teacher Credentialing. The District would reimburse the test expenses and up to two program management fees to register to take the tests. The next test date was June 23, 2007, and the regular registration deadline was May 18, 2007. Late registration was permitted for an additional fee that the District would not reimburse. The District would also reimburse up to \$675 for the preparation classes available through the County Office of Education, which were \$165, \$300, and \$165 for tests 1, 2, 3, respectively. Ms. Barrow's letter also noted the web address for an online study guide.
- b) Independent study available through the University of San Diego consisting of four three-unit courses for which the teacher would view DVDs, read appropriate pages in the textbook (which covered the four courses), and complete written assignments. The teacher was required to submit transcripts with the appropriate application and fee to the Commission on Teacher Credentialing. The District would reimburse the \$1,510 cost of the four courses if completed by the January 31, 2008 deadline established by the legislature. Ms. Barrow's letter noted that other approved CLAD coursework available from universities could be found on the CTC website.
- c) AB 2913 staff development consisting of completing 45 hours of approved training (available June 19-27, 2007 or August 2-10, 2007) and passing a final examination. The District would reimburse the training cost of \$675. The District would also pay the costs of substitutes if training were taken during the school year, or a stipend of \$665 if it were taken during the summer.

Ms. Barrow's letter also stated that the teachers were responsible for submitting verification of training and passing exams, with the appropriate application and fee, to the Commission on Teacher Credentialing. The District would reimburse the \$55 filing fee. Her letter included a Notice of Intent form on which the teacher was to check the pathway he or she would be using to obtain a CLAD certificate; the completed form was to be returned to Human Resources by April 30, 2007.

21. Respondent Bertuca did not complete and return the Notice of Intent form or otherwise respond to Ms. Barrow's April 3, 2007, letter regarding CLAD compliance.

22. On May 7, 2007, Ms. Barrow again wrote to all District teachers, including respondent Bertuca, who had failed to complete and return the Notice of Intent form sent with her April 3, 2007, letter to teachers lacking a CLAD, BCLAD or CLAD equivalent. She stated that the District needed each teacher's compliance plan as soon as possible to

ensure funding for reimbursements of the necessary tests and training. She again noted the necessity for ensuring compliance with state requirements.

23. Respondent Bertuca did not complete and return the Notice of Intent form or otherwise respond to Ms. Barrow's May 7, 2007, letter regarding CLAD compliance.

24. On June 1, 2007, Ms. Barrow again wrote to all District teachers, including respondent Bertuca, lacking a CLAD, BCLAD or CLAD equivalent. On the letter to each teacher she noted the information the District had received from that person's Notice of Intent regarding the route they had chosen to obtain an English Learner authorization. Respondent had not completed the form. Ms. Barrow reminded the teachers that the various pathways to compliance outlined in her April 3, 2007, letter had deadlines for registration and completion. She noted also that she would be available over the summer to process reimbursements and answer questions.

25. On July 23, 2007, Ms. Barrow wrote to respondent Bertuca and referenced the March 28, 2007, letter<sup>3</sup> in which she advised respondent Bertuca to send her documentation to the Commission on Teacher Credentialing for evaluation with regard to meeting the CLAD requirement. Respondent Bertuca had not advised the District of any response she had received, or if she had forwarded the documentation to the Commission.

To ensure that respondent Bertuca had as many options available as possible if her documentation was rejected, Ms. Barrow encouraged her to contact the Commission. Ms. Barrow reiterated that the AB 2913 training being offered through the County Office of Education had a registration deadline of August 31, 2007, and noted that it was filling up quickly. She also wrote that the Independent Study option, which many teachers had chosen, would cease to be an option after January 31, 2008.

26. On August 5, 2007, respondent Bertuca e-mailed Ms. Barrow that she sent "all my stuff" to the Commission the prior month and was "waiting to hear." She also wrote that:

To be quite candid, I'm only probably [sic] going to work a couple more years. I'm 57, and my husband retired from teaching 2 years ago. What is your sense of the bottom line if I don't get my certification? I'm not sure if my time and the district's resources balance out against a couple more years. I love my part-time job, and I love working with English language learners. I guess that, for me, is my bottom line!

27. On August 6, 2007, Ms. Barrow replied by e-mail to respondent Bertuca stating the following:

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<sup>3</sup> Factual Finding 19, above.

The district has not formed a formal party line on what will happen with teachers who don't receive their English Learner authorization, so it is hard to say. It is considered, by both the County Office of Education and the Commission on Teacher Credentialing, to be a mis-assignment to have a teacher without this authorization teaching in a class with English Learners. Therefore, we are focusing our attention on getting everyone compliant. I would encourage you to seek certification, especially where the district has reserved funds to pay for it. Perhaps you could consider the Fall AB 2913 training through the COE? Or, the independent study program through the University of San Diego, seems to go fairly quickly for any of our teachers and offers the most flexibility. Please feel free to call me if you'd like to discuss your options further.

28. On September 13, 2007, Ms. Barrow again wrote to all District teachers, including respondent Bertuca, who had not obtained a CLAD, BCLAD or CLAD equivalent. She included for each teacher a form annotated with the information the District had regarding his or her current progress in securing an English Learner authorization, and asked that the teachers provide updated information.

Ms. Barrow also reminded the teachers that the various pathways to compliance had deadlines for registration and completion, including that all independent study coursework had to be completed by January 31, 2008 and that the first AB 2913 class was the following day.

29. On October 1, 2007, Ms. Barrow again wrote to the remaining 14 District teachers, including respondent Bertuca, who had not obtained a CLAD, BCLAD or CLAD equivalent, with information regarding online registration for the December 8, 2007, CTEL test for authorization.

30. On November 14, 2007, Ms. Barrow wrote to respondent Bertuca and referenced her previous communications in which respondent was asked to provide information on her efforts to obtain authorization.<sup>4</sup> Ms. Barrow wrote that despite the memos sent to respondent Bertuca's attention no update on her status had been received. She requested that respondent Bertuca advise if she had made any progress regarding obtaining a CLAD. She wrote that: "Deadlines for reaching CLAD compliance are quickly approaching and we are committed to doing everything we can to helping our teachers reach this goal."

31. On November 19, 2007, respondent Bertuca replied to Ms. Barrow by e-mail at 3:13 p.m. The entirety of her e-mail was as follows:

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<sup>4</sup> See Factual Findings 20, 21, 22, 23, 24, and 25, above.

Hi Leslie,

And that's about where I am. The reply is that the CTC can't evaluate all my stuff without my actually applying for the CLAD certificate. So I'm still pondering. What is the deadline for compliance, and what exactly does that mean again?

Thanks,  
Connie

32. Ms. Barrow replied by e-mail 26 minutes later on November 19, 2007, and wrote to respondent Bertuca that:

We have asked all of our teachers to meet the CLAD requirement by the end of this school year. This means that the teachers have received their CLAD or equivalent (through testing, coursework or training). It is probably easiest to apply for the credential by doing it through the COE, and the district will reimburse you for the \$55 application fee.

Given your ELD assignment, it is very important that you comply with this English Learner authorization requirement.

Although she continued to teach English Learners respondent Bertuca did not apply for the credential through the COE, or take any other steps to secure a CLAD or equivalent authorization necessary.

33. Approximately two months later, at 1:22 p.m. on January 14, 2008, respondent Bertuca e-mailed Ms. Barrow. The entirety of her e-mail was as follows:

I'm getting ready to submit my crazy quilt of stuff to the CTC. In looking over all the info from you, it appears I send [*sic*] you all the stuff and you submit it, along with the completed application?

One more thing: I found my Emergency Permit. I'm going to pony you [*sic*] a copy, because I think I can extend its use for four more years. The clause in question is P13. That would be awesome.

Thanks,  
Connie Bertuca

Respondent Bertuca's feigned ignorance of the procedure, as expressed in her e-mail, was contradicted by her November 19, 2007, e-mail in which she demonstrated knowledge

that the Commission on Teacher Credentialing could not evaluate her documentation unless she submitted an application for the CLAD certificate. Moreover, respondent Bertuca had been repeatedly informed that she would have to submit the application, with supporting documentation, to the Commission on Teacher Credentialing and that the District did not have that responsibility.

34. Ms. Barrow replied by e-mail 13 minutes later, at 1:35 p.m. on January 14, 2008, as follows:

I'm glad you are getting everything sent out. We actually can't send it out through our office, however, the COE may be able to help with the application process. Or, you can submit the application yourself. The COE would also be who you would want to contact regarding the Emergency Permit. I would recommend speaking to Sue Corso, though Susie Noess may also be able to help. Good luck!

Respondent Bertuca responded by e-mail 9 minutes later, at 1:44 p.m. on January 14, 2008, as follows:

Thanks Leslie – but maybe you know the answer to this. On the application, it asks for all college transcripts. Would that be for CLAD as well? Since I have a standard secondary credential, wouldn't it be understood that I've gone to college?????

And yes, I'll do this through the Sues.

35. Respondent Bertuca delayed another twelve days before sending her application for a CLAD certificate to the Commission on Teacher Credentialing. On Saturday, January 26, 2008, she e-mailed to Ms. Barrow the following:

I sent my CLAD stuff in today. Susie at COE advised against sending it, but I wrote a cover, and Gwen Heskett wrote me a very nice recommendation, so – you never know. However, when I revisited the CCTE [sic] website, and read everything again, I decided I'm not optimistic. So, my next question to you is – the next CTEL exams are in June. If I register, is that any kind of guarantee for keeping my job?

In short, respondent Bertuca delayed sending her application for a CLAD certificate to the Commission on Teacher Credentialing more than ten months after she was specifically informed by Human Resources<sup>5</sup> that any class with an English learner requires a teacher that

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<sup>5</sup> See Factual Finding 16, above.

holds an appropriate EL authorization, and compliance was an issue of immediate importance.

36. On January 28, 2008, Ms. Barrow replied by e-mail to respondent Bertuca. She wrote that:

I'm glad that you have taken some steps toward obtaining your authorization, though I agree, I am not optimistic that the CTC will grant it at this time.

As of today, the District has not determined a hard and fast policy as to what to do about teachers who do not have the appropriate English Learner Authorization. Fortunately, most of our teachers have complied with this requirement. However, your ELD assignment does cause particular concern.

I strongly encourage you to register for the June CTELS and perhaps look into some of the test prep classes that were being offered through the Santa Clara County Office of Education.

Most of our teachers who took the December CTEL performed quite well, though all took a slightly different path in terms of preparation.

I'm sorry I don't have a more specific answer for you at this time. As you can see, I am copying Tanya with this and will get more information to you as further determinations are made.

37. Later that day, at 3:40 p.m. on January 28, 2008, respondent Bertuca replied by e-mail that:

Thanks, Leslie. I'll wait a bit until I hear from you or I hear from Tanya to register. I can send you a copy of proof of registration, if that will serve as a place holder. Do I need to enroll in a test prep something [sic]? I took the samples online, and I did fine.

In her testimony at hearing respondent Bertuca did not explain how she proposed to send a copy of proof of registration if she was going to "wait a bit" to register. She also did not explain why she chose to wait to register for the June 2008 CTEL test when she had been urged since March 2007 to obtain an authorization by testing or some other pathway.

38. Shortly thereafter, at 4:14 p.m. on January 28, 2008, Ms. Barrow wrote to respondent Bertuca by e-mail and stated the following:

You will not be able to teach ELD next year without your English Learner authorization. What other assignments you may be eligible for will need to be determined.

Again, I highly encourage you to go ahead and register. Whether or not you take a test prep class is entirely up to you. It is not required, and given your experience, you may feel comfortable taking the test without one. Let me know if I can help with any of this.

39. That evening at 6:13 p.m. on January 28, 2008, respondent Bertuca e-mailed Ms. Barrow that:

I guess what I'm asking is this: I was told by our administration<sup>6</sup> if I don't have CLAD, not only will I not be able to teach ELD, but if there are layoffs, I might not be rehired because someone with CLAD would need to be hired, even though I am 'highly qualified' (by NCLB standards) to teach other English classes. This was confusing because everyone BUT me can teach ELD, and there were 2 people after I was [sic]. If the district, to be compliant, requires me to have my certificate in hand before the end of this year, I may not be rehired. If [sic] proof of registration is [sic] enough to demonstrate, well, good faith? Intent? As good as a certificate? Then I'll register tomorrow! Does this make sense? Maybe this is more a question for Tanya – I'm glad you're forwarding these to her!

40. On January 30, 2008, Ms. Barrow e-mailed respondent Bertuca the following:

I apologize for the delay in replying to you, but I wanted to wait until I had the opportunity to confer with Tanya.

What your administration is telling you is essentially correct. Being Highly Qualified under NCLB is not the same as credential compliance under Williams (and all of the English teachers in our comprehensive high schools are Highly Qualified). The CLAD certificate, or it's [sic] equivalent, is required not only to teach ELD, but to teach any subject matter in which there is even one English Learner in the class. This is not a decision handed down by the district, but by the CDE and CTC. Given the make up of our district, that would be almost any class.

Should the district need to reduce FTE in English, then yes, your lack of a CLAD would leave you vulnerable to layoff. Proof of registration is not the same as passage of the three exams and issuance of a certificate.

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<sup>6</sup> Apparently respondent Bertuca's reference was to the principal or other administrator(s) at her school site.

Should you be laid off and subsequently obtain a CLAD or equivalent, that would be helpful if we are able to reinstate any FTE. Again, I encourage you to register for the exams. I hope I have been able to clarify this matter for you. Please call if I can help with anything.

41. On March 7, 2008, respondent Bertuca e-mailed the State Commission on Teacher Credentialing the following:

I have an application for CLAD pending, submitted Feb 20:  
[respondent's address and SSN]

I would like to add Emergency CLAD to the application. It could save my teaching job for next year!

Respondent Bertuca's e-mail contradicted her representation to the District that she submitted her application on January 26, 2008.<sup>7</sup>

42. On March 11, 2008, Teri Bixler, Information Services, Certification, Assignment and Waivers Division of the State Commission on Teacher Credentialing e-mailed respondent Bertuca with the following information:

You cannot add emergency CLAD to the application we have here. Why would you do that? Do you qualify for the CLAD with this application? Or, are you now sure you do not qualify and want to change it to an emergency CLAD? If this is the case, you will have to apply through your employer for the emergency CLAD with a new application and fee.

Respondent Bertuca forwarded Ms. Bixler's e-mail to Ms. Barrow on March 12, 2008, with her own e-mail which stated that:

It occurred to me that this might work. The COE would not support my application for either permanent or emergency, so I submitted the application and paid the \$55 on my own. Can you help me resubmit my application for an emergency credential?

43. On January 30, 2008, Ms. Barrow e-mailed respondent Bertuca as follows:

I am very sorry, but if the COE is unwilling to support your application for an emergency CLAD there is little I can do. The COE is your employing agency. I did speak with them and discovered why they couldn't accept your application. Emergency credentials can only be issued once, and can be

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<sup>7</sup> See Factual Finding 35, above.

renewed only if certain requirements are met. It seems that you already had an emergency CLAD back in 2003, but didn't take any of the necessary steps to continue it (coursework or examination). The emergency certificate expired in 2004.

I do regret that it has come down to this. We have worked very hard over the course of the last year, with multiple communications, to avoid just this type of situation. I continue to recommend that you register for the June CTEL exams.

Please do not hesitate to call or email if you have any questions or if I can be of any other type of assistance.

44. On March 27, 2008, Ms. Barrow e-mailed Mr. Kirschen stating that a CLAD is required of all teachers regardless of how many English learners are in the class. She appended to her e-mail an e-mail from the state Commission on Teacher Credentialing which stated that "if even one student has been determined to be an English learner, then the teacher must hold the appropriate English Learner authorization."

45. In April 2008 respondent Bertuca wrote the Board that in August 2007 she asked directly what the District's "bottom line" was "in terms of teacher's holding CLAD" and as late as January 28, 2008, was told that the District did not have a "bottom line." She claimed if anyone had told her that her job was in jeopardy she would have made sure she took the test to meet the January 31 deadline for securing a CLAD by taking tests. She also wrote that her school has 45 sections of non-English Learner classes she could teach until she obtained a CLAD certificate, and that other teachers could teach English Learners in the interim. She concluded her letter to the Board with the statement that: "What I disagree with soundly is the fact of my possible termination being kept from me until it was too late to act."

46. At hearing respondent Bertuca reiterated some of the same arguments that were stated in her April 2008 letter to the Board. Her contention that the District kept from the fact of her possible termination was not supported by the evidence. As the lengthy series of notifications quoted above demonstrates, respondent Bertuca and other District teachers were advised of the requirements for CLAD authorization and the impending deadlines for compliance. Respondent Bertuca must have known that her ELD classes contained English Learners, and she acknowledged that she understood from the *Williams* decision that the District could require all teachers to hold a CLAD authorization. Moreover, the District did not have information about the Governor's budget until January, and cannot be charged with not passing on information it did not possess.

Respondent Bertuca's claim that she would have taken the steps to obtain CLAD certification if the District had told her job was in jeopardy is not credible. She was repeatedly informed of the legal requirements, pathways to compliance with related deadlines, and financial and other support available. She chose to ignore that information, and actively misrepresented her status to the District by claiming that she had applied for a

CLAD certificate on January 26, 2008, when in fact she delayed until February 20, 2008.<sup>8</sup> Her August 5, 2007, e-mail<sup>9</sup> suggests that her true motivation was to engage in a pattern of delays, feigned ignorance and misunderstanding, and misrepresentations until she worked "a couple more years" and retired.

Respondent testified that she presently teaches honors freshman English, which has no English Learners. She questioned Ms. Krause why the District could not create several classes without a single English Learner so she could retain her position. Ms. Krause properly answered that the District cannot move students around based on race, ethnicity or language to accommodate a teacher's lack of CLAD qualification.

47. Respondent testified that the intent of the original layoff based on budget concerns "is separate from" layoffs based on CLAD certification, and the two issues became confused. Respondent's views were not supported by competent evidence. No competent evidence suggested that the Board was confused in its understanding of the settlement of the *Williams* lawsuit and statutory requirements that all teachers with English learners in their classes have a CLAD, BCLAD or CLAD equivalent.

48. Currently every District high school classroom has at least one English Learner, and is therefore required to have a teacher with a CLAD certificate. In consequence, Board Resolution No. 198-07-08, which authorized "skipping" to satisfy the District's special needs, and Resolution No. 20-07-08, the "tie-breaking criteria," were reasonable and necessary to meet the needs of the District and its students. Respondent Berta, who chose to not obtain a CLAD certificate or equivalent despite the repeated urgings of the District, was properly identified for layoff.

#### LEGAL CONCLUSIONS

1. Cause for the elimination of 14.77 full-time equivalent positions exists in accordance with Education Code sections 44949 and 44955. Except as to respondents Erin Asamoto, Chris Carey-Stronck, Luke Dahlen, Marissa Ferejohn-Swett, Katharine Garkey, Michelle Hubbard, Bob Hudson, Matthew Mohulski, Diana Nieves, Damian Pawlowski, Karen Quinn, Lisa Storer, Miguel Valladolid, Holly Woolbright, Anne Zachan, and Portia Zavitsanos, who withdrew their Notices of Defense and Requests for Hearing, cause further exists to give respondent Berta notice that her services will not be required for the 2008-2009 school year. This cause relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

2. None of the reductions will prevent the district from providing mandated services. The reductions are in the interest of the schools and their students.

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<sup>8</sup> See Factual Finding 41, above.

<sup>9</sup> See Factual Finding 26, above.

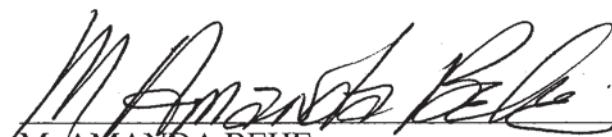
3. No employee with less seniority than respondent Bertuca is being retained to render a service which she is certificated and competent to provide.

4. Respondent Bertuca did not establish by a preponderance of evidence that she was denied due process or any right to which she is entitled by Education Code sections 44949 and 44955.

## ORDER

Notice may be given to respondent Constance Bertuca that her services will not be required for the 2008-2009 school year.

DATED: May 5, 2008



M. AMANDA BEHE  
Administrative Law Judge  
Office of Administrative Hearings