

BEFORE THE GOVERNING BOARD OF THE  
BASSETT UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the District's Reduction In  
Force of:

CERTIFICATED EMPLOYEES OF THE  
BASSETT UNIFIED SCHOOL DISTRICT,

Respondents.

OAH Case No. 2015030802

**PROPOSED DECISION**

Michael A. Scarlett, Administrative Law Judge (ALJ), Office of  
Administrative Hearings, heard this matter on April 16, 2015, in La Puente,  
California.

Kerrie McNally, Attorney at Law, Fagen Friedman & Fulfrost LLP,  
represented the Bassett Unified School District (District or BUSD).

Richard T. Schwab, Attorney at Law, Trygstad, Schwab & Trygstad,  
represented respondents Amy Arreola, Jorge Avila, Guadalupe Barba, Marta  
Castellanos, Vanessa Chavez, Teresa Fernandez, Maria Figueroa, Elena Gonzalez,  
Marlo Leon, Nicole Macias-Puente, Rafael Melara, Giuliana Morales, Jennifer Pena,  
Belinda Puente, Isabel Reyes, Carin Sakuma, Luz Torres, and Van Truong,  
certificated employees of the BUSD (referred to herein collectively as respondents).  
Respondent Israel Avila was not represented and did not appear at the proceeding.

Oral and documentary evidence was received and the matter was submitted for  
decision on April 16, 2015.

**FACTUAL FINDINGS**

1. On March 5, 2015, Dr. Alex J. Rojas, Superintendent of BUSD  
(Superintendent), made and filed the District's Statement of Reduction in Force in his  
official capacity as public officer.

2. Respondents are certificated employees of the District.

3. On March 5, 2015, the Governing Board of the District (Governing Board), upon the recommendation of the District's Superintendent, adopted Board Resolution Number 25-15 (Resolution No. 25-15), recommending to reduce or eliminate particular kinds of services (PKS) provided by District for the 2015-2016 school year. Pursuant to Education Code sections 44949 and 44955, the following particular kinds of services were recommended to be reduced or eliminated:

<u>Services</u>	<u>Number of Full-time Equivalent Postions (FTE)</u>
K-5 Elementary School Teaching	7.0 FTE
6-8 Middle School Teaching, "Core" Instructional Model	12.0 FTE
<b>Total Full-time Equivalent Reduction:</b>	<b>19.0 FTE</b>

4. Resolution No. 25-15 also adopted tie-breaking criteria and procedures to be used in determining the order of seniority of the District's certificated employees who have the same credential and who share the same first date of paid service in a probationary position. The validity or application of the tie-breaking process was not challenged at hearing and thus is not at issue in this case.

5. Pursuant to Resolution No. 25-15, the Superintendent was directed to send appropriate notices to all certificated employees whose services would be terminated by virtue of the Resolution. On March 6, 2015, the District timely served respondents a "Notice of Recommendation that Service Will be Terminated" informing them that the Superintendent had recommended not to re-employ them in the upcoming 2015-2015 school year, pursuant to Education Code sections 44949 and 44955. The District further informed each respondent of his or her right to request a hearing, among other things.

6. In response to the District's written notice, each respondent timely requested a hearing to determine if there is cause for not reemploying him or her for the ensuing 2015-2016 school year.

7. The District timely served a Statement of Reduction in Force, Statement to Respondent, a blank Notice of Participation in Reduction in Force Hearing Form, relevant sections of the Education Code and Government Code, and a Notice of Hearing (collectively, "RIF Packet"), upon each respondent. The RIF Packets were served and filed by the District's Superintendent in his official capacity.

8. Jurisdiction for this proceeding exists pursuant to Education Code

sections 44949 and 44955.

9. Respondent Israel Avila timely requested a hearing but failed to appear at the hearing. Respondent Israel Avila was not represented by Mr. Schwab because his last assignment was in an administrative position as a school principal, but he was reassigned to the classroom and issued a layoff notice by the District. Accordingly, respondent Israel Avila waived his right to a hearing in this case. (Ed. Code, § 44949, subd. (c)(1).)

#### *Notices of Non-reelection*

10. The District served Notices of Non-reelection on five certificated employees: Yasmine Baker, Barbara Granados, Marisela Renteria-Hooker, Maria Koreen, and Anna Cervantes. The Notices of Non-reelection were served on these employees prior to the Governing Board taking action on Resolution No. 25-15 on March 5, 2015. These certificated employees did not receive a RIF Packet or precautionary layoff notices from the District. Thus, they did not request a hearing, did not appear at hearing and were not respondents to this proceeding. At hearing, after reviewing the Notices of Non-reelection served on Renteria-Hooker and Cervantes, the parties stipulated that the notices were served on or before March 9, 2015, pursuant to Education Code section 44929.21, and thus were timely.

11. Renteria-Hooker and Cervantes were listed on the District's seniority list as temporary employees when they should have been designated as probationary employees. Respondents' counsel alerted the District to the error on the seniority list after the March 15, 2015, layoff notices had been served on the respondents. The District does not dispute that Renteria-Hooker and Cervantes should have been designated as probationary employees on the District's seniority list. Dr. Julio Fonseca, the Associate Superintendent for BUSD, testified that the District hired Renteria-Hooker and Cervantes as long-term substitute teachers, but they did not sign temporary employee contracts. He testified that even though they were listed as temporary employees on the seniority list, the District treated them as probationary employees. Subsequently, the District corrected the seniority lists in April 2015 to show Renteria-Hooker and Cervantes as probationary employees, with Renteria-Hooker having a seniority date of October 18, 2013, and Cervantes having a seniority date of January 13, 2014.

12. Respondents argue that Renteria-Hooker and Cervantes should have been served with layoff notices based on their corrected status as probationary employees on the District's seniority lists. Respondents rely on *Cousins v. Weaverville Elementary School District* (1994) 24 Cal.App.4th 1846, to assert that Renteria-Hooker and Cervantes are entitled to a layoff notice and a RIF Packet from the District. Respondents' argument is not persuasive.

13. The District has authority to non-reelect probationary teachers for any non-discriminatory reason. (*Summerfield v. Windsor Unified School District* (2002) 95 Cal.App.4th 1026; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87; *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App.3d 805.) However, a school district may not non-reelect probationary teachers exclusively for the purpose of reducing staff for economic reasons; such action must be taken in accordance with the layoff statutes. (*Cousins v. Weaverville Elementary School District* (1994) 24 Cal.App.4th 1846; *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 917, fn. 4.) In *Cousins v. Weaverville Elementary School District*, *supra*, the purpose of the non-reelection notices was to reduce staff due to financial circumstances and to avoid the time and expense of a layoff hearing.

14. Respondents' argument must fail because first, Renteria-Hooker and Cervantes were not served with a RIF Packet or a precautionary layoff notice. Consequently, they did not request a hearing and did not appear in this proceeding. Thus, there exists no jurisdiction to address any issue regarding these certificated employees. Second, even if there was jurisdiction, respondents failed to show that the District non-reelected Renteria-Hooker and Cervantes exclusively to reduce staff for economic reasons. Dr. Fonseca testified that the District treated Renteria-Hooker and Cervantes as probationary employees, even though they were incorrectly designated as temporary employees on the seniority list. Thus, the District elected to send them Notices of Non-reelection, notifying them that their services would not be required for the 2015-2016 school year. The District terminated their employment pursuant to Education Code section 44929.21, subdivision (b).

15. After the Notices of Non-reelection were served on Renteria-Hooker and Cervantes, the District recommended to the Governing Board that particular kinds of services were required to be discontinued and the Board adopted Resolution No. 25-15 on March 5, 2015. Thus, unlike in *Cousins v. Weaverville*, the District did not try to avoid the time and expense of a layoff proceeding by non-reelecting Renteria-Hooker and Cervantes. The District simply erred in designating the two employees as temporary employees on the seniority list, but treated them as probationary employees and non-reelected them as opposed to issuing layoff notices. Finally, as a practical matter, Renteria-Hooker and Cervantes's exclusion from this layoff do not negatively affect any of the respondents in this proceeding. The District terminated the two employees. Consequently, respondents cannot claim that either Renteria-Hooker or Cervantes is performing a service that a senior certificated employee is credentialed and competent to render.

#### *Reduce/Discontinue a Particular Kind of Service*

16. The services identified in Resolution No. 25-15, Factual Finding 3, are particular kinds of services that may be reduced or discontinued within the meaning of section 44955. Dr. Fonseca testified that the Governing Board reduced or discontinued

the services because the District is experiencing declining enrollment and intends to convert Torch Middle School (Torch) from a “Core” instruction model in grades six through eight, to a Departmentalized model in seventh and eighth grade for the 2015-2016 school year. Dr. Fonseca testified that 87 to 90 percent of the District’s budget cost are allocated to certificated employee staff. The District has approximately 4,000 students attending seven schools and employs approximately 210 certificated employees. Dr. Fonseca testified that the District’s declining enrollment over the last four or five school years was a factor in its decision to reduce or discontinue services. He testified that after a review of all of the District’s schools and the curriculum and staffing projections for each school, it was determined that the District was overstaffed with certificated employees and that a reduction in particular kinds of services would be required for the 2015-2016 school year.

17. The District also determined that the “Core” instruction model currently in use at Torch would be converted to the Departmentalized model for the 2015-2016 school year. Currently Torch uses teachers with multiple subject credentials to teach two or more subjects to the same group of students in the classroom in grades six through eight. The District intends to convert the seventh and eighth grades at Torch to a Departmentalized model of instruction, which requires teachers with single subject teaching credentials to teach specific areas of instruction to Torch’s older students in the seventh and eighth grades. Students would change class periods and instructors for multiple classes teaching single subject matters. The District intends to continue using the Core instruction model in the sixth grade for the 2015-2016 school year. Because of the reorganization at Torch, the District determined that it must reduce the number of teachers with multiple subject teaching credentials who can only teach the core curriculum at Torch.

18. Respondents argued that the District’s stated reason for reduction in services, i.e., converting Torch from the Core instruction model to the Departmentalized model of instruction and declining enrollment, did not justify the proposed reductions in the particular kinds of services. This assertion is not persuasive.

19. The decision to reduce or discontinue a particular kind of service is a matter reserved to the District’s discretion. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was so unreasonable and arbitrary as to indicate an abuse of discretion. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.) As long as there is a change in the method of teaching a subject, a particular kind of service provided in excess of any statutorily mandated minimum can be reduced or eliminated pursuant to section 44955. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.) The Governing Board’s decision to reduce the particular kinds of services in Factual Finding 3 is neither arbitrary nor capricious but is rather a proper exercise of the Governing Board’s discretion. The reduction or discontinuation of

particular kinds of services related to the welfare of BUSD and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of BUSD, as determined by the Governing Board.

*TOSA Position Not Included as PKS in the Resolution*

20. Respondent Giuliana Morales argues that she should not be laid off because the District failed to include her position as Teacher On Special Assignment – Instructional Coach (TOSA-IC) as a particular kind of service in Resolution No. 25-15. Respondent Morales has a seniority date of November 4, 2008, and has a Professional Clear Multiple Subject teaching credential and English Language (EL) and Specially Designed Academic Instruction in English (SDAIE) authorizations. Her Bilingual Crosscultural Language and Academic Development (BCLAD) authorization is pending. The District issued a layoff notice to respondent Morales as part of the PKS for the 6-8 Middle School Teaching, “Core” Instruction Model 12 FTE positions.

21. In May 2014, respondent Morales was assigned to the TOSA-IC position at Torch for the 2014-2015 school year. Prior to the 2014-2015 school year, from 2008 through the 2013-2014 school year, respondent Morales was assigned as a middle school Core instruction teacher at Torch. Respondent Morales testified that she interviewed for the TOSA-IC position on two occasions and that the position requires specific training that she obtained during the 2014-2015 school year. The District published a job description for the TOSA-IC position that was revised on March 18, 2014. The job description specified that under the direction of the Executive Director, for Curriculum and Instructional Services, the TOSA instructional coach would assist in the effective implementation of the new Common Core State Standards. The role of the instructional coach is to work with classroom teachers through supplemental support, staff development, on-site coaching to enhance Language Arts and Mathematics instruction, effective instructional strategies, and improve student achievement. The education, experience and required certification for the TOSA-IC position was specified as: minimum five years teaching experience, multiple subject teaching credential, including EL authorization or single subject credential with EL authorization, no child left behind compliance, and valid California driver’s license.

22. Dr. Fonseca testified that respondent Morales was placed in the TOSA-IC position as a special assignment outside of the classroom. The TOSA-IC assignment is not a class or course of instruction and is filled by the District based upon need each school year. The TOSA-IC position is not a particular kind of service, but is a special assignment that would be filled by any teacher with a multiple subject or single subject credential and EL authorization. The District need not specify TOSA-IC as a particular kind of service because the position is a special assignment that is not specific to any particular subject matter or credential, and it is

unclear whether District resources will be available for a TOSA-IC position for the 2015-2016 school year. The District reduced or discontinued certificated middle school teachers who taught in the Core instruction model using their multiple subject credential. Respondent Morales is a certificated teacher with a multiple subject credential teaching who has taught in a Torch Core instructional classroom, except for the one year she was placed on special assignment in the TOSA-IC position in the 2014-2015 school year. The District is not required designate the TOSA-IC position as a particular kind of service and it is not precluded from including respondent Morales in the 12 FTE positions being reduced or discontinued as a PKS for middle school teachers teaching Core instruction classes at Torch.

### *Competency Criteria for Alternative Education*

23. Resolution No. 25-15 determined that it is necessary to retain certificated employees competent and qualified to teach alternative education. In order for a certificated employee to displace a less senior certificated employee currently serving in an alternative education setting, including Nueva Vista High School, the certificated employee must have served the District for one in the last five school years in an alternative education setting.<sup>1</sup>

24. Nueva Vista High School is the alternative education high school in BUSD which services students with deficiencies in course credits and who have social and emotional issues. The school provides a smaller classroom setting and is design to give students a second opportunity to thrive academically. Nueva Vista High School is the only alternative education high school in the District. Jessica Estrada currently teaches at Nueva Vista High School and will have one year teaching at alternative high school at the end of the 2014-2015 school year. Estrada has a seniority date of October 3, 2013, is number 191 on the seniority list, and has a clear multiple subject teaching credential with an EL authorization.<sup>2</sup> Estrada teaches classes in California High School Exit Examination (CAHSEE) and English Language Development (ELD) to students at Nueva Vista High School. She is also trained in the Fuel Education Program, which is a credit recovery program designed to teach alternative education students at Nueva Vista High School mathematics, science, and English classes on-line. No respondent has training in the Fuel Education Program.

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<sup>1</sup> The Resolution also determined that it was necessary to retain certificated employees competent and qualified to be high school counselors. The validity or application of this competency criteria was not challenged at hearing and thus is not at issue in this case.

<sup>2</sup> The seniority list did not reflect that Jessica Estrada held an EL authorization, but evidence at hearing established that she possessed this authorization.

25. Respondent Luz Torres contends that she should be allowed to bump into the alternative education position held by Jessica Estrada at the Nueva Vista High School. Respondent Torres has a seniority date of October 16, 2008, is number 167 on the seniority list, and has a professional clear multiple subject credential with EL and SADIE authorizations, and a clear single subject credential in introductory English. She is currently assigned to an eighth grade Core instruction class at Torch. Respondent Torres has not taught in the alternative education setting for one year in the last five years, and has never taught at Nueva Vista High School. Respondent Torres also testified that she was qualified and competent to teach drama and introductory visual and performing arts (VAPA) and would accept either position if offered and available. However, there is no less senior certificated employee teaching drama or VAPA that respondent Torres is qualified and competent to displace.

26. Respondent Elena Gonzalez also contends that she should be allowed to bump into the alternative education position held by Jessica Estrada at the Nueva Vista High School. Respondent Gonzalez has a seniority date of October 29, 2010, is number 175 on the seniority list, and has a professional clear multiple subjects credential with EL and SADIE authorizations. She is currently assigned to a sixth grade Core instruction class at Torch. Respondent Gonzalez has not taught in the alternative education setting for one year in the last five years, and has never taught at Nueva Vista High School. Respondent Gonzalez has taught CAHSEE and ELD at Bassett High School. However, Bassett High School is a traditional comprehensive high school, and not an alternative education school.

27. Education Code section 44955, subdivision (b), in relevant part, provides:

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.

If an employee identified for layoff is “certificated and competent” to provide a service that a more junior employee has been retained to render, the senior employee may “bump” into the position occupied by the junior employee. (Ed. Code § 44955, subd. (b).)

28. The determination of whether an employee is “certificated and competent” is a “discretionary” decision within the “special competence” of a school district. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) It is within a school district’s discretion to establish competency standards, including “prior experience teaching middle school programs and students.” (*Id.* at p. 300.) In *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 567, the court upheld a competency standard that required that an employee must have rendered a service or



taught in a specific subject area for one year in the preceding 10 years to be considered “competent” to render that service for the purpose of “bumping” a junior employee. In *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, the court upheld a rule that defined competency as having at least one semester actual teaching experience in alternative education within the last five years.

29. Resolution No. 25-15 determination that it would be necessary to retain certificated employees competent and qualified to teach alternative education was within the discretion of the District. The District’s competency criterion is not too narrowly construed as it comports with the competency criteria upheld in *Duax v. Kern Community College Dist*, *supra*, 196 Cal.App.3d 555, 567, and *Bledsoe v. Biggs Unified School District*, *supra*, 170 Cal.App.4th 127. Thus, the District’s competency criterion requiring a more senior certificated employee to have served for at least one year in the last five school years in an alternative education setting in order to displace a less senior certificated employee currently teaching at Nueva Vista High School is a reasonable exercise of the Governing Board’s discretion. Respondents Torres and Gonzalez do not have the alternative education competency criteria required by Resolution 25-15. They have not taught in an alternative education setting for one year in the last five years, and therefore, are not certificated and competent to displace Jessica Estrada at the Nueva Vista High School.

30. The District considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

31. The District maintains a seniority list containing employees’ seniority dates, current assignments and locations, credentials, and authorizations. In anticipation of the PKS reduction, the District and staff updated the District’s seniority list. The District sent a notice containing the seniority list to all certificated employees to confirm the accuracy of their seniority dates and credentials on the seniority list and give them an opportunity to review and correct any errors or discrepancies contained in the seniority list. Based upon responses provided by the certificated employees, the District amended the seniority list.

32. The District used the seniority list to develop a proposed order of layoff of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held other credentials entitling them to displace or “bump” other employees. In determining who would be laid off for each kind of service reduced the District counted the number of reductions not covered by known vacancies, and determined who must be laid off in inverse order of seniority. The District continually updates to the seniority list based upon new information received from the certificated employees. The seniority list was last amended and updated in April 2015, to accurately reflect that Renteria-Hooker and Cervantes were probationary employees.

33. No certificated employee junior to any respondent was retained to render a service that any respondent is certificated and competent to render.

## LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. A District may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)

3. The services identified in Resolution No. 25-15 are particular kinds of services that can be reduced or discontinued under Education Code section 44955. The Governing Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, but was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of BUSD's schools and pupils within the meaning of Education Code section 44949.

4. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

5. Cause exists to give notice to respondents Amy Arreola, Israel Avila, Jorge Avila, Guadalupe Barba, Marta Castellanos, Vanessa Chavez, Teresa Fernandez, Maria Figueroa, Elena Gonzalez, Marlo Leon, Nicole Macias-Puente, Rafael Melara, Giuliana Morales, Jennifer Pena, Belinda Puente, Isabel Reyes, Carin Sakuma, Luz Torres, and Van Truong that their services will be reduced or will not be required for the 2015-2016 school year because of the reduction or elimination of particular kinds of services.

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## ORDER

Notice may be given to respondents Amy Arreola, Israel Avila, Jorge Avila, Guadalupe Barba, Marta Castellanos, Vanessa Chavez, Teresa Fernandez, Maria Figueroa, Elena Gonzalez, Marlo Leon, Nicole Macias-Puente, Rafael Melara, Giuliana Morales, Jennifer Pena, Belinda Puente, Isabel Reyes, Carin Sakuma, Luz Torres, and Van Truong that their services will be reduced or will not be required for the 2015-2016 school year, because of the reduction and discontinuance of the particular kinds of services.

Dated: May 6, 2015



MICHAEL A. SCARLETT  
Administrative Law Judge  
Office of Administrative Hearings