

**BEFORE THE
BOARD OF TRUSTEES OF
THE EL MONTE UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:
Certificated Employees of the El Monte
Union High School District,

OAH Case No. 2013020845

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 15, 2013, at El Monte, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Thomas M. Madruga and Christine K. Hsu, Olivarez Madruga, P.C. Those respondents who appeared were represented by Maria Keegan Myers, Rothner, Segall & Greenstone. Part way through the hearing, Ms. Myers ceased representing several respondents when a conflict arose. Those teachers were Abraham Meza, Patricia Harbit, George Ledesma, and Allison Leanos.

Oral and documentary evidence was received on the hearing date, but the record was held open so that the parties could submit briefs. Respondents' brief was timely received, and marked for identification as Exhibit G.¹ Footnote 1 to Respondents brief states that a revised Exhibit A—the list of respondents represented by Ms. Myers—was submitted with the brief, but none accompanied either the faxed version or the original later received by mail. That footnote states that Ms. Myers had not represented Respondents Ashley Diguilio, Madelyn Henley, Howard Kim, Aileen Lopez, Nguyen Nguyen and Maria Palmieri at any time.

Complainant's brief was timely received and was marked as Exhibit 32, for identification. Complainants also submitted another copy of the seniority list which remains appended to the Closing Brief and a transcript of the hearing. The transcript will be marked as Exhibit 33 for ease of reference. Citations to the transcript will be to the page number, followed by a colon, and the line numbers where the pertinent material may be found.

The matter was deemed submitted for decision on April 25, 2013.

The ALJ hereby makes his factual findings, legal conclusions, and order, as follows.

¹ The fax copy was timely received, but the original will be made part of the record.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant Nick Salerno filed and maintained the Accusation² in the above-captioned matter while acting in his official capacity as Superintendent of the El Monte Union High School District (District).

2. The following persons are certificated employees of the District and are deemed Respondents in this case: Ibis Aguilar, Lysandra Aguilar, Jorane Barton, Edgar Bedolla, Preetom Bhattacharya, Marilyn Martinez Bright, Rachel Brotnher, Sergio Cabrera, Sylvia Casillas, Cesar Castellanos, Raquel Chavarria, Jessical Chavez, Diane Chiappone, Irina Christadorescu, Jeniffer Daniela, Rodrigo Diaz Lopez, Ashley DiGuilio, Richard Douge, Christopher Dow, Brent Eldridge, Ewa Enrique, Ilbea Fedele, Jorge Felix, Michael Felix, Carolina Gonzalez, Patricia Harbit, Madelyn Henley, Karen Kennedy, Howard Kim, Ada Kudlacek, Jessica La Rosa, Allison Leanos, George Ledesma, Niyiri Manougian, Vanessa Marquez, Sally Matsubara, Abraham Meza, Timothy Mito, Miriam Morales-Garcia, Nguyen Nguenyn, Maria Palmieri, Wendy Pham, Keisa Pineda, Kristina Puckett, Juan Raygoza, Marilyn Rojas, Christine Sandoval, Aaron Sepulveda, Larry Sepulveda, Rachel Snow, Ruby Solorzano, James Taite, Luz Vieyra Valadez, Linda Vallejo, Jennifer White, David Williams, Louis Zamora, and Julija Zubac.

3. (A) On February 19, 2013, the Board of Trustees of the District (Board) adopted Resolution number 25-12/13, entitled “Reduction or Discontinuance of Particular Kinds of Services, Deviating From the Seniority Order and Establishment of Tiebreaking Criteria” (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2013-2014 school year. Specifically, the resolution requires the reductions of 62 “FTE”—Full Time Equivalent positions—by reducing various types of services. The decision to enact the Reduction Resolution was based on financial concerns as the District faces a budget shortfall; the District is grappling with a multi-million dollar deficit for the upcoming school year.

(B) The FTEs that the Board determined to reduce are described in the Reduction Resolution, as follows:

² The term “accusation” refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondents are not “accused” in the everyday sense of that word; they have done nothing wrong, and all appear to be dedicated professionals. It might be said that they are simply accused of not having enough seniority or other qualifications to retain their positions with the District in the face of a resolution to reduce positions.

English	15 FTE
Math	5 FTE
Physical Education	7 FTE
Social Science	9 FTE
Science	13 FTE
Spanish	4 FTE
Career Ed—Business	4 FTE
Counselors	5 FTE
Total FTE to be reduced:	62 FTE

4. (A) As part of the Reduction Resolution, the Board adopted “tie breaking” criteria for determining seniority in cases where two or more certificated employees share the same seniority date. The tie-breaking criteria, set forth on Exhibit B to the Reduction Resolution, were based solely on the needs of the District and its students.

(B) The Reduction Resolution also established “skip criteria” so that certain junior employee could be exempted from layoff. That criteria was set forth on Exhibit A to the Reduction Resolution. Only one of the six categories was disputed by the parties: number 2, which exempted “instructional coaches,” although the application of another, to some physical education teachers, was disputed as well.

5. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955.³

6. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District’s discretion because of the uncertainty regarding the District’s financial resources, which are insufficient at this time to otherwise avoid a multi-million dollar budget deficit in the next school year. That deficit could exceed five millions dollars.

7. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board. If the District can not meet its financial obligations due to the impending deficit, its welfare and that of its students will suffer.

8. (A) On March 14, 2012, each Respondent and other certificated teachers were given written notice that pursuant to sections 44949 and 44955, their services would not be required in the 2013-2014 school year (hereafter the preliminary notices). A total of 72 teachers received preliminary notices. Although ten of those persons did not request a hearing, the District served all persons who received a preliminary notice with an Accusation

³ All further statutory references are to the Education Code.

and other documents pertaining to the hearing process. Twenty-two of those persons did not request a hearing. However, at the hearing the District took the position that it would waive the failure to request a hearing or to file a notice of defense, treating all as Respondents, and allowing any person who had not requested a hearing or filed a notice of defense to participate in the hearing.

(B) Following the service of the Accusations and prior to the hearing, the District rescinded the preliminary notices and withdrew the Accusations against 14 teachers. Those persons are identified in Exhibit 18. To the extent that any of them were Respondents they are dismissed from this proceeding. Just prior to the hearing, on April 12, 2013, the District rescinded the preliminary notices that were served on Respondents Michael Felix, Jr., James Taite, and Patricia Harbit, and those respondents are deemed dismissed from this proceeding. Further, during the hearing, the District re-assessed the bumping rights of some Respondents, and rescinded the preliminary notices against Respondents Sylvia Casillas, Richard Douge, and Sally Matsubara, so that the matter is dismissed as to these three respondents. Finally, on April 19, 2013, the District rescinded the preliminary notice to George Ledesma, and he will be dismissed from the case, as he is authorized to bump into a position. (Ex. 32, p. 10, fn. 6.)

(C) All jurisdictional requirements have been met.

9. To implement the reduction in force, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and it set forth information relevant to the tie-breaking criteria, such as credential types and post-graduate degrees. However, the District had not completed the tie-breaking process to all employees as of the time of the hearing.

Respondents' Assertions

10. As noted in Factual Finding 8(B), during the hearing the District determined that three teachers could bump into positions held by other, more junior teachers. The District also asserted it properly skipped two permanent teachers who had been assigned as Instructional Coaches. Those two teachers were Mr. Allende Palma Saracho (Saracho) and Mr. Kent Besocke (Besocke). Two junior Physical Education (P.E) teachers were skipped so that they could be assigned to Adaptive P.E. classes.

11. Respondents asserted that the District should not be allowed to skip the two Instructional Coaches. Further, 10 of the Respondents asserted they were qualified to serve as instructional coaches, essentially arguing they should bump into those positions. One respondent who made that assertion, Ms. Snow, also asserted that her seniority date was incorrect by one week. Respondent Allison Leanos, asserted she should not be bumped from her position as Opportunity Teacher. Two other respondents asserted that they should be retained to teach Adaptive P.E. and therefore should have been skipped, rather than some other more junior P. E. teachers.

Respondent Snow's Seniority Date

12. Respondent Snow asserted that her seniority date should be August 22, 2011, and not August 29 of that year, as asserted by the District. In support of her position, she produced a copy of her employment contract for the 2011-2012 school year. That agreement was signed by Ms. Snow on August 17, 2011. It identifies her position as a Probationary I Teacher. It also identifies her contract year as being "from 8/22/11 effective to 6/15/2012." (Ex. B.)

13. In October 2012, Edward Zuniga, Assistant Superintendent for Personnel (Zuniga), wrote Respondent Snow (as he did the other certificated employees) regarding their seniority date, credentials, and other information. In the letter, it was stated that the District deemed her seniority date to be August 29, 2011, and they listed her as a "Prob 2." The letter noted that if Ms. Snow did not agree with the District's information, she could and should provide other information to Mr. Zuniga. Instead of then contesting the date, Snow indicated that the information was accurate; she did so on October 29, 2012.

14. Respondent Snow testified to that she was told by Mr. Zuniga's predecessor that she was required to report to work on August 22, 2011, to engage in training. She could not show that she was actually paid for that period of time.⁴ However, the District did not move the balance of Exhibit 31 into evidence, which might have impinged on the issue.

15. (A) A copy of the calendar for the 2011-2012 school year was received as part of Exhibit C, which was part of an excerpt from the agreement between the District and the teacher's association. It shows that in 2011-2012, August 22 through 25 were the first days for new teachers, with continuing teachers to come on August 29. This is consistent with Ms. Snow's contract. (Ex. C, p. 4.)

(B) Exhibit C also contains the calendar, or the key components of the calendar, for the years 2008-2009, 2009-2010, and 2012-2013. In every one of those years, the new teachers had a first day listed that was one week ahead of the continuing teachers. Hence, in 2008, new teachers had a first day of August 25, but continuing teachers that of September 29. In the current school year, new teachers had "First Days" of August 20-23, 2012, while continuing teachers had a first day of August 27, 2012. (Ex. C, p. 3.)

⁴ Snow was asked if she had reviewed her pay records, and her response was "at this time, no, I have not; but I do not believe I was paid for those days. I am not entirely certain at this point." (Ex. 33, 152:8-10.) The statement that she did not believe she had been paid could be an erroneous transcription, because on cross examination, Ms. Hsu stated: "You also thought you had been paid for those days?" Snow replied "that was my understanding." (Id., 158:7-9.) However, Ms. Snow could provide no more than her understanding or belief that she was paid for working on August 22, 2011.

The Skipping of Instructional Coaches

16. As noted in Factual Findings 4(B), the Board's Reduction Resolution called for the skipping of permanent teachers then assigned as Instructional Coaches. The pertinent skip criterion states as follows:

The El Monte Union High School District Board of Trustees will seek to deviate from the order of certificated layoff, pursuant to Education Code section 44955, because of special training, experience, or credential that others with more seniority do not possess:

[¶] . . . [¶]

2. Certificated personnel who are permanent and who are currently employed as instructional coaches and who will be assigned as an instructional coach for the 2013/2014 school year.

(Ex. 9, p. A-1.)

17. Three permanent teachers have been assigned to act as Instructional Coaches: Justin Lim, Besocke, and Saracho. Mr. Lim is so senior that he was not subject to layoff. That is not the case for Saracho and Besocke. While both are shown as permanent teachers. Besoke has been assigned a seniority date of December 7, 2011, while Saracho's seniority date is August 30, 2010.⁵ Two probationary teachers also assigned as Instructional Coaches are not protected by the skip criteria.

18. (A) The evidence shows that the Instructional Coaches provide support to the other teachers, assisting them in lesson planning to promote Sheltered Instruction Observation Protocol (SIOP). "Key roles [of Instructional Coaches] are that of a facilitator, demonstration teacher, coach, and mentor/co-teacher." (Ex. D, p. 1.) The Instructional Coaches are not assigned to teach students in class, but exist to help train teachers. The program that created the position of Instructional Coach has been in existence less than two years.

⁵ There are some questions about Mr. Besoke's seniority date. Mr. Zuniga testified that it was January 27, 2011, but the seniority list, Exhibit 7 at page 9, shows it to be December 7 of that year. Assuming Mr. Zuniga was mistaken, it is not clear how Besoke could be permanent and have a seniority date that is less than two years old as of the time of the hearing. It is fundamental that a teacher must have at least two years of probationary service to become permanent. If a fully credentialed teacher started as a probationary teacher, and achieved permanent status, their seniority date would have to precede that date when they become permanent by two years, unless, perhaps, there had been a break in service as a permanent teacher of less than 39 months. (§ 44931; *San Jose Teachers v. Allen* (1983) 144 Cal.App.3d 627.)

(B) According to Exhibit D, a job description for the position, the minimum qualifications for an Instructional Coach are “any combination of experience and training that would likely provide the required knowledge and skills is qualifying.” The document goes on to describe the types of experience that could be qualifying, such as mentoring other teachers, experience with staff development planning, five years of experience teaching in a content area to all student populations. Knowledge of SIOP, state and federal laws governing literacy, and Academic Intervention Models might also contribute.

(C) A job announcement to fill three vacancies for Instructional Coaches for the year 2012-2013 was received in evidence as Exhibit 28. On its front page, the District stated the following as “employment requirements:” a credential authorizing teaching in grades 9-12; EL authorization; NCLB Highly Qualified; previous instructional coaching experience “preferred,” and, knowledge of and ability to implement SIOP strategies “preferred.”

(D) At the page labeled “page 2” of Exhibit 28 (the cover page has no number), the job announcement states the following “minimum qualifications,” and they are substantially similar to the earlier job announcement, Exhibit D. Thus, Exhibit 28 states that the minimum qualifications are:

Any combination of experience and training that would likely provide the required knowledge and skills is qualifying. A typical way to obtain the required knowledge and skills would be:

Experience:

- At least five years of experience teaching in a content area to all student populations including ELL, GATE and special education.
- Experience mentoring teachers.
- Experience with staff development planning, facilitation and presentation.

Minimum Education:

- Any combination equivalent to: Bachelor’s degree in Content Area supplemented by graduate courses needed to meet credential requirements.

Licenses/Certificates

- Valid and appropriate California Teaching Credential that authorizes instruction at all secondary levels.
- EL authorization
- Valid California driver's license.

Knowledge of:

- Sheltered Instruction Observation Protocol [SIOP]
- Academic Intervention Models
- Professional Learning Communities' and/or Data Teams' philosophy and practice
- Practices, procedures and techniques involved in the development and implementation of differentiated staff development duties
- Principles, theories, standards, practices, strategies and procedures involved in enhancing student achievement and related literacy
- State and federal standards and requirements governing literacy
- Oral and written communication skills
- Applicable laws, codes, regulations, policies and procedures

(Ex. 28, pp. 2-3. Punctuation and emphasis as in original.)

(E) The document goes on to list nearly a page of things that a potential Instructional Coach should demonstrate they have the ability to do, such as to facilitate meetings, plan and organize work, work independently, and operate a computer and office equipment.

(F) It appears from the documentation that any number of experienced teachers employed by the District could qualify for the job. In part, this follows from the bare-bones job requirements of the position, which are three: any type of secondary school credential,⁶ EL authorization, and NCLB highly qualified status. The other things pointed to by the District as required qualifications are in fact labeled as preferences, and the statement of minimum qualifications reveals that a candidate for the job could assemble various background items of experience and education to show the ability to perform the job.

(G) As to the importance of the SIOP training which the current Instructional Coaches have had, Mr. Kyne acknowledged that going through the training listed on Exhibit 29, the SIOP training calendar for 2011-2012, was not a prerequisite to filling the position of Instructional Coach. (Ex. 33, 101:14-17.) And, as noted in Factual Finding 20, it appears that Mr. Besoke could not have had more than one-third of the available SIOP training, given his first paid date of service in December 2011.

19. Mr. Zuniga testified that the Instructional Coach program is not a course. (Ex. 33, 63:25-64:5.) He further testified that the Instructional Coaches do not teach the students, and the students could not register for a course with the Instructional Coaches. This analysis is reflected in the seniority list, which shows Saracho's "current teach[ing] assignment" as "non-teaching." (Ex. 7, p. 9.) The seniority list describes Besoke's current assignment in the

⁶ Mr. Kynes testified that no particular credential is needed for the position. (Ex. 33, 101:22-3.)

same way. (*Id.*) That description is also used for a counselor, Ruby Solorzano, and a school psychologist, Alex Adams. (*Id.*)

20. Saracho and Besoke each hold single subject English credentials. Each has English Learner (EL) authorizations, Besoke holding a CLAD certificate, Saracho an EMBED. Both have had training in SIOP to prepare them to act as Instructional Coaches, but the extent of that training was not made clear. It is inferred that Besoke has had less training than Saracho, as Besoke has only been in the position since December 2011, and would have missed virtually all of the training scheduled for that year, which amounts to two-thirds of the training sessions listed on Exhibit 29.⁷

Respondents' Claim to Bump Into Instructional Coaching Positions

21. A number of the respondents testified, asserting that they were credentialed and qualified to act as Instructional Coaches. Several of them were senior to both Besoke and Sachacho. They are: Rachel Brochner (11/7/08); Raquel Chavarria (8/31/09); Jennifer Daniels (8/31/09); and Wendy Pham (3/5/10). Two teachers are tied with Saracho, and senior to Besoke: Keisa Pineda (8/30/10) and Ada Kudlacek (8/30/10). Vannessa Marquez (2/8/11), Rachel Snow (8/22 or 8/29/11), Cesar Castellanos (8/29/11) and Chris Dow (8/29/11) are all junior to Saracho but senior to Besoke.

22. Each of the Respondent's who would bump into the Instructional Coach position has had some SIOP training, and several attested to having implemented SIOP. For instance, Ms. Chavarria testified to having at least six days of training, and Ms. Pineda seven, including the first SIOP training held in the District, and she attested to having the ability to implement SIOP strategies. Ms. Kudlacek attested to 11 days of SIOP training, including some in another district before she came to the District. Ms. Pham also attested to having at least six days of SIOP training, and the ability to implement that strategy. Ms. Daniels claimed at least five days of training.

23. At least two of the senior Respondents could show training in coaching teachers, or time coaching them or "mentoring" them, a term used in the job description. Ms. Kudlacek had mentored teachers, and has been a teacher for 24 years. Ms. Pham has been a master teacher to two other teachers, and received coaching experience through a program at UCLA, and then provided coaching in the District. Ms. Daniels has also been a master teacher.

⁷ Exhibit 29 lists 18 training activities, each lasting from one-half to three days. Twelve of the eighteen were scheduled for 2011, the last set on December 15 of that year, or a week after Besoke started. Of the six scheduled in 2012, one was a two-day "SIOP Inter-rater Reliability Training activity," and the other five were described as "coaching/collaboration practice." The latter sessions were one-half day each.

The Adaptive P.E. Skips and Claims to Bumping Rights

24. In the Reduction Resolution, the District provided that it would skip certain P.E. teachers, specifically:

4. Certificated personnel who possess a credential authorizing service in Physical Education that also possess a certification in Adaptive Physical Education authorizing service for special needs students, who are presently assigned as a Physical Education teacher and who will be teaching within the scope of that credential, and who will be assigned within the scope of that credential for the 2013/2014 school year.

(Ex. 9, at p. A-1,)

25. The District is skipping two junior P.E. teachers based on this skip criterion. They are Bridget Brotherton (8/29/11) and Samantha Candido (9/13/12). According to the seniority list, both of these probationary teachers are authorized to teach Adaptive P.E., and Ms. Brotherton is currently assigned to do so. While Ms. Candido is assigned to a P.E. class this year, she is not teaching Adaptive P.E.

26. Two P.E. teachers senior to Brotherton and/or Candido testified in this case. The first, Ms. Puckett, is currently teaching P.E. and has been admitted to a program to obtain her authorization to teach Adaptive P.E., beginning in the fall of 2013. She asserted that enrollment and participation in the course will authorize her to teach Adaptive P.E. The second senior P.E. teacher, Ms. Chiappone, is currently teaching Adaptive P.E. under a waiver, because she is enrolled in an Adaptive P.E. program. However, she does not yet have her state authorization.

The District's Bumping of Ms. Leanos

27. As noted in Factual Finding 8(B), during the hearing, the District determined that business teachers who had been subject to layoff could bump into the Opportunity School positions. One Respondent, Ms. Leonas, would be bumped from her position as a result. She provided testimony that she has unique training and experience that supports her continued employment in her position. She confirmed that her seniority date is November 5, 2009.

Other Findings

28. The Respondents all appear as well educated and qualified teachers, dedicated to their profession and the District's students.

29. As set out further in the Legal Conclusions, some of the Respondents must be retained, so that it can be found that no junior certificated employee is being retained in a position which a senior employee is certificated and competent to fill.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 8(C).

2. (A) As a general rule, a school district may reduce particular kind of services (PKS) 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.) A PKS reduction does not have to lead to fewer classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 (*San Jose Teachers*) [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject, any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued by the District in this case are particular kinds of services within the meaning of section 44955. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of section 44949. This Legal Conclusion is based on Factual Findings 3, 5, 6, and 7, and the foregoing authorities.

3. A senior teacher 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. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) On the other hand, in appropriate cases a junior teacher may be given retention priority over one or more senior teachers—the junior teacher may be exempted or “skipped” to the detriment of more senior employees—if the District demonstrates a need to teach a course or course of study, and if the junior teacher possesses credentials and skills and training not possessed by more senior colleagues, which skills and training are necessary to teach that course or course of study. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

4. (A) As generally discussed in Legal Conclusion 3, a school district may deviate from seniority through skipping, which is governed by Section 44955, subdivision (d). The statute essentially allows skipping in four circumstances, but only the first

enunciated standard is relevant in this case, that is where: “The district demonstrates a specific need for personnel to teach a specific course or course of study, . . .”⁸

(B) If a need is demonstrated to teach a particular course or course of study, then a district must then demonstrate that the certificated employee who would be skipped has special training and experience necessary to provide the instruction or service in question.⁹

5. Based on the record in this case, the District has not the very first test, in that it has not demonstrated that instructional coaching is a course or course of study.¹⁰ This conclusion is based on Factual Findings 16 through 19. This conclusion is also based on section 51015 of the Code, which provides that “‘Course’ means an instructional unit of an area or field of organized knowledge, usually provided on a semester, year, or prescribed length of time basis.” Section 51014 states that “‘Course of study’ means the planned content of a series of classes, courses, subjects, studies, or related activities.” It is plain that, as used in section 44955, courses are offered to the students of a district, not to various employees of a district. Here, the District's own witness, Mr. Zuniga, and the seniority lists, have demonstrated that an Instructional Coach does not teach a course or course of study. The skipping criteria for Instructional Coaches is invalid, and therefore, the District cannot skip two relatively junior teachers, Saracho and Besoke.

6. A school district may not create justifications for skipping; the only permissible justifications are those set out section 44955, subdivision (d). While the District's investment

⁸ The second situation where a district may skip junior teachers arises where a district “demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . pupil personnel services.” The third occurs where it is demonstrated that there is “a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . health for a school nurse.” Finally, a district may skip to maintain or achieve “compliance with constitutional requirements related to equal protection” (§44955, subd. (d).)

⁹ Counsel for Complainant argue that under *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, there is a two step analysis to apply here. (Ex. 32, pp. 3-4.) However, counsel has skipped the step of establishing the statutory test of whether or not there is a need to teach a course or course of study. In *Bledsoe*, that was never an issue.

¹⁰ According to Black's Law Dictionary, the word “demonstrate” means “to teach by exhibition of samples; to derive from admitted premises by steps of reasoning which admit of no doubt; to prove indubitably. (Citation omitted.) To show or prove value or merits by operation. (Citation omitted.)” (Black's Law Dict. (4th ed. 1968), p. 519, col. 1.) Webster's defines the term as “1: to show clearly. 2a: to prove or make clear by reasoning or evidence. B: to illustrate and explain esp. with many examples. 3: To show or prove to a customer.” (Webster's Seventh New Collegiate Dict. (1965), p. 220, col. 1.)

in improving the skills of its teachers is laudable, and is considerable in terms of time and money, that does not allow the skipping of the personnel who are not retained to teach a course or course of study. Likewise, the “need” to have coaches, or to improve instruction in the District, as asserted by Mr. Kyne, does not make the function of the Instructional Coaches that of teaching a course or course of study. The creation of other justifications for skipping, outside the statutory scheme, would provide discretion to a district outside that authorized by the statute, and it would deprive certificated employees of their seniority rights.

7. Complainant spent much of its case showing how much special training the Instructional Coaches had received, and why they needed it. To be sure, the exact training received by Saracho and Besoke was not clear, especially as to Besoke. (Factual Findings 18(G), 20.) And, as acknowledged by Mr. Kyne, the training was not a job requirement. (Factual Finding 18(G).) At bottom, the training becomes irrelevant to justify skipping where it is not utilized to teach a course or course of study.

8. (A) Respondents Rachel Brochner, Raquel Chavarria, Jennifer Daniels, Wendy Pham, Keisa Pineda, and Ada Kudlacek may bump into an Instructional Coach Position pursuant to section 44955, subdivision (b), based on Legal Conclusion 3, and Factual Findings 18 through 23. Each of those Respondents has the requisite credential, EL certification, and NCLB status. All have some of the preferred training and experience. No competency criteria was established. Indeed, it appears that most of these Respondents would have as much SIOP training as Besoke, and three of these Respondents, Pham, Daniels, and Kudlacek have significant training and/or experience in training teachers.¹¹

(B) As noted in the findings, four of these Respondents are senior to both Saracho and Besoke, and the two who are tied with Saracho (Pineda and Kudlacek), and in any event are senior to Besoke. It is fundamental that no junior teacher can be retained when there is a senior teacher who is credentialed and competent to fill the junior teacher's position, and that is the case here. Since the District failed to give Saracho and Besoke a precautionary layoff notice, and since they must therefore be retained, then the six respondents listed in Legal Conclusion 8(A), above, must be retained, so that the finding can be made that no senior teacher is being laid off when a junior is retained to fill a position that his senior colleague is credentialed and competent to fill.

(C) That rule does not protect Respondents Marquez, Castellanos, Snow, and Dow, as they are all probationary teachers. Their status as probationary allows the District to lay them off; a probationary teacher might be skipped under the statute, but they may not bump a permanent teacher. To allow a probationary teacher to bump an equally qualified

¹¹ The District did not pass any resolutions concerning any particular competency criteria for this RIF proceeding. The job announcements, Exhibits D and 28, are the only available measures in evidence, and they are so broad as to encompass many teachers, including the four probationary teachers who wish to bump into these positions.

permanent teacher would do violence to one of the most basic provisions of section 44955, even if that probationary teacher had more years of service in the District.

9. Ms. Snow's seniority date should be changed to August 22, 2011, based on Factual Findings 12 through 15. A certificated teacher's seniority date is the first paid date of service in a probationary position. (§44845.) Her contract shows August 22 as the start date, and the school calendar for 2011-2012 in Exhibit C corroborates that date. That new teachers are to start early has been the District practice in other years. It must be noted that only page 1 of Exhibit 31 was received in evidence, as Ms. Snow could not authenticate the balance of it. If the balance of the document were received, the second page would show that at some point the Districts' records showed her as starting on August 22, and at the same time the fourth and fifth pages imply that she was not paid for any day in August 2011, begging the question of how the District could assert August 29 as her correct seniority date.

10. The District properly skipped Respondents Chiappone and Puckett, because the exemption criteria requires an Adaptive P.E. authorization, and neither Respondent has one at this time, and perhaps will not until the next school year. March 15 has, for years, been treated as the cut-off date for having a credential that may be considered in the lay off process. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698-699.)

11. Under the principals discussed in Legal Conclusion 3, Respondent Leanos may be laid off by the District, as she is junior to the teachers bumping her, who are otherwise credentialed and competent to perform her assignment. While she appears well-qualified, she simply lacks the seniority to retain her position.

12. With the dismissal of respondents Rachel Brochner, Raquel Chavarria, Jennifer Daniels, Wendy Pham, Keisa Pineda, and Ada Kudlacek from this proceeding, it may be concluded that no junior teacher or probationary teacher is being retained to perform a service that any respondent is certificated and competent to perform, based on Legal Conclusions 1 through 11, and their factual predicates. Therefore, the District may issue final lay off notices to the balance of the Respondents.

ORDER

1. The Accusation is dismissed as to Respondents Michael Felix, Jr., James Taite, Patricia Harbit, Sylvia Casillas, Richard Douge, Sally Matsubara, George Ledesman, Rachel Brochner, Raquel Chavarria, Jennifer Daniels, Wendy Pham, Keisa Pineda, and Ada Kudlacek,

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2. Rachel Snow's seniority date shall be August 22, 2011.

3. The District may lay off the remaining Respondents, by serving them with final layoff notices.

May 5, 2013

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings