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

In the Matter of the Non-Reemployment of: JURACIA CARBAJAL, TERESA JOHNSON, ROSEMARY RAMON, MARTIN BUKOVSKY, and MARY JO STANLEY, Respondents.	OAH No. N2004030576

PROPOSED DECISION

On April 29 and April 30, 2004, in Gilroy, Santa Clara County, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

M. Carol Stevens, Esq., with Janae H. Novothy, Esq., of Kay and Stevens, Attorneys at Law, 545 Middlefield Road, Suite 180, Menlo Park, California, 94025, ("Superintendent's Counsel") represented Edwin Diaz, Superintendent, Gilroy Unified School District.

Michelle A. Welsh, Esq., of Stoner, Welsh and Schmidt, Attorneys at Law, 413 Forest Avenue, Pacific Grove, California 93950-0656, ("Respondents' attorney") represented Respondents herein. Also, Respondents' attorneys represented Ms Teresa Johnson, who is a credentialed teacher, but who hold a position with the District as a temporary employee.

The record was held open to afford Respondents the opportunity to file written closing arguments with OAH. On Wednesday, May 5, 2004, OAH received, via telefacsimile transmission, from Respondents' attorney a document titled "Respondents' Post Hearing Brief," which was marked as exhibit "P" and was received as argument. Also, on May 5, 2004, OAH received, by telefax, from Superintendent's attorneys a written argument titled "Closing Argument and Post Hearing Brief," which was marked as exhibit "34," and was received as argument.

On May 5 2004, the parties were deemed to have submitted the matter and the record closed.

FACTUAL FINDINGS

1. On April 8, 2004, Edwin Diaz, Superintendent ("the Superintendent") for the Gilroy Unified School District ("the District"), made and filed the Accusation against Respondents in his official capacity.

2. Respondents Juracia Carbajal, Rosemary Ramon, Martin Bukovsky and Mary Jo Stanley ("Respondents") are probationary or permanent certificated employees of the District.

3. Ms Teresa Johnson appeared at the hearing to declare either that the status of temporary employee is improper, or that despite the District's imposition upon her of the status of temporary employee, the District is obligated to offer her employment for the ensuring school year. However, based on facts set forth herein below, Ms Teresa Johnson, a university intern, is not deemed as a Respondent, who has standing to contest the District's prospective lay-off action.

4. On or before March 9, 2004, the Superintendent presented the District's Governing Board a recommendation[1] in the form of written memorandum that the District give notice that particular kinds of services, then offered through the District, be eliminated by the District for the ensuing school year (that is, the term of 2004-2005).

5. On March 9, 2003, with six affirmative votes[2] and one Board member absent[3] the District's Governing Board adopted Resolution number 03/04-22.

The resolution recites that it has become necessary for the District to reduce and/or to discontinue, no later than the beginning of the 2004-2005 school year, particular kinds of services in the form of an array of four distinct categories in the sum of 4.4 FTE (full time equivalent) certificated positions as follows:

1.0 FTE positions	Reduce the number of Psychologists from 5.5 FTE to 4.5 FTE
1.4 FTE "	Reduce the number of Nurses from 4.2 FTE to 2.8 FTE
1.0 FTE "	Reduce the number of Counselors from 4.0 FTE to 3.0 FTE
1.0 FTE "	Eliminate the After School Programs Facilitator Position
4.4 FTE	Total Number of Reduced or Eliminated Certificated Positions

[1] The letter, titled "Notice of Recommendation Not to Reemploy Probationary or Permanent Certificated Employees," which sought to reduce or discontinue 4.4 FTE certificated position, by Edwin Diaz, Superintendent, bears a date of "March 11, 2004." However, as Respondent made no objection to the date of the letter, it is reasonably inferred that the Superintendent presented the Governing Board with the letter before Resolution #03/04-22, which bears as a date of "9th day of March 2004."

[2] Bundros, Gurich, McRae, Owens, Rogers and Russo.

[3] Kraemer.

6. By individual letters, dated March 11, 2004, the District's Superintendent dispatched, via certified mail, preliminary notices[4] to a number of FTE position holders, including each respondent, who had status as a permanent or probationary employee. The letter stated that the District's Governing Board had an intention to reduce or to discontinue the particular service provided by each person who received the notice. Hence, due to the prospective elimination of the particular kind of service now rendered to the District, each of the recipient respondents learned the District would not reemploy the named individuals in the certificated positions each had worked.

The letter, dated March 11, 2003, which had attached to it the District's resolution and other pertinent documents[5], also conveyed to each respondent that no certificated employee of the District having less seniority than each respective respondent would be retained for the 2004-2005 school year to render a service that each respondent was then credentialed and competent to render to students under the District's competency criteria.

7. Also, by another letter, dated March 11, 2004, the District's Superintendent sent a number of preliminary notices to FTE position holder - Ms Teresa Johnson - who is a temporary certificated employee with the District for the current school year 2003-2004. Although Ms Johnson, as a temporary certificated employee under her contract of employment, does not have standing under Education Code sections 44949 and 44955 to a hearing to challenge in this matter on questions of bumping mechanism or skipping procedures, the District informed that temporary credentialed employee of her ability to appear at the hearing to challenge the propriety of being deemed a temporary[6] credentialed employee assigned as an intern school psychologist.

8. The written preliminary notices, to each respondent and to the District's temporary employee, as issued from the District's Superintendent and the governing board's resolution set out legally sufficient reasons of the District's governing board's intent to eliminate the positions occupied by each affected respondent and affected person for the current school year of 2003-3004.

9. Each respondent, and other affected temporary employee, timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent, or affected person, for the ensuing school year.

10. The District's Superintendent caused to be timely served upon each respondent the Accusation, dated April 8, 2004, and related documents. Each respondent, and other affected temporary employee, filed timely notices of defense.

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4 "Notice of Recommendation That Services Will Not be Required."

5 Request for Hearing form, Proof of Service document, and copies of Education Code sections 44949 and 44955.

6 *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal 4th 911.

11. All pre-hearing jurisdictional requirements were met.

12. At the hearing of this matter, the District withdrew the Accusation filed against Respondent Martin Bukovsky. By its withdrawal of the Accusation in that limited scope, the District will retain the services of Martin Bukovsky.

13. The certificated employee - Ms Sandra Ruehlow - who held the position of Categorical After School Programs coordinator did not request a hearing, and is not a respondent in this proceeding.

14. District Assistant Superintendent for Human Resources Ms Linda Piceno ("Assistant Superintendent") appeared at the hearing of this matter to provide credible and persuasive evidence.

The Assistant Superintendent is responsible for advising the District's governing board on pertinent aspects of the district's practices and procedures for personnel issues, hiring procedures, credentialing considerations, and the respective status of employees in certificated positions. The Assistant Superintendent is charged by the Governing Board with contract management for the certificated units. In addition to the foregoing, the Assistant Superintendent, as part of the Superintendent's executive team, is vested with knowledge, expertise, and experience to offer competent and reliable evidence regarding the basis for the proposed lay-off action that will take effect for the ensuing school term.

The Assistant Superintendent in her official capacity was reasonable in her exercise of discretion in executing the procedures associated with the lay-off action as required by the Board's resolution. The District governing board's subject designee was not arbitrary, capricious nor fraudulent in carrying out the District's Resolution 03/04-22.

Respondents' Contentions

15. Respondents contend that the District's lay-off action will result in school programs - pertaining to student counseling, nurse services, and psychologist assistance - not to be in compliance with state and federal law on the matter of statutorily mandated services for students in the District. Respondents aver that the proposed District lay-off action purportedly may result in impermissible cuts in District personnel that are arbitrary and illegal.

In particular, respondents aver that the District's lay off action pertaining to psychologist services will prevent the District from meeting the needs of special education students who receive educational services under IEPs ("individual educational plans"). As to counselor services, respondents argue that reducing counseling services will not serve the welfare of the schools and pupils of the District. Regarding nursing services, respondents contend that the District's administration has made assumptions regarding the provision of nursing services that are erroneous and that the proposed lay-off action will thrust the District

below state mandated levels for staffing ratios of nurses to students for the effective delivery of necessary nursing services.

Ms Teresa Johnson argues that the District's action to eliminate the position held by her is improper because: (a) the District's position regarding her status is not legally sound even though she is a university intern, who serves the District under a temporary employee contract. She advances that she has standing as a probationary employee to contest the District's proposed lay-off action; (b) the District's view is not correct that for the ensuing school year she has no "rehire rights," even if she is a university intern; and, (c) the District should be equitably estopped from denying her an employment position for the ensuing school year because a District "agent" offered her a job for the 2004-2005 school year.

Respondents' various and respective contentions are without merit and are rejected.

Claims of Individual Certificated Employees at the Hearing of this Matter

a. School Counselor - Respondent Rosemary Ramon

16. For the current school year, the District has 4.0 FTE counselors. Two schools - Mount Madonna Continuation High School and Solarsano Middle School - share 1.0 FTE counselor position. The District has assigned 1.0 FTE counselor position to Brownell Academy, while South Valley Middle School is assigned 1.0 FTE counselor position. And, Brownell Academy and South Valley Middle School share 1.0 FTE counselor position.

For the school year 2004-2005, the District's administration plans to assign 2.0 FTE counselor positions to overlap Brownell Academy and South Valley Middle School. And no change will occur with Mount Madonna Continuation High School and Solarsano Middle School arrangement with the sharing of 1.0 FTE counselor position.

The Assistant Superintendent established that Respondent Rosemary Ramon divides her 1.0 FTE counselor position between Brownell Academy and South Valley Middle School. The position of her counseling services is additional to the contemplated 1.0 FTE counselor position that will be retained at each site. The counseling services, in the way of conflict resolution, as provided by Respondent Ramon are not mandated by California or federal law.

Respondent Ramon, as a counselor, can not offer counseling or instructional services to students with IEPs (Individual Education Plans) in the special education program as offered by the District. Respondent Ramon is not a certificated psychologist so as to offer services to special education students.

17. Respondent Rosemary Ramon ("Respondent Ramon") appeared at the hearing to offer evidence under oath.

During the current school year, Respondent Ramon has worked for the District as a counselor. August 18, 2003, is her first day of paid service with the District. Respondent Ramon occupies the status of probationary certificated employee with the District.

Respondent Ramon holds a clear Pupil Personnel Services credential as issued by the State of California Commission on Teacher Credentialing ("CTC"). Under the credential, Respondent Ramon is only authorized to provide service as a counselor for the District's students. She does not hold a teacher's credential.

Respondent Ramon splits the time under her 1.0 FTE between Browell Academy and South Valley Middle School. She devotes most of her time through counseling among small groups of students in the context of conflict resolution.

Respondent Ramon points to no statutorily or regulatory authority that requires the District to provide counseling services at the optimum level argued by respondents. No authority is offered to show that the governing board's decision to eliminate conflict resolution services at Browell Academy and South Valley Middle School violates a requirement for mandated services to students.

Respondent Ramon offers no competent evidence that the District will be unable to provide statutorily mandated counseling services for the ensuing school year by reducing one full time equivalent position of counselor from the current number of four counselors to next year's three FTE counselor positions.

Moreover, Respondent Ramon provides no competent evidence that the District has retained any faculty member junior to her for which Ms Ramon possesses a credential and is competent to teach or to provide service to the District's students.

b. School Nurses - Respondent Juracia Carbajal and Respondent Mary Jo Stanley

Respondent Mary Jo Stanley

18. Respondent Mary Jo Stanley ("Respondent Stanley") appeared at the hearing to offer evidence under oath.

During the current school year, Respondent Stanley has worked for the District as a school nurse. She is a registered nurse and has also acquired a public health certificate. Her first date of paid service to the District was February 26, 2001[7]. Respondent Stanley occupies the status of permanent certificated employee with the District. However, Respondent offers that the California Commission on Teacher Credentialing currently

[7] At the hearing of this matter, the parties stipulated to the first date of paid service for Respondent Stanley. The District corrected the seniority date on the Certificated Order of Employment with regard to Respondent Stanley.

recognizes her as having "a temporary school nurse credential" because she has not completed a Master's Degree program.

During the current school year, Respondent Stanley occupied a 0.8 FTE position with the District.

19. Respondent Stanley is a compelling witness who projects superb commitment to excellence and devotion to provision of services to students of the District. But, Respondent Stanley does not show that she possesses the training, skill and experience of a statistician or accountant so as to offer reliable and trustworthy evidence on the extent and scope of the District's prospective delivery of nurse or medical-oriented services to district students. Nor, does Ms Stanley show that she possesses an ability to offered competent evidence regarding claims that the District's contemplated lay-off action will violate state or federal law for the provision of mandated health care services to students of the District.

Respondent Stanley does not establish that a document that consists of panels from a "Power Point" software program presentation contains reliable and trustworthy data upon which the governing board may make a decision that would set aside the proposed lay-off action. The presentation includes panels that reflect references to "mandates and standards" which are not in fact mandatory services for which the District is bound to offer. The presentation reflects inaccuracies that cast doubt upon the reliability of the data and renders Respondent Stanley as not credible on the matter of mandated health care delivery services that may be affected by the District's proposed lay off action.

Moreover, Respondent Stanley provides no competent evidence that the District has retained any nurse junior to her for which Ms Stanley possesses a credential and is competent to provide service to the District's students.

Respondent Juracia Carbajal

20. Respondent Juracia Carbajal ("Respondent Carbajal") appeared at the hearing to offer evidence under oath.

Respondent Carbajal has a first date of paid service to the District as December 2, 1999. She holds a preliminary school nurse services credential. Respondent Carbajal works in only part of a full time equivalent position that is defined as 0.60 FTE. Her nurse services position is categorically funded; but, the Superintendent stipulates and agrees that Respondent Carbajal currently holds permanent employee status with the District.

Respondent Carbajal offered no competent evidence that extends credibility to, or greater reliability for, the PowerPoint presentation given by Respondent Stanley at the hearing.

Respondent Carbajal provides no competent evidence that the District has retained any nurse junior to her for which Ms Carbajal possesses a credential and is competent to provide service to the District's students.

c. School Psychologist – Ms Teresa Marie Ponticello Johnson

21. Ms Teresa Marie Ponticello Johnson ("Ms Johnson") appeared at the hearing to offer evidence under oath ("Respondent Johnson").

During the current school year, Ms Johnson has worked for the District as a university intern under a temporary employee contract. She began her employment relationship with the District effective on August 18, 2003. Ms Johnson has worked full time, but under her contract with the District, she has been paid one-half the rate of the compensation earned by a credentialed full-time psychologist for the District.

As a university intern, Ms Johnson has completed the academic requirements and passed her national examination, but she must report the hours she has logged in her past year's experience with the District before she can acquire a credential. Ms Johnson asserts that on or about June 12, 2004, she will be eligible for the California Commission on Teacher Credentialing to issue her a credential as a school psychologist. But, she has not yet received a preliminary or clear credential.

Ms Johnson offers insufficient evidence to establish that she has status as a probationary or tenured teacher with the district. Ms Johnson lacks standing to engage in a contest of the District's prospective action to reduce or eliminate particular kinds of services that may result in the loss of the position occupied by her.

Moreover, Ms Johnson provides no competent evidence that the District has retained any faculty member junior to her for which Ms Johnson possesses a credential and is competent to teach or to provide service to the District's students. The evidence shows that Ms Johnson is the junior psychologist now employed by the District.

22. Ms Johnson is not persuasive that the District, through an authorized agent, offered her an employment position for the ensuing school year.

Ms Johnson declares that Mr. Joe Guzicki ("Mr. Guzicki"), a junior school administrator, first asked her if she were interested in working for the District next year in position of school psychologist, and that on or about April 22, 2004, she accepted his offer of employment for next year. First, Ms Johnson did not call Mr. Guzicki as a witness to the hearing to offer evidence as to (i) the circumstances and particulars of the offer he made to Ms Johnson, (ii) the authority that the governing board had vested in him to contractually bind the District to an employment contract with Ms Johnson, and (iii) the essence of the governing board's ratification of the claimed job offer to Ms Johnson in light of the Superintendent's recommendation, dated March 9, 2004, that led to the governing board's Resolution number 03/04-22 as adopted on March 9, 2004.

Assuming for argument sake that Mr. Guzicki actually voiced an interest in extending a job to Ms Johnson for the ensuing school year, respondents, on behalf of Ms Johnson, did not establish that Mr. Guzicki had authority from the District or the Superintendent to make a valid offer of employment to Ms Johnson so as to consummate a binding contractual obligation for the District. Nor, did respondents demonstrate that Ms Johnson, or any witness for respondents, possesses the qualification, experience or knowledge of District employment practices so as to render competent testimony regarding current controlling District policy on steps necessary to prefect contracts for the employment of a certificated employee.

Further assuming that Mr. Guzicki made the unauthorized offer to Ms Johnson of an employment position for the next school year, respondents do not provide evidence that Ms Johnson's reliance upon the representations by Mr. Guzicki resulted in her change of positions that involved circumstances that inured to her detriment, or that Ms Johnson altered her position so as to perfect the elements that comprise the doctrine of equitable estoppel.

Unpersuasive Representations and Claims by Respondents' Witnesses.

23. Respondents called four witnesses to offer evidence in an effort to show the District's supposed unreasonable or faulty basis for the prospective lay-off action. Those witnesses, though sincere and committed to retaining the services of the individuals affected by Governing Board Resolution number 03/04-22, are not persuasive.

a. Ms Pamela Rogers

24. Ms Pamela Rogers is a school psychologist with the District. She has a clear professional pupil student services credential. She has been employed by the District for eight years; but, for 25 years she served as a school psychologist in the State of Massachusetts.

Ms Rogers believes that the District's school psychologists attend about fifty percent of the total number of meetings of District staff who prepare Individual Educational Plans (IEPs) for students with developmental disabilities or pronounced learning disabilities. Ms Rogers notes that 30% of the time of a psychologist is devoted to optional meetings. Ms Rogers confirms that a psychologist is not required by law to administer the "GATE" tests for talented or gifted students; but, a psychologist's supervision of that test would "be valuable."

But, Ms Rogers has no personal knowledge of the District's plans and policies for the provision of services by psychologists for the ensuing school year.

Although Ms Rogers claims that she was present when District administration-level employee – Dr. Guzicki – asked School Psychology Teresa Johnson whether she were interested in holding an employment position with the District for next school term, Ms

Rogers has no knowledge of the authority given Mr. Guzicki to contractually bind the District. And, Ms Rogers has no personal knowledge regarding the governing board having actually presented Ms Johnson with an offer of employment for the 2004-2005 school year.

b. Ms Michelle Nelson

25. Ms Marguerite Michelle Nelson ("Ms Nelson") offered evidence in this matter.

Although Ms Nelson holds tenured employee status as a certificated science teacher with the District, she is now on "leave of absence" so as to devote full time to duties and tasks of President of the Gilroy Teachers' Association, which is the labor union for the District's affected certificated employees herein.

Ms Nelson is not persuasive that the governing board's decisions made in the year 2003 regarding the employment status of an intern have a binding or precedential effect upon the District's current designation and treatment of Ms Johnson as a university intern.

Ms Nelson is not credible that she has sufficient knowledge of the decision-making processes and policies of Superintendent and other executive administrators of District so as to offer competent evidence at this hearing that the District, in the past year, granted interns certain employment standing or rights so as to enable a university intern to claim probationary employee status in the instant lay-off proceeding. Ms Nelson offers no competent evidence that a claimed "historical" instances of one intern employee during the past school years in some manner establishes a fixed or concrete policy determination of the District that vests Ms Johnson with probationary employee status, or extends "rehire rights" to that university intern, a temporary employee of the District.

c. Ms Eileen Obata

26. Ms Eileen Obata ("Ms Obata") offered evidence in this matter.

Ms Obata holds the designation of District Nurse. She claims that she has been an employee of the District for 26 years. She has been the District Nurse for a term of eight years.

Ms Obata is the supervisor of Respondent Carbajal and Respondent Stanley. Ms Obata is familiar with the work of Respondents in the context of the District's provision of nursing services to students in the District.

But, Ms Obata is not a District administrator.

Yet, Ms Obata is a member of the Teachers' Bargaining Unit. As an active union leader, Ms Obata shows a bias towards the claims of the respondent nurses to secure employment for the ensuing school year.

Ms Obata does not show that she has personal knowledge of the District's plans and policies for the provision of services by nursing personnel for the ensuing school year.

Ms Obata offered at the hearing certain data for which she had prompted district employees - health cares and school nurses – to gather the raw information that was eventually purportedly assembled or prepared by the secretary to Ms Obata. The material is not shown to be trustworthy or reliable as the persons who actually gathered and prepared the questionable data were not made available for cross-examination by the Superintendent's counsel.

Ms Obata provided the record with conflicting and contradictory material. A record offered by respondent and titled "State Mandated Health Screens Performed by School Nurses," was shown to be misleading and not accurate. Respondent's supposed mandated services have been, and lawfully may be, performed by health clerks, who are not registered nurses or holders of certificated employee status. Moreover, the supposed mandated services are in reality discretionary services as provided by the District for its students.

Respondents, through Ms Obata, sought to offer an unreliable document titled, in part "Student Health Statistics,"[8] as well as other compilation of mass records and logs[9]. The data is questionable in that respondents' methods of gathering and analyzing the records were not established at the hearing. Moreover, respondents called no expert witness in the person of a statistician or accountant to establish the efficacy of the production of the information or the comprehensiveness and accurate nature of assembling the documents submitted on behalf of respondents. Ms Obata is not credible that she has personal knowledge regarding the underlying contents of records upon which the supposed summaries of District services, which respondents sought to offer as evidence upon which the governing board could made findings of fact for this decision.

Ms Obata is not a school administrator. She had no duty to record accurately in contemporaneously prepared memoranda regarding acts, events or occurrences that would warrant the writings, offered at hearing through Ms Obata, to meet the statutory requirements for application of the "government employee's"[10] exception to the hearsay rule. Ms Obata's written statement for presentation to the governing board's meeting that led to adoption its Resolution 03/04-22 is not proper evidence upon which factual findings can be made for the agency decision in this matter

Ms Obata offers no evidence with regard to the District proposed lay-off action being defective due to less senior employees being retained by the district to the detriment of respondents' prospective employment status.

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[8] Respondent's exhibit "F."

[9] Exhibit "G," titled "Daily Log Count (Children Seen in Nurses' Office) and Medication given Daily ...."

[10] California Evidence Code section 1280.

d. Maureen Romac

27. Ms Maureen Romac ("Ms Romac") offered evidence in this matter.

Ms Romac is a program specialist in the District's Special Education program. She has been employed by the District for 21 years; but, for six years she has occupied a District position as Special Education Coordinator.

Ms Romac shows that District has about 25 to 30 students, who are schooled under IEPs, and who require counseling by District psychologists. But, her knowledge is acquired from review of the District's Management Information System ("MIS"). And, she confirms that no District counselor engages in counseling of students with IEPs.

Ms Romac has held the offices of president, vice-president and other offices of the labor union that represents the District's certificated employees. She manifests a bias in favor of respondents in their quest to retain a respective employment position with the District for the next school year. Ms Romac shows no objectivity or concern towards the rationale of the District's proposed lay off action to be due to limited or non existent funding sources for the ensuing school year.

Ms Romac offers no evidence with regard to the District proposed lay-off action as being defective due to less senior employees being retained by the district to the detriment of respondents' employment status.

Respondents, generally

28. Respondents do not offer competent evidence that the District did not treat respondents fairly. Evidence is not offered to support respondents' general argument that the District failed to engage in an intelligent and rational process in deciding which employee to retain and which employees to discharge. No competent evidence shows the District knowingly set out to distort data or statistical information to reach the preliminary decision in this matter. The District's Assistant Superintendent's findings and conclusions are not so inaccurate as to render as fatally flawed this lay-off action.

The weight of evidence shows the Assistant Superintendent and the Superintendent were not arbitrary, capricious or fraudulent in their respective reasonable use of discretion to reduce or eliminate particular kinds of services for the next academic year.

The District's Reasonable Basis to Proceed

29. The Assistant Superintendent appeared at the hearing of this matter to offer credible and persuasive evidence.

The Assistant Superintendent is directly involved and knowledgeable on the details many administrative matters pertaining to certificated employees. The Assistant Superintendent provided expert witness opinions on the District policies and practices of matter, including but not limited to: credential standing of employees; hire dates for temporary employees hired to replace a permanent teacher on leave and for emergency credentialed teachers; seniority dates for permanent and probationary teachers; as well as the array of services, academic offerings and programs by the District for its students.

Upon learning that the District was required to initiate lay-off proceedings for teacher employees of the District, the Assistant Superintendent and other employees of the District effected reasonable and lawful steps to develop the District's seniority list for the District's teachers.

Assistant Superintendent accurately attended to identifying the District's service position holder who was properly designated as a temporary employee. Also, she studied and set forth on the District's seniority list for probationary and permanent employees, the dates that established first day of paid service to the District by the permanent and probationary employees, who have standing under Education Code sections 44949 and 44955.

30. The only services, as mandated by law, that the District must provide through services performed by a school nurse involve (i) the supervision of individual health care plans developed for students only under Section 504 of the Rehabilitation Act of 1973 and (ii) performing or supervising the performance of specialized health care services for (special education) students identified with exceptional needs under the Individuals with Disabilities Education Act ("IDEA").

School nurses are one of the authorized providers for the other health care services the District is required by law to provide – vision and hearing testing, scoliosis screening, and assistance with administering students' prescribed medications.

31. All other services that have been provided by the District's nurses or could be provided by the nurses are delivered solely at the District's discretion, and the District may exercise its discretion to eliminate them or not provide them in the first place. These discretionary services, include, but are not limited to:

- Conduct immunization programs and ensure that every pupil's immunization status is in compliance with the law. (Education Code Section 49425);
- Assess and evaluate the health and developmental status of pupils to identify specific physical disorders and other factors relating to the learning process, communicate with the primary care provider. (Education Code Section 49425);
- Design and implement a health maintenance plan to meet the individual health needs of the students. (Education Code Section 49425);

- Refer the pupil and his or her parent or guardian to appropriate community resources for necessary services. (Education Code Section 49425);
- Maintain communication with parents and all involved community practitioners and agencies to promote needed treatment. (Education Code Section 49425);
- Interpret medical and nursing findings appropriate to the student's individual educational plan and make recommendations to professional personnel. (Education Code Section 49425);
- Consult with, conduct in-service training to, and serve as a resource person to teachers and administrators. (Education Code Section 49425);
- Counsel pupils and parents. (Education Code Section 49425);
- Provide dental health programs for students. (See Health & Safety Code Section 104775);
- Provide sexual health education instruction. (Education Code Section 51933);
- Provide CPR training to employees and/or students. (Education Code Section 49413);
- Provide emergency epinephrine auto-injectors to trained personnel who may use them to provide emergency medical aid to persons suffering from an anaphylactic reaction. (Education Code Section 49414); and,
- In the absence of a credentialed school nurse, provide school personnel with voluntary emergency medical training or provide emergency medical assistance to pupils with diabetes suffering from severe hypoglycemia, (Education Code Section 49414.5).

32. Regardless of the inherent value of the nurse services offered to some of the District's students, the discretionary services are not mandated by law. The District's delivers the bulk of the nurses' services for its students at its discretion; so that the District may eliminate or reduce such services

33. Although the District based its calculations of the amount of nursing time that will not be needed by reducing or eliminating particular services on information provided by District Nurse Obata, many discrepancies exist between the District's estimates and Respondents' estimates. Neither a resolution of these discrepancies or a credible determination about this evidence is necessary to conclude that the District may reduce or eliminate nursing services and still provide the minimum level of mandated services with 2.8 FTE nurses because the District has established that, if necessary, it will eliminate every service provided by nurses that is not mandated to be provided by nurses. At the bare-bones level and using Respondents' own time estimates, 2.8 FTE nurses will be able to perform the minimum mandated services, as well as additional mandated nurses services or discretionary services that the District may choose to have them provide.

34. Respondents contend that the District plans to transfer mandated nursing services from the certificated nurses to classified employees (for example, health clerks). No competent evidence exists to establish that the District has such a plan. In response to

respondents' assertions, the Assistant Superintendent presented credible evidence that as a result of the pending layoff action the District will not expand health clerk duties, employ additional health clerks, or increase the workload of health clerks.

The Assistant Superintendent is credible in offering evidence that with the exception of services eliminated by the proposed layoff action, health clerks will continue to perform the duties specified in their classified job description services as they have in the past. To the extent that the District eliminates nurses' services, health clerk duties may be reduced.

35. The Assistant Superintendent for Human Resources Linda Piceno offered persuasive and credible evidence that the District Governing Board has not approved an employment contract between the District and Ms Teresa Johnson for the 2004-2005 school year.

Ultimate Findings

36. California state law mandated that school districts provide specialized services to students being educated under individual educational plans ("IEPs"). But, evidence in this matter does not show that mandated services in the District for the ensuing school year are in jeopardy of being reduced below the level required by law. (*California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App. 3d 32, 34-35; *Rutherford v. Board of Trustees* (1976) 64 Cal. App. 3d 167; *Degner v. Governing Board* (1977) 67 Cal. App. 3d 689.)

37. The recommendation of the District's Superintendent and the governing board's preliminary decision to eliminate or discontinue 4.4 FTE positions, including the positions held by each respondent, were neither arbitrary nor capricious. Rather, the superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

38. The District's proposed elimination or discontinuation of a number of FTE positions, including the positions respectively held by respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

39. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Board lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

40. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents herein, the District will retain any certificated employee who is junior to such respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

LEGAL CONCLUSIONS

1 Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 11.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non reemployment of respondents.

4. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. *John Siebel Associates v. Keele* (1986) 188 Cal. App. 3d 560, 565.

The District stipulates to withdraw the Accusation against the certificated employee named in Factual Finding 12. The stipulation is binding on the parties.

5. 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 vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.

As to Ms Teresa Marie Ponticello Johnson

6. Respondents, on behalf of Ms Teresa M. P. Johnson, argue the law applies hereto as expressed in the *Kavanaugh*[11]. The facts in this matter do not fit within the scope of *Kavanaugh.* Respondents do not show a reasonable basis for the District to alter classification status of "temporary employees" to first year probationary employee, namely Ms Johnson. The District did not err to a degree of blameworthiness as to justify on equitable theories the reclassification of Ms Johnson as a respondent. An employee, who is working under a university intern permits, works for the District under contracts that make her a provisional or temporary employee, who has no standing on the seniority list of the District.

[11] *Kavanaugh v West Sonoma County High School District* (2003) 29 Cal.4th 911.

The Education Code permits a certificated employee to be classified as a temporary employee under numerous circumstances.[12] Specifically, the Education Code allows school districts to hire on a temporary basis teachers who have not met all the state standards and qualifications for a preliminary or clear credential.

The District properly classified Ms Johnson as a temporary teacher because she did not hold a preliminary or clear credential. The District made this classification before Ms Johnson began her employment. The District provided Ms Johnson with a written contract clearly identifying the temporary nature of her employment and the duration of the temporary employment as required by *Kavanaugh v. West Sonoma County Union High School District.*[13] Ms Johnson's employment contract with the District explicitly classified her as a temporary employee; the contract states that a university intern "does not acquire tenure while serving on an internship credential" and "you may be released from District employment as a temporary certificated employee. . . pursuant to Education Code Section 44954."

Like other teachers who do not hold preliminary or clear credentials, university interns are generally treated as temporary teachers because the law prohibits granting probationary rights to university interns, prohibits university interns from acquiring tenure while serving as interns, and explicitly states that the layoff provisions do not apply to university interns. University interns are governed by Education Code Sections 44450-44467. Education Code Section 44464 states, "the rights provided by Sections 44948 and 44949 shall not be afforded to [university] interns." Section 44948 establishes mid-year dismissal rights of probationary teachers, and Section 44949 establishes certificated employee layoff rights.

A recent court of appeal decision discussed the differences between district interns and university interns. *Welch v. Oakland Unified School District*[14] held that although district interns have probationary status from the beginning of their service, university interns are not entitled to probationary status. Because they cannot be probationary, university interns are properly classified as temporary.

Because she is a temporary employee and not entitled to layoff rights, the District can release Ms Johnson under Education Code Section 44954 by simply providing her with a release for next year.

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[12] Long-term substitute, §§ 44917, 44918; temporary leave replacement, §§ 44920, 44918; categorical or contract program, §§ 44909, 44918; provisional or emergency credential/permit, § 44911; temporary pending basic skills test, §§ 44830(c)(1), 44918; class size reduction temporary pending basic skills test, §§ 44830(c)(2), 44918; retired temporary, §§ 24216.5, 24216.6, 24214; short-term temporary, § 44919(a); high school, § 44921; temporary replacement for permanent teacher on STRS disability, § 44986(b)(1); short-term temporary, § 44919(c); pre-intern, §§ 44305, 44308; university intern, §§ 44450-44467; district intern, §§ 44885.5, 44830.3, 44325.

[13] *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 129 Cal.Rptr.2d 811.

[14] *Welch v. Oakland Unified School District* (2001) 91 Cal.App.4th 1421, 1427-1431, 111 Cal.Rptr.2d 374, 378-381.

The affected employee - Ms Johnson - a District temporary employee, is not persuasive that Education Code section 44916[15] is applicable to the fact of this matter.

7. Education Code section 44955 establishes, in part, that the order of teacher layoff must occur "in inverse of the order in which [the certificated employees] were employed, as determined by the board in accordance with the provisions of [Education Code section] ... 44845...." And, Education Code section 44845, in part, states: "[e]very probationary or permanent employee employed ... shall be deemed to have been employed on the date upon which [s]he first rendered paid service *in a probationary position.*" [*Emphasis added.*]

Education Code section 44911 sets out: "[s]ervice by a person under a *provisional credential shall not be included* in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district." [*Emphasis added.*]

Respondents assert that the *Golden Valley*[16] appellate decision supports the notion that a university employee's service constitutes service to the District as a probationary employee. Respondents, on behalf of Ms Johnson, contend that an employee who obtains a qualifications for a credential during the school year should be given a first day of paid probationary service pegged to such employee's first date of service to the District under an temporary contract, as opposed to the later date that corresponds to the first day of service under the clear credential. Respondents are not correct.

The *Golden Valley* decision pertained to a teacher's mid-year dismissal rights under Education Code section 44948.3. That appellate court opinion does not address an aspect of layoff procedures under Education Code sections 44949 and 44955.

Also, Education Code section 44911 set out: "Service by *a person under a provisional credential shall not be included* in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district." [*Emphasis added.*]

Summerfield v. Windsor Unified School District (2002) 95 Cal. App. 4t 1026, states: "the numerous provisions of the Education Code expressing *the legislative preference for*

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[15] Education Code section 44916 prescribes that: "The classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. *If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district,* unless employed with permanent status. [Emphasis added.]

[16] *California Teachers Association v. Golden Valley Unified School District* (2002) 98 Cal. App.4th 369.

fully credentialed teachers and the goal of reducing the number of teachers employed under temporary or emergency credentials." *Summerfield* shows that an emergency credential does not accrue time in service for the attainment by such a classified teacher of permanent status. *Summerfield* cites Education Code section 45023.1, subdivision (a)(1) (which limits salary increases to credentialed teachers but not such increases for those holding emergency credentials), and Education Code section 44225.7, subdivision (c) (which directs assignment of interns to classrooms so as to diminish a District's reliance on teachers on emergency permits).

The scheme devised by the California Legislature would be violated, and grave wrongs visited upon earlier credentialed teachers with a later hire date than the subject provisional or emergency credentialed teachers, under the arrangement sought by respondents, on behalf of Ms Johnson, who gained fully credentialed status in the mist of the school year. Probationary status is not retroactively conferred to the beginning of employment of a teacher who secures a clear credential during the school year after an initial contract is executed by the teacher in a status other than probationary.

8. A District employee who accepts a contract as a temporary employee is estopped to claim probationary status, absent a clear statutory mandate that warrants the contract be abrogated. (*Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.* (1977) 76 Cal. App. 3d 223, 227-228; *Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070, 1079.)

The temporary employee - Ms Teresa Johnson - who appeared at the hearing of this matter offered no competent evidence to refute the District's position that she holds status as an employee position under a temporary contract with the District. Hence Ms Johnson has no standing as a Respondent to contest the District's lay-off action.

The very recent appellate court decision of *Fine v. Los Angeles Unified School District*[17] explains:

> ". . . a teacher serving under an emergency permit continues to serve under that permit, and under the contract to which she agreed, until the teacher is issued a credential and registers it with the District. Otherwise stated, the District has no duty to classify a teacher as probationary retroactive to the date of her credential."

9. Temporary teachers who served 75% of a school year have reemployment rights under Education Code section 44918. If a vacant position becomes available for such an employee is (a) certified to teach, and (b) qualified to service, the temporary teacher who has served 75% of the preceding school year may be reemployed as a probationary

[17] *Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070, 1078.

employee. (*Royster v. Cushman* (1989) 213 Cal. App. 3d 65.) But, the procedures under Education Code sections 44949 and 44955 do not call for the decision from administrative adjudication proceeding to result in an Order that prescribes rehire rights for a laid off temporary employees, who has no standing in the matter. Respondents' motion for an order, on behalf of Ms Teresa M. P. Johnson, to require the District to bestow specific rehire or "call back" rights upon Ms Johnson, as a temporary employee of the District, can not be granted.

10. In this matter Ms Johnson, who held a contractual position as a temporary employee, did not present competent evidence to establish a basis for the application of the doctrine of equitable estoppel. The facts in this matter do not present the elements necessary for the District's lay-off action to be set aside as to Ms Johnson - the complaining temporary employees. (*Shoban v. Board of Trustees of Desert Center Unified School District* (1969) 376 Cal.App.2d 534, 544-546.) No competent and credible evidence shows that Ms Johnson reasonably relied upon information or guidance from responsible and duly authorized personnel of the District that misled her, as a temporary employee, to her detriment.

11. Also, in the matter of Ms Johnson's assertion that a junior administrator offered her job for the ensuring school year, school district administrators simply recommend employment candidates for a governing board's approval. For example, Education Code Section 44830 states:

> "The *governing board of a school district shall employ* for positions requiring certification qualifications, only persons who possess the qualifications therefore prescribed by law. It is contrary to the public policy of this state *for any person or persons charged, by the governing boards, with the responsibility of recommending persons for employment by the boards* to refuse or to fail to do so for reasons of race, color, religious creed, sex, or national origin of the applicants for that employment."

An early case held that a contract with a teacher was invalid when it was agreed to by two individual members of the governing board, but the full board never officially acted to approve the contract.[18] This interpretation is consistent with a non-employment case, *Santa Monica Unified School District v. Persh* (1970) 5 Cal.App.3d 945, which held that a contract entered into by a school administrator was invalid if not ratified by the school board. Education Code Section 17604 explicitly states:

> "Wherever in this code the power to contract is invested in the governing board of the school district. . ., the power may by a majority vote of the board be delegated to its district superintendent. . . . However, no contract made pursuant to the

[18] *Barnhard v. Gray* (1936) 12 Cal.App.2d 717.

delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board. . . ."

Santa Monica Unified School District v. Persh held that under this code section, a contract is unenforceable if it was never approved or ratified by the governing board, even when a party detrimentally relied on promises from district administrators.

The District's governing board has not approved an employment contract with Ms Johnson for the 2004-2005 school year, and no employment contract can be created without governing board approval. As a university intern, Ms Johnson is a temporary employee and can be released under Education Code Section 44954. Ms Johnson is not entitled to the layoff proceedings required by Education Code Sections 44955 and 44949. Even if Ms Johnson can demonstrate that she is a probationary employee, the District has the right to terminate her because Ms Johnson's particular kind of service (psychologist) is being reduced or discontinued, and Ms Johnson is the least senior psychologist in the District.

As to Respondent Rosemary Ramon

12. Education Code section 49600 establishes that counseling services offered in a school district are discretionary services as opposed to being mandatory services. The statute sets forth, in part: "[t]he governing board of any school district may provide a comprehensive educational counseling program for all pupils enrolled in the schools of the district .... " [Emphasis added.] The governing board's reduction of one full time equivalent counseling position will not eliminate mandatory services.

As to Respondents Stanley and Carbajal

13. The District will eliminate entirely some services provided by nurses, and eliminate or reduce other particular kinds of services by changing the method by which it provides services. A particular kind of service may be eliminated or reduced even though a service continues to be performed or provided in a different manner. The California Supreme Court established this principle in 1935. *Davis v. Berkeley School District*[19] held that a school district could lay off traveling art teachers, and instead assign regular classroom teachers to teach art to students. (See also *Fuller v. Berkeley School District* (1935) 2 Cal.2d 152, 159.)

This principle has been repeatedly reaffirmed by courts over the years. For example, *Campbell Elementary Teachers Association v. Abbott*[20] upheld the district's layoff of nurses, counselors, psychologists, and other specialists, explaining:

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[19] *Davis v. Berkeley School District* (1935) 2 Cal.2d 770.
[20] *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796.

> ". . . a district may not dismiss an employee. . . and yet continue the identical kind of service and position held by the terminated employee. [Citation omitted.] But the *particular kind* of service of the employee may be eliminated even though a service continues to be performed or provided in a different manner by the district. [Citing *Davis, supra*, *Fuller, supra*, and other cases.] . . . Where, as here, the district apparently contemplated a change in the method of teaching or in the particular kind of service in teaching a subject, there was a discontinuance of the former particular kind of service."[21]

Even though a service must continue to be performed in a school district, the particular kind of service provided by the employee may be eliminated.

Rutherford v. Board of Trustees upheld a school district's decision to reduce nursing services, stating, "even though a service must continue to be performed in a school district, the particular kind of service of the employee may be eliminated."[22] The court explained that districts may reduce services by eliminating the service entirely, or:

> "may 'reduce services' by determining that preferred services shall be reduced in extent because fewer employees are made available to deal with the pupils involved."[23]

The District plans to reduce the total amount of services currently provided by nurses, and also will change the method and manner in which it provides the remaining services. The District's planned elimination and changed methods of providing services are reasonably and clearly summarized on the charts in the record as District Exhibits 24 and 29.

14. Respondent nurses are not persuasive when they cite Education Code Section 49400 to support an argument that the District cannot reduce nursing services. Section 49400 states, in its entirety: "[t]he governing board of any school district shall give diligent care to the health and physical development of pupils, and may employ properly certified persons to do the work." This language or substantially similar language has been in California law since approximately 1907.[24] In the nearly 100 years of its existence, this statutory language apparently has been cited in only two school district cases and three Attorney General opinions. In all but one instance, this language was cited solely as a source of authority for a school district governing board to take some action not specifically authorized elsewhere in statutes.[25] Respondents have not and cannot point to any case

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[21] *Campbell Elementary Teachers Association, Inc. v. Abbott, supra*; *see also Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853, 120 Cal.Rptr.2d 615.

[22] *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 177; 134 Cal.Rptr. 290.

[23] *Id.*, 64 Cal.App.3d at pp. 178-179.

[24] See discussion of precursor of this statute in *Beard v. Webb* (1917) 35 Cal.App. 332.

[25] *Beard v. Webb, supra* (authority to employ and pay an optometrist); *Kern County Union School District v. McDonald* (1919) 180 C. 7 (authority to condemn land and build a gymnasium); 31 Ops.Atty.Gen 27 (1958)

interpreting Section 49400 as defining a particular level of required "diligent care to the health" of pupils. On its face, Section 49400 neither requires or recommends any specific services a school district should or may provide to "give diligent care to the health and physical development of pupils." More specific and more recent statutes provide the only framework for defining the health care services a school district is required to provide for students and the additional levels of health care a school district may choose, solely in its discretion, to provide.

15. Respondent nurses represent that they are obligated to comply with unspecified Nursing Practices Act[26] standards that sometimes conflict with also unspecified Education Code standards. But, the Nursing Practices Act provides a code of ethics for nurses. The Nursing Practices Act does not address mandated student health care services, or the responsibilities of school districts in any way, and there are no provisions in the Act that even remotely address the responsibilities of school districts and school nurses. Consequently, the Nursing Practices Act does not restrict the District's ability to reduce or eliminate discretionary services and services that the District is not required to provide through school nurses.

As to Respondents Carbajal, Ramon, and Stanley

16. The services being reduced or discontinued by the District are particular kinds of services within the meaning of Education Code section 44955 (*Degner* v. *Governing Board* (1977) 67 Cal.App.3d 689).

Ultimate Conclusions

17. Cause exists under Education Code sections 44949 and 44955 for the Gilroy Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

No employee with less seniority than any Respondent is being retained to render a service which any Respondent is certificated and competent to render.

18. The District's lay-off action is necessary. The District's proposed action is consistent with the law. And, the District's contemplated lay-off action is reasonable in its execution.

(authority to approve and pay for preventive inoculations for employees or pupils); 62 Ops.Atty.Gen. 344 (1979) (authority to require random drug tests for student athletes); and 67 Ops.Atty.Gen. 55 (1984) (basis for determining that leased facilities meet the Field Act test of being used "for elementary or secondary school purposes").

[26] Business and Professions Code Section 2700, et seq.

ORDER

The Accusation served on Respondents Juracia Carbajal, Rosemary Ramon, and Mary Jo Stanley, along with temporary employee Ms Teresa Johnson, is sustained, except that the Accusation is dismissed as to Respondent Martin Bukovsky.

Notice may be given to Respondents Juracia Carbajal, Rosemary Ramon, and Mary Jo Stanley, along with temporary employee Ms Teresa Johnson, before May 15, 2003 that their services will not be required for the 2004-05 school year because of the reduction or discontinuance of particular kinds of services as indicated in Resolution number 03/04-22.

DATED: May 7, 2004

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings