

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

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED EMPLOYEES OF  
THE FRESNO UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. 2011030798

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 26, 27, 28, and 29, and May 3, 2011, in Fresno, California.

Robert V. Piacente, Attorney at Law, represented the Fresno Unified School District (District).

Ernest H. Tuttle, III, Attorney at Law, represented all respondents who are members of the Fresno Teachers' Association (FTA) and are listed on Attachment A hereto, except those designated with an "XX," (collectively, represented respondents).

Respondents Robin Drake, Leslie Malone, Janet Renteria, and Salpy Adams represented themselves (collectively, self-represented respondents).

Evidence was received on April 26, 27, 28, and 29, and May 3, 2011. The record was left open to allow the parties to submit closing briefs. On May 10, 2011, self-represented respondent Drake filed a closing brief, which was marked as Exhibit UU. On May 11, 2011, the District filed its closing brief, which was marked as Exhibit 47. On May 11, 2011, self-represented respondent Malone filed a closing brief, which was marked as Exhibit VV. On May 11, 2011, the represented respondents filed their closing brief, which was marked as Exhibit WW. The parties' closing briefs were added to the record as closing arguments. The record closed and this matter was submitted for decision on May 11, 2011.

Pursuant to Education Code section 44949, subdivision (e),<sup>1</sup> a continuance was granted to add an extra day of hearing and to allow the parties to submit written closing

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<sup>1</sup> All further statutory references are to the Education Code unless otherwise indicated.

briefs. As a result, the time deadline for submitting the proposed decision to the Governing Board and respondents was extended from May 7, 2011, to May 19, 2011; and the time deadline for the Governing Board to act on the proposed decision and serve final notices of termination of services was extended from May 15, 2011, to May 27, 2011.

## FACTUAL FINDINGS

1. On March 9, 2011, the District's Governing Board adopted Resolution No. HR2011 03, entitled "Resolution to Implement Certificated Staff Reductions Due to a Reduction or Discontinuation of Particular Kinds of Services" (PKS Resolution). As set forth in the PKS Resolution, the Governing Board determined that it was necessary to reduce or discontinue particular kinds of services (PKS) at the close of the 2010-2011 school year, and, as a result, to terminate the employment of certain certificated District employees. In the PKS Resolution, the Governing Board directed the Superintendent to initiate and pursue the procedures necessary to terminate the services of the certificated employees affected by the PKS Resolution. The reductions are based upon the severe budget cuts that the District is facing, and are not related to the work performance of the affected teachers.

2. As set forth in the PKS Resolution, the particular kinds of services being reduced at the end of the 2010-2011 school year are as follows:

<u>Services</u>	<u>FTE<sup>2</sup></u>
1. K-8 Multi-Subject Positions	385 FTE
2. Home Economics Positions	46 FTE
3. Certificated Tutor Positions	45 FTE
4. R.O.P./Vocational Education Positions	21 FTE
5. Business Positions	13 FTE
6. Designated Subjects/Voc. Ed. Positions	12 FTE
<b>Total:</b>	<b>522 FTE</b>

3. Prior to March 15, 2011, Kim Mecum, Associate Superintendent of Human Resources/Labor Relations, gave written "Notice of Recommendation that Service Will No Longer Be Required" (Preliminary Notice) to all certificated employees listed on Attachment A hereto, notifying them that it had been recommended to the Governing Board that their services be eliminated at the close of the 2010-2011 school year pursuant to sections 44949 and 44955.<sup>3</sup>

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<sup>2</sup> "FTE" stands for full-time equivalent.

<sup>3</sup> It was not disputed that Ms. Mecum was duly delegated and authorized by the Governing Board and the Superintendent of the District to issue the Preliminary Notices.

4. Pursuant to a Memorandum of Understanding dated March 16, 2011, the District and FTA reached an agreement as to the service: (1) by the District of the Accusation, Statement to Respondent, Notice of Hearing, blank Notice of Defense, and copies of relevant Government Code sections (collectively, Uniform Accusation) upon the represented respondents; and (2) by the represented respondents of a Uniform Request for Hearing and Uniform Notice of Defense upon the District. In light of the District's and represented respondents' agreement, each represented respondent: (1) was properly and timely served with a Preliminary Notice and timely requested a hearing; (2) was properly and timely served the Uniform Accusation; and (3) timely filed a Notice of Defense. Each of the self-represented respondents was timely and properly served with a Preliminary Notice, Accusation, Statement to Respondent, Notice of Hearing, blank Notice of Defense, and copies of relevant Government Code sections. Each self-represented respondent either timely filed a Request for Hearing and Notice of Defense, or the District waived timely filing of these documents.

5. During the hearing, the District rescinded some of the Preliminary Notices that it had previously served. All of the certificated employees who are listed on Attachment A whose notices were not rescinded remain respondents in this proceeding.

6. Section 44955 sets forth legal rules that the District must follow when determining which certificated employees to lay off. Subdivision (b), in relevant part, provides:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

Pursuant to subdivision (b), a senior certificated employee who is rendering a particular kind of service that is designated for reduction may "bump" a more junior employee who is rendering a service that the senior employee is credentialed and competent to render.

Subdivision (c), in relevant part, provides that a school district "shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render."

Subdivision (d)(1) permits a school district to deviate from terminating certificated employees in order of seniority (i.e., "skip" a junior certificated employee) when the school district "demonstrates a specific need for personnel to teach a specific course or course of study ... [and] the certificated employee has special training and experience necessary to teach that course or course of study ... which others with more seniority do not possess."

*Skipping of Multiple Subject Credential Holders at Persistently Low Achieving Schools*

7. In the PKS Resolution, the Governing Board adopted the following resolution:

BE IT FURTHER RESOLVED that due to the District's need to retain existing staff at its persistently low achieving schools and otherwise deviate from the order of seniority to retain specific personnel for specific courses of study or to provide specialized services, the skipping criteria attached as Exhibit "C" are hereby adopted by the Board.

8. In Exhibit C to the PKS Resolution, the Board included the following skipping criteria:

To maintain existing certificated staff at the District's persistently lowest achieving schools as those terms are defined by the No Child Left Behind Act and applicable state law (currently Carver Academy Middle School, Yosemite Middle School, and Webster Elementary School.)

9. In February 2010, the District's three skipped schools - Carver Academy (Carver), Yosemite Middle School (Yosemite), and Webster Elementary School (Webster) – were designated as "Persistently Low Achieving Schools" under the No Child Left Behind Act of 2001 (NCLB) (20 U.S.C., § 6302 et seq.), and the California Education Code. (§ 53100 et seq.; 5 Cal. Code Regs., § 4800 et seq.) The lowest five percent of California's schools, as measured by students' academic achievement on state assessments, are identified as Persistently Low Achieving Schools. (74 Code Fed. Regs. § 65618 (Dec. 10, 2009); § 53201, subd. (b).) Persistently Low Achieving Schools must implement one of four corrective models: (1) the turnaround model; (2) the restart model; (3) the transformation model; or (4) school closure. (74 Code Fed. Regs., §§ 65618-65619 (Dec. 10, 2009); § 53202, subd. (a).)

10. At its meeting on May 26, 2010, the Governing Board approved implementation of the turnaround model for the District's three Persistently Low Achieving Schools. Under this model, the District was required to take the following steps to turnaround these three schools:

(1) Replace the principal and grant the principal sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates;

(2) Using locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students;

(A) Screen all existing staff and rehire no more than 50 percent; and

(B) Select new staff;

(3) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in the turnaround school;

(4) Provide staff with ongoing, high-quality, job-embedded professional development that is aligned with the school's comprehensive instructional program and designed with school staff to ensure that they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies;

(5) Adopt a new governance structure, which may include, but is not limited to, requiring the school to report to a new “turnaround office” in the LEA, hire a “turnaround leader” who reports directly to the Superintendent or Chief Academic Officer, or enter into a multi-year contract with the LEA or State Educational Agency (SEA) to obtain added flexibility in exchange for greater accountability;

(6) Use data to identify and implement an instructional program that is research-based and “vertically aligned” from one grade to the next as well as aligned with State academic standards;

(7) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students;

(8) Establish schedules and implement strategies that provide increased learning time (as defined in the United States Department of Education notice published in the Federal Register at 74 Federal Register 59805 (Nov. 18, 2009); and

(9) Provide appropriate social-emotional and community-oriented services and supports for students. (5 Cal. Code Regs., § 4803.)

Under the turnaround model adopted by the Governing Board, the Persistently Low Achieving Schools were given two years to improve their students’ academic performance.

11. In June 2010, the District and FTA entered into a Memorandum of Understanding (PLAS MOU) regarding the Persistently Low Achieving Schools, which provided that 10 additional duty days would be added to the school year for teachers to “engage in activities that address and seek solutions to student learning problems consistent with an accountable professional learning community model,” which included activities such as “professional learning, teacher planning/collaboration, targeted student support/intervention/pre-assessment, and development of transition programs.” The PLAS MOU provided that these additional 10 duty days would not be used for “extended or additional direct classroom instruction of students.”

The PLAS MOU also provided that the teachers’ duty day would be increased by one-half hour “for the exclusive purpose of providing additional direct instruction to students.”

The PLAS MOU provided further that it was an “essential component of developing and maintaining accountable professional learning communities” to provide the teachers a “sufficient amount of time during the work day to engage in activities such as ... reviewing student data, developing common formative assessments, sharing instructional strategies and methods, lesson planning, standards aligned curriculum and developing real time intervention strategies.” The PLAS MOU stated that the “majority of time allocated for meetings as set forth in [the collective bargaining agreement] shall be utilized for the activities described immediately above, without regard to a rigid yearly, semester, daily or weekly configuration of time for these purposes.” In addition, the PLAS MOU provided that:

An integral part of an accountable professional learning community is to ensure teachers are a key component of addressing the needs of students. Therefore, time will be allocated during staff meetings and professional development activities for teachers to present and discuss feedback, concerns and strategies for addressing curricular and social/emotional needs of students. The community may also explore and potentially create/adopt appropriate vehicles to assess feedback in a joint effort to maintain and improve an effective school climate.

12. During the hearing, Julie Severns, Administrator, Leadership Development; Edward Gomes, Yosemite’s principal; Kelli Wilkins, Webster’s principal; and Steve Gonzalez, Carver’s principal, testified about the changes that have been made at the three skipped schools as a result of having been designated as Persistently Low Achieving Schools. The turnaround model adopted by the Governing Board required that the staff at the three schools be reconstituted. As a result, 50 percent of teaching and administrative personnel were changed. Mr. Gomes and Mr. Gonzalez described the difficulties they had in attracting existing District personnel to transfer to a Persistently Low Achieving School. As a result, they ended up hiring some new staff. The staff at the three Persistently Low Achieving Schools were required to commit to staying at the schools for at least one year. They also committed to: (1) utilizing the student behavioral management system; (2) actively

participating in their accountable learning communities; and (3) fully implementing the District's aligned instruction system and academic initiatives. Not only did the skipped Persistently Low Achieving School teachers voluntarily take on these additional commitments, they also agreed to accept the heightened scrutiny under which the Persistently Low Achieving Schools operate.

13. Ms. Severns testified that the staff at each of the Persistently Low Achieving Schools are functioning as accountable learning communities. Within their accountable learning communities, every teacher and administrator is accountable to one another for the students' success. The staff at the Persistently Low Achieving Schools have received four training sessions (one four-hour session and three three-hour sessions) from Dr. Alexander Platt, the training developer, on how to create and maintain accountable learning communities. In their accountable learning communities, the teachers and administrators focus on working collaboratively to teach and assess their students.

14. Ms. Severns, Mr. Gomes, Ms. Wilkins and Mr. Gonzalez described the additional training that the teachers at the Persistently Low Achieving Schools have received, including:

- a. Skillful Teacher Training. In addition to training the Persistently Low Achieving School teachers on developing accountable learning communities, Dr. Platt also provided them with Skillful Teacher training, which gave them tools to be more effective teachers.
- b. Safe and Civil Schools Training. The Persistently Low Achieving Schools were provided this school-wide training focused on creating and implementing disciplinary strategies. In addition, the Persistently Low Achieving School teachers received the classroom component of this training: CHAMPS for elementary school teachers, and Discipline in the Secondary Classroom for middle school teachers.
- c. Capturing Kids Hearts. The Persistently Low Achieving Schools were provided this training focused on instructing teachers on how to develop social and emotional supports for their students.
- d. Other Training. In addition, the Persistently Low Achieving School teachers, depending on their grade levels and teaching areas, were given other training focused on designing lessons plans; providing interventions in writing, language arts, and math; and utilizing technology.

15. Pursuant to the skipping criteria set forth in the PKS Resolution relating to the District's three Persistently Low Achieving Schools, the District skipped the following 12 junior certificated employees<sup>4</sup>:

At Carver:

<u>Name:</u>	<u>Title:</u>	<u>Seniority Date:</u>	<u>Status:</u>	<u>Credential:</u>	<u>FTE</u>
Mahkefa Brown	Teacher, Middle	8/2/10	Prob 1	MS, <sup>5</sup> CLAD <sup>6</sup>	1
Benjamin Arnold	Teacher, Elementary	8/2/10	Prob 1	MS, CLAD	1

At Webster:

<u>Name:</u>	<u>Title:</u>	<u>Seniority Date:</u>	<u>Status:</u>	<u>Credential:</u>	<u>FTE</u>
Mayra Rodriguez	Teacher, Elementary	8/2/10	Prob 1	MS, CLAD	1
Jennifer Nakagawa	Teacher, Elementary	8/13/09	Prob 2	MS, CLAD	1
Sheng Vue	Teacher, Elementary	1/24/08	Perm	MS, BCLAD <sup>7</sup>	1
Ezequiel Zuniga	Teacher, Elementary	8/16/07	Perm	MS, BCLAD	1
Kristy Kennedy	Teacher, Resource	8/9/07	Perm	MS, CLAD	1

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<sup>4</sup> Although the District's skipping chart of the certificated employees skipped at the Persistently Low Achieving Schools does not include any certificated tutors, at the hearing, Ms. Wilkins testified that it was her understanding that certificated tutors at the Persistently Low Achieving Schools have also been skipped. There was no evidence submitted during the hearing as to the names or seniority dates of the skipped certificated tutors.

<sup>5</sup> "MS" stands for a multiple subject credential.

<sup>6</sup> "CLAD" stands for a Crosscultural, Language, and Academic Development certificate.

<sup>7</sup> "BCLAD" stands for Bilingual Crosscultural, Language, and Academic Development certificate.



At Yosemite:

<u>Name:</u>	<u>Title:</u>	<u>Seniority Date:</u>	<u>Status:</u>	<u>Credential:</u>	<u>FTE</u>
Natalie Beckwith	Teacher, Middle	11/13/09	Prob 0	MS, Limited Assign: English, CLAD	1
Jeanna DeHaro	Coach, Literacy	8/13/09	Prob 2	MS, CLAD	1
Lisa Bridgen	Teacher, Library	8/4/09	Prob 0	MS, Emerg Library, CLAD	1
Suzanne Fisher	Teacher, Middle	8/14/08	Perm	MS, Supp: SSC/Eng, M/M (expired), CLAD	.6 <sup>8</sup>
Marcy Scharton	Teacher, Middle	8/16/07	Perm	MS, CLAD	1

16. At the hearing, the District argued that its skip of these junior teachers at the three Persistently Low Achieving Schools is authorized under section 44955, subdivision (d)(1), and consistent with *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127 (*Bledsoe*). Respondents disputed the District's argument.

17. In *Bledsoe*, the court was called upon to determine whether a school district could lay off a senior certificated employee when it skipped two more junior employees who were teaching in a community day school. The court in *Bledsoe* determined that, even though the more senior employee was credentialed and competent to teach in the positions that the junior employees occupied, the school district demonstrated that it had a specific need for the two junior teachers to teach in the community day school, and the two junior teachers had special training and experience necessary to teach in a community day school that the more senior teacher did not possess. The *Bledsoe* court therefore found that, consistent with section 44955, subdivision (d)(1), the school district could skip the two junior employees and lay off the more senior employee.

18. In its opinion, the *Bledsoe* court made clear that the determination of whether a school district may lay off senior employees and retain more junior employees involves a two-step analysis: (1) pursuant to section 44955, subdivision (b), the school district must first determine whether the senior employees are credentialed and competent to render the services that the junior employees have been retained to render; and (2) if the school district determines that the senior employees are credentialed and competent to render these services, the school district must then decide whether, pursuant to section 44955, subdivision (d)(1): (i) it has a specific need for the junior employees to teach a specific course or course of

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<sup>8</sup> The exhibit submitted by the District indicates that Ms. Fisher is teaching AVID (Advancement Via Individual Determination).

study, and (ii) the junior employees have special training and experience necessary to teach that course or course of study that the more senior employees do not possess.

19. There was no dispute that there are senior respondents who are credentialed and competent to teach in the positions currently occupied by the junior teachers who have been skipped at the Persistently Low Achieving Schools. There was no evidence that the skipped junior teachers have any special training or experience beyond that which they have received during this school year in their Persistently Low Achieving Schools. But the evidence established that the District has spent considerable time and money implementing the turnaround model adopted by the Governing Board for the Persistently Low Achieving Schools. And while the assessment results achieved to date are mixed, the turnaround model requires the District to show improvement in students' standardized test scores within two years. The District argued that there would be a significant adverse impact upon its ability to effectuate a turnaround at the Persistently Low Achieving Schools within the two-year time frame if it were not allowed to retain the skipped junior teachers. The District's argument is persuasive. If the District could not skip the junior teachers at the Persistently Low Achieving Schools, there would be a substantial disruption in the District's ability to accomplish the mandates that have been imposed under the NCLB, and significant additional time and money would have to be spent to train new teachers and incorporate them into the accountable learning communities that have been created at each of the three Persistently Low Achieving Schools.

20. Respondents argued that the courses taught at the Persistently Low Achieving Schools are not different from courses taught by multiple subject teachers throughout the District, particularly those teaching in schools that have been placed in program improvement status. Respondents' argument is not persuasive. The District demonstrated that the turnaround model that has been adopted and the accountable learning communities that have been created at the Persistently Low Achieving Schools have fundamentally affected the delivery of instruction to students at these schools in a unique way so as to constitute a specific course of study. The District also demonstrated that it has a specific need to retain the junior teachers who have received the intensive training needed to implement this specific course of study at the Persistently Low Achieving Schools.

21. Respondents asserted that they too: (1) have received training similar in substance to that given to the Persistently Low Achieving School teachers; (2) work collaboratively with their fellow teachers to implement effective teaching strategies and assess their students' success; and (3) teach in schools that have been placed in program improvement status. While there was no dispute that respondents' assertions are accurate, they are not sufficient to show that the junior Persistently Low Achieving School teachers should not be skipped.

As Ms. Severns explained, the training that was provided to Persistently Low Achieving School teachers during this school year was not different in substance from the training that teachers in other District schools have received. All District teachers have been offered training in the same content areas as that provided to the Persistently Low Achieving School teachers. But the training given to the Persistently Low Achieving School teachers

was different in its frequency, depth and intensity. Under the Collective Bargaining Agreement, District teachers are limited to a total of 27 hours a semester for both professional learning and grade-level or subject-matter planning. Pursuant to the PLAS MOU, this time limit was eliminated for Persistently Low Achieving School teachers. Given the 10 additional professional learning days and 30 extra minutes of school each day, the Persistently Low Achieving School teachers have received significantly more training than other District teachers, and have had substantially more time to work cohesively with their fellow teachers to conduct grade-level and subject-matter planning. In addition, Persistently Low Achieving School teachers received some of their extra training directly from the training developers. In contrast, at other District schools, some of the training was first provided to site administrators or foundation teams, who in turn, provided the training to other teachers. Moreover, Persistently Low Achieving School teachers were required to take the training as a group, while other District teachers have been offered some of the training on a voluntary and individual basis. Given the significantly greater amount of time devoted to training, Persistently Low Achieving School teachers have been able to collaborate with fellow teachers, implement the training, and assess its success much more quickly than has occurred at other District schools. The District therefore established that the skipped junior teachers have the special training and experience necessary to teach in the Persistently Low Achieving Schools that more senior respondents do not possess

22. Respondents argued further that, for the next school year, Yosemite will be adding 10 new teachers, and this change will cause more disruption to Yosemite's turnaround than allowing senior respondents to bump junior skipped teachers. The District conceded that there will be 10 different teachers at Yosemite next year: three current Yosemite teachers are retiring; four Yosemite teachers are transferring to other schools; and three new instructional programs will be added. The District also conceded that this loss of teachers, and the need to train replacement or additional teachers, may result in a disruption in the District's turnaround efforts at Yosemite. But all the vacancies at Yosemite are in single subject areas. The junior teachers that have been skipped all have multiple subject credentials. Respondents did not show that the changes in Yosemite's single subject teaching staff next year justify overturning the District's skip of junior multiple subject teachers at the Persistently Low Achieving Schools.

23. In sum, pursuant to section 44955, subdivision (d)(1), the District demonstrated that it has a specific need for the skipped junior teachers to teach the specific courses of study provided to students at its Persistently Low Achieving Schools. The District also demonstrated that the skipped junior teachers have been provided with special training and experience necessary to be Persistently Low Achieving School teachers that more senior respondents do not possess. The District therefore established compliance with section 44955, subdivision (d)(1). Accordingly, the District properly applied the skipping criteria set forth in its PKS Resolution to skip these junior certificated employees. The District's application of these skipping criteria should therefore be upheld.

Seniority Dates of Respondents Holding Multiple Subject Credentials

24. The seniority date of a certificated employee must be determined in accordance with section 44845, which provides:

Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position.

25. In addition, under section 44918, subdivision (a), if a certificated employee has served at least 75 percent of a school year as a long-term substitute, the employee will be deemed to have served that year as a probationary employee, if the employee is hired as a probationary employee for the next school year:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.<sup>9</sup>

26. It has been the District's practice that the first written agreement that it enters into with a certificated employee is a temporary contract. The District does not give written notice to a certificated employee, or ask a certificated employee to sign a contract, before the District hires that certificated employee as a long-term substitute or probationary teacher. Sometime after the school year has begun, the District sends its certificated employees a document entitled "Terms of Employment," which includes information such as the certificated employee's position title, status code, work location, FTE, "certificated hire date," and seniority date. The District asks each certificated employee to sign and date the Terms of Employment, and return it to the District. The Terms of Employment provides that, by signing the document, a certificated employee acknowledges that the information set forth in it, including the designated seniority date, is true and correct. Even though respondents may have signed Terms of Employment acknowledging the correctness of seniority dates designated by the District, respondents did not thereby waive any rights to challenge their designated seniority dates during this proceeding. (§ 44924; *Bakersfield*

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<sup>9</sup> Section 44918, subdivision (d), provides:

Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

*Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1275 (*Bakersfield*).

27. During the hearing, respondents raised two general challenges to the manner in which the District has determined the seniority dates of certain teachers holding multiple subject credentials. First, respondents argued that the District violated section 44845 in the manner in which it assigned seniority dates to teachers who were hired to teach in District schools during the leveling process at the beginning of the school year. Second, respondents argued that the District violated section 44918, subdivision (a), by failing to grant teachers who served more than 75 percent of a school year an additional year as probationary employees. These issues are addressed below.

#### *Respondents Retained During the Leveling Process*

28. The District has a transient student population. From year to year, the District does not know how many students may enroll at each of its school sites. Because enrollment in its schools varies from year to year, at the beginning of each school year, the District conducts what it calls its “leveling process” to ensure that an appropriate number of teachers are employed at each of its schools for the number of students who enroll. When conducting this leveling process, the District must follow its collective bargaining agreement, and first determine whether the teaching needs of its schools can be filled through existing teachers hired through the lateral and overage processes. If all of a school’s teaching positions cannot be filled through the lateral and overage processes, the school principals may then hire new teachers to fill teaching positions.

29. Ms. Mecum testified that, during the leveling process, until a school principal receives authorization to hire a regular teacher to fill a teaching position, the principal may fill that position with a substitute teacher; if the principal does not fill the teaching position through the lateral or overage processes, the principal may then hire the substitute teacher as the regular teacher in that position. According to Ms. Mecum, school principals have been told to tell the teachers hired as substitutes that they have no right to a teaching position until the leveling process has been completed and they are retained as regular teachers. When the District retains these substitutes as regular teachers, it has them sign a Contract for Temporary Certificated Employee (temporary contract). The District considers the date that the new teacher signs a temporary contract to be the teacher’s seniority date.

30. The respondents who testified described the process through which they were hired differently from the way Ms. Mecum described it. According to these respondents, when they were first hired to fill teaching positions, their principals did not tell them that they were being hired as substitutes. Instead, their principals told them that they were being retained as regular teachers in their classrooms. They attended the pre-service training, set up their classrooms, met with parents, and assigned class work and grades as if they were regular teachers. Prior to beginning work, they did not receive or sign any documents explaining to them the leveling process or informing them that they were being hired as long-term substitutes or temporary employees.

These respondents were paid substitute pay for the first approximately three to eight weeks they worked. After they started working, some of them were told by their principals that they would have to wait until the leveling process was completed and they had signed their contracts to begin receiving regular teacher pay. Many of them initialed substitute sign-in sheets in order to receive pay for their first few weeks of work, prior to signing their temporary contracts.<sup>10</sup>

When they received their temporary contracts, almost all of these respondents were given retroactive pay back to their first day of work, to make up for the difference between substitute pay and regular teacher pay. But even though almost all of these respondents received regular teachers' pay back to their first day of work, the District set all their seniority dates as the day they signed their temporary contracts.

31. Respondents argued that the seniority dates of these teachers should not be the day when they signed their temporary contracts; instead, their seniority dates should be the first day they started working as regular teachers for the District. As set forth below, respondents' argument is persuasive.

32. Certificated employees must be classified into one of four classifications: substitute, temporary, probationary, or permanent. (*Bakersfield, supra*, 145 Cal.App.4th at pa. 1278.) In determining whether a certificated employee should be classified as a substitute, temporary, probationary, or permanent teacher, a school district must comply with section 44916, which provides:

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.

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<sup>10</sup> By signing the substitute sign-in sheets, respondents did not waive their right to later challenge whether the District properly classified them as substitutes. (§ 44924; *Bakersfield, supra*, 145 Cal.App.4th at p. 1275.)

33. In *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911 (*Kavanaugh*), the California Supreme Court held that, in accordance with section 44916, an employing school district must provide a new certificated employee with written notice of employment status “[a]t the time of initial employment.” If the school district fails to provide such notice, or if the notice fails to indicate employment is “temporary,” under section 44916, the certificated employee shall be deemed to be a probationary employee. As the court explained:

[T]he Legislature’s intent and purpose in enacting section 44916 was to benefit teachers. Stated differently, section 44916 reveals the Legislature’s intent that certificated teachers be informed of their classification at a time that is sufficiently early in the process to enable them to make informed decisions regarding their future employment. ...

Reading section 44916 to mean that certificated teachers must be informed in writing, on or before their first day of paid service to their employing districts, of their salary and employment status is thus consistent with the apparent purpose of the statute. Once a school year begins, for teachers to find a job as other than a substitute is much more difficult. A requirement that employing districts inform applicants for certificated positions of their proposed employment status (permanent, probationary, temporary, substitute) before they actually begin working avoids the kind of bait-and-switch scenario in which a teacher begins the school year believing his or her status is probationary (with the accompanying level of job protection) only to discover after the year has started—when it is too late to find another position—that the position is only temporary.

(*Kavanaugh, supra*, 29 Cal.4th at pp. 912-922.)

34. When the affected respondents were first hired by the District during the leveling process, they were not told they were being hired as substitutes. Before they started working, they were not given or asked to sign any documents that notified them of their classification. When they started working, they assumed the full responsibilities of classroom teachers. Their first indication that the District considered them to be substitutes came after they began working, when they were asked to sign substitute sign-in sheets and were paid substitute pay. Under *Kavanaugh*, this notice came too late to allow them to be considered substitutes. In any event, when the District retroactively made up the difference between their initial substitute pay and regular teacher pay from the first day they worked, the District thereby nullified any argument that these respondents were substitutes when they began working.

35. Under the reasoning set forth in *Kavanaugh*, the affected respondents cannot be deemed to have been temporary employees when they began working because they were not notified that they were temporary before their first work day.

36. In accordance with *Kavanaugh*, the affected respondents must be designated as probationary employees from their first day of service as teachers during the leveling process. Because the affected respondents must be deemed to have been probationary as of their first day of service, under section 44845, their first day of service is their seniority date.

37. None of the District's reasons for assigning these respondents seniority dates approximately three to eight weeks after they began working was persuasive. The District argued that, in order to maintain consistency for all new teachers, the District assigned the day they signed their temporary contracts as their seniority date. But by choosing the day that these teachers signed their temporary contracts as their seniority date, the District did not achieve consistent results. Teachers who started working for the District on the same day were assigned different seniority dates depending on the fortuity of the contract completion process. For example, self-represented respondent Malone started working on the same day with two other teachers who were assigned seniority dates that were earlier than hers, and who, as a result, were not designated for layoff. From the evidence that was presented, it appeared that the completion of Ms. Malone's temporary contract may have been delayed because an incorrect funding source number was typed onto the original requisition for her position. A mistake during the contracting process cannot be allowed to dictate a teacher's seniority date.

Ms. Mecum also testified that a new teacher could not be given a seniority date that was before that teacher's position was authorized in accordance with the District's leveling process. The court addressed this issue in *Kavanaugh* when it rejected the school district's argument that the term "at the time of initial employment," as used in section 44916, should be interpreted to refer to the date that the district formalized the teacher's hiring in a contract. As the *Kavanaugh* court, in relevant part, explained:

[W]ere we to accept the [school district's] proffered interpretation of section 44916, governing boards of school districts would be permitted to provide written notice of a teacher's classification and salary level at some indeterminate future time, when it was convenient for the governing board to meet, possibly well after the teacher had rendered paid service and long after the information could be of practical use to him or her. ... Because section 44916 was written to place the burden of notification on school districts and to benefit certificated teachers, no reason appears to interpret that section to give school districts greater flexibility in hiring at the expense of teachers.

(*Kavanaugh supra*, 29 Cal.4th at p. 923.)



The *Kavanaugh* court made clear that, under section 44845, a teacher's seniority date is not based upon when a school district may complete an internal authorization process. Instead, it is based upon when the teacher first renders paid probationary service to the school district.

Ms. Mecum testified further that the District gave the affected respondents retroactive pay because it was difficult to retain long-term substitutes to fill these positions. Paying these respondents as regular teachers without recognizing their first day of paid service as their seniority date is inconsistent with the mandate of section 44845.

38. In order to comply with section 44845 and the dictates of *Kavanaugh*, the District must correct the seniority dates of the affected respondents as follows:

<u>Name</u>	<u>Current Seniority Date</u>	<u>Correct Seniority Date</u> <sup>11</sup>
Milena Fast	September 20, 2006	August 15, 2006
Maria Magana	September 28, 2006	August 17, 2006
Leslie Malone	September 20, 2006	August 15, 2006
Marcia McComb	August 31, 2006	August 18, 2006
Elizabeth Ortiz-Salazar	September 22, 2006	August 15, 2006
Kathy Pauls <sup>12</sup>	September 20, 2006	August 15, 2006
Kalleah Ray	September 20, 2007	August 16, 2007
Larissa Shafer-Lopez	September 12, 2007	August 16, 2007
Michelle Sheehan	September 15, 2006	August 15, 2006
Lana Twitty	October 3, 2007	August 16, 2007
Mary Xiong	September 7, 2006	August 18, 2006

39. After correcting the seniority dates of these respondents, the District must determine whether their new seniority dates cause them to be more senior to any certificated employees who were not given Preliminary Notices and who have been retained to render services that these respondents are credentialed and competent to render. If there are more junior certificated respondents who have been retained to render services that these

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<sup>11</sup> The corrected seniority dates are based upon the testimony and exhibits that the affected respondents offered at the hearing. In some instances, these corrected seniority dates are not consistent with the information set forth in either the represented respondents' closing brief or Exhibit A to the District's closing brief. It appears that the determination of the correct seniority dates for some affected respondents may revolve around whether they should be given credit for pre-service training days. Before changing any seniority dates, the District should verify that the corrected seniority dates set forth above are the first days the affected respondents were paid for service during the leveling process.

<sup>12</sup> In the alternative, Ms. Pauls also argued that her seniority date should be changed to sometime in December 2005. Mr. Pauls did not submit adequate evidence to establish that her seniority date should be changed to sometime in December 2005.

respondents are certificated and competent to render, the District must rescind these respondents' Preliminary Notices on a one-to-one basis, starting with the most senior respondent.

*Respondents Who Worked at Least 75 Percent During the Previous Year*

40. If the District wishes to retain a certificated employee who has worked 75 percent or more of the previous school year as a long-term substitute, it has been the District's practice to enter into a temporary contract with that employee for the following school year. If the District wishes to retain the certificated employee for a third year, the District does not enter into a contract with that certificated employee. Instead, upon approval of the Governing Board, the District deems that employee to be a "probationary 2" teacher. During the hearing, the District explained that, after the first year, it retains long-term substitutes for a second year as temporary employees, and not as probationary employees, because, overall, it has more teachers assigned to categorically-funded programs and on leaves of absence than it has temporary teachers. Respondents argued that the District should be required to comply with section 44918, and classify as probationary from the beginning of their first school year the affected respondents who served more than 75 percent of that first school year as long-terms substitutes and/or temporary employees, and then returned the following school year as full-time teachers.

41. The limitations of the temporary classification were addressed in *California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146-147 (*Vallejo*):

Section 44915 states: "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees." Although this statute does not mention temporary employees, other provisions of the Code authorize that classification in certain narrowly defined situations. (*Bakersfield, supra*, 145 Cal.App.4th at pp. 1279-1280; see, e.g., §§ 44917, 44919, 44920.) Section 44915 therefore establishes probationary status as the default classification for teachers whom the Education Code does not require to be classified otherwise. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1280; *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 109 (*Motevalli*).)

"The [Education] Code recognizes two general kinds of temporary employees: those who are employed to serve for less than three or four months, or in some types of limited, emergency, or temporary assignments or classes (see §§ 44919, 44921, 44986); and those who are employed for up to one year to replace a certificated employee who is on leave or has a

lengthy illness (see §§ 44920, 44918).... In addition, persons employed in categorically funded programs or in programs operated by a district under contract are treated *like* temporary employees in certain respects (§ 44909), as are persons employed as substitute teachers. (§ 44917.)” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1281, fns. omitted.) In establishing these narrow categories, the Legislature has sought to limit the ability of school districts to classify teachers as temporary employees. (*Id.* at p. 1280; *Haase v. San Diego Community College Dist.* (1980) 113 Cal.App.3d 913 [“The Legislature ... has restricted the flexibility of a school district in the continued use of temporary employees [citations], for otherwise the benefits resulting from employment security for teachers could be subordinated to the administrative needs of a district”].) “Because the substitute and temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature, and should be strictly interpreted.” (*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821.)

In order to ensure that school districts do not abuse the temporary contract tool to solve staffing problems in derogation of certificated employee rights, courts have held that districts may not employ more temporary teachers than there are permanent or probationary employees on leave plus the number of categorically funded positions. (*Santa Barbara Federation of Teachers v. Santa Barbara High School District* (1977) 76 Cal.App.3d 223, 227-228 (*Santa Barbara*); *Paulus v. Board of Trustees* (1976) 64 Cal.App.3d 59, 62-63 (*Paulus*).) Both *Santa Barbara* and *Paulus* make clear that there does not need be a one-to-one correspondence between any particular temporary employee in a school district and any particular leave of absence or categorically funded position, as long as the aggregate total of such positions does not exceed the total number of temporary employees in the school district.

42. Consistent with the courts’ rulings in *Vallejo*, *Santa Barbara* and *Paulus*, the District may classify certificated employees as temporary when it has more teachers assigned to categorically-funded programs and on leaves of absence than it has temporary employees. But when it classifies certificated employees as temporary, the District still must comply with the mandates of sections 44845, 44916, and 44918, and the California Supreme Court’s ruling in *Kavanaugh*.

43. Robin Drake. Self-represented respondent Drake was employed by the District as a long-term substitute on October 12, 2005. She worked continuously as a long-term substitute for the remainder of the 2005-2006 school year, which constituted more than 75 percent of that school year. On August 14, 2006, the first day of the 2006-2007 school year, she returned as the regular teacher in the same classroom in which she had taught as a long-term substitute the previous school year. Before the first day of school, the District did not give Ms. Drake any notification of her classification. On September 20, 2006, she signed a temporary contract. The District asserts that Ms. Drake’s seniority date is September 20,

2006, the day she signed her temporary contract. Ms. Drake asserts that, under the mandates of sections 44916, 44918, and 44845, and *Kavanaugh*, her seniority date should be October 12, 2005. Ms. Drake's assertion is persuasive.

Because the District failed to notify Ms. Drake of her classification before she began working on August 14, 2006, in accordance with *Kavanaugh*, Ms. Drake must be deemed to have been a probationary employee as of that date. The District could not thereafter make her a temporary employee by entering into a temporary contract. Because Ms. Drake must be deemed to have been a probationary employee as of August 14, 2006, and because she served as a long-term substitute for more than 75 percent of the 2005-2006 year, under section 44918, subdivision (a) (Finding 25), Ms. Drake must be deemed to have served the 2005-2006 school year as a probationary employee. Because Ms. Drake's service in the 2005-2006 school year must be deemed to have been probationary, in accordance with section 44845 (Finding 24), Ms. Drake's seniority date must be corrected to October 12, 2005, her first day of paid service in a probationary position.

44. Gregory Larmer. Mr. Larmer began working as a long-term substitute for the District on October 5, 2006. On November 3, 2006, Mr. Larmer signed a temporary contract, which stated that he would start work as a temporary employee beginning on November 9, 2006. Although he was originally paid as a substitute teacher when he began working on October 5, 2006, in November 2006, the District retroactively paid him for the difference between his substitute pay and his regular teacher pay back to his first day of work. He worked continuously for the District from October 5, 2006, until the end of the 2006-2007 school year, which was more than 75 percent of that year. He began working at the same school at the beginning of the next school year. The District asserts that Mr. Larmer's seniority date is August 16, 2007. Mr. Larmer asserts that, consistent with sections 44916, 44918, and 44845, and *Kavanaugh*, his seniority date should be October 5, 2006. Mr. Larmer's assertion is persuasive.

From his testimony, it was clear that Mr. Larmer was aware that, when he first started working on October 5, 2006, he was initially being hired as a long-term substitute. An argument can be made under *Kavanaugh* that, when he signed his temporary contract in November 2006 and was paid retroactively as a regular teacher back to October 5, 2006, he ceased to be a long-term substitute and thereby became a probationary employee as of that date. But even if it is accepted that he was a long-term substitute/temporary employee during the 2006-2007 school year, there was no evidence that Mr. Larmer signed a contract with the District when he began working in 2007-2008 school year. Consequently, under the reasoning in *Kavanaugh*, he must be deemed to have been employed as a probationary employee when he began working on August 16, 2007, the first day of the 2007-2008 school year. Because he was employed as a probationary employee from the beginning of the 2007-2008 school year, and because he served more than 75 percent of the 2006-2007 school year as a long-term substitute/temporary employee, under section 44918, subdivision (a) (Finding 25), he must be deemed to have been a probationary employee during the 2006-2007 school year. Because Mr. Larmer's service in the 2006-2007 school year must be deemed to have been probationary, in accordance with section 44845 (Finding 24), Mr. Larmer's seniority

date must be corrected to October 5, 2006, his first day of paid service in a probationary position.

45. Michelle Baker. Ms. Baker began working for the District on October 5, 2006. Ms. Baker was not hired through the District's substitute system. Instead, she heard of the job opening from a friend and contacted the principal of Lowell Elementary, who hired her as a kindergarten teacher. She worked continuously as a kindergarten teacher from October 5, 2006, until the end of the 2006-2007 school year, which was more than 75 percent of that school year. She was not given any written notice of her classification or asked to sign any paperwork prior to beginning work on October 5, 2006. She was paid as a long-term substitute for the 2006-2007 school year. She began working as a fourth/fifth grade teacher at the beginning of the 2007-2008 school year. There was no evidence to indicate that the District gave Ms. Baker any notice of her classification before she started working at the beginning of the 2007-2008 school year. On October 3, 2007, she signed a temporary contract, which stated that she would begin working as a temporary employee for the District on October 11, 2007. The District asserts that Ms. Baker's seniority date is October 11, 2007, the effective date of her temporary contract. Ms. Baker asserts that her seniority date should be October 5, 2006, the first day she began working for the District. Ms. Baker's assertion is persuasive.

Because Ms. Baker was not given any notice of her classification before she began working on October 5, 2006, given the reasoning set forth in *Kavanaugh*, an argument can be made that she should be considered to have been a probationary employee on October 5, 2006. But even if it is accepted that, based upon her pay, she was a long-term substitute for the 2006-2007 school year, she must be deemed to have been a probationary employee when she began working at the beginning of the 2007-2008 school year, because the District failed to give her prior notice of her classification. As made clear by the *Kavanaugh* court, the District could not thereafter make her a temporary employee. Because Ms. Baker must be deemed to have been employed as a probationary employee from the beginning of the 2007-2008 school year, and because she served more than 75 percent of the 2006-2007 school year as a long-term substitute, under section 44918, subdivision (a) (Finding 25), she must be deemed to have been a probationary employee during the 2006-2007 school year. Because Ms. Baker's service in the 2006-2007 school year must be deemed to have been probationary, in accordance with section 44845 (Finding 24), Ms. Baker's seniority date must be corrected to October 5, 2006, her first day of paid service in a probationary position.

46. Virginia Gutierrez. During the summer prior to the 2006-2007 school year, Ms. Gutierrez was hired by the principal of Calwa Elementary School to be a first-grade teacher, when an additional first grade class had to be added due to high enrollment. On August 21, 2006, the first day of school, she began teaching in the classroom. She did not receive or sign any documents regarding her classification before she began teaching. On November 22, 2006, she signed a temporary contract, which stated that she was being hired as a temporary employee beginning on November 23, 2006. Before she signed her temporary contract, she was paid as a long-term substitute. After she signed her temporary contract, she was given retroactive pay back to August 21, 2006, to make up the difference between her substitute pay and her regular teacher pay. Ms. Gutierrez worked 100 percent of

the 2006-2007 school year as a first grade teacher. Near the end of that school year, she received a layoff notice for the following year.

During the summer prior to the 2007-2008 school year, Ms. Gutierrez was hired by the principal of Slater Elementary School to be the first-grade teacher, when an additional first grade class had to be added due to high enrollment. She began working as a first-grade teacher on the first day of school for the 2007-2008 school year. On September 20, 2007, Ms. Gutierrez signed a temporary contract, which stated that she would begin working as a temporary employee on September 21, 2007. The District asserts that Ms. Gutierrez's seniority date is September 21, 2007. Ms. Gutierrez asserts that her seniority date should be August 21, 2006, her first day of work as a first-grade teacher. Ms. Gutierrez's assertion is persuasive.

Ms. Gutierrez must be treated the same as the respondents hired during the leveling process. (Findings 28 through 39.) Before Ms. Gutierrez started working as a first-grade teacher on August 21, 2006, she was not given or asked to sign any documents that notified her of her classification. When she started working, she assumed the full responsibilities of a first-grade teacher. When the District retroactively made up the difference between her initial substitute pay and her regular teacher pay from the first day she worked, the District thereby nullified any argument that Ms. Gutierrez was a substitute from her first work day until she signed her first temporary contract. Under the reasoning set forth in *Kavanaugh*, Ms. Gutierrez cannot be deemed to have been a temporary employee when she began working because she was not notified that she was temporary before her first work day. In accordance with *Kavanaugh*, Ms. Gutierrez must be designated as a probationary employee from August 21, 2006, her first day of service as a first-grade teacher. In accordance with section 44845, Ms. Gutierrez's seniority date must therefore be changed to August 21, 2006.

47. Heather Lancaster. On September 19, 2005, Ms. Lancaster began working as a sixth-grade teacher at Birney Elementary School. Because Birney was then on the D track, September 19, 2005, was the first day of school. According to Ms. Lancaster, she was hired to be the regular teacher in the sixth grade and worked the entire 2005-2006 year in the same classroom. On November 17, 2005, she signed a temporary contract, which stated that she would begin working as a temporary teacher on November 18, 2005. When she began working in September 19, 2005, she was paid as a long-term substitute. After she signed her temporary contract, she received retroactive pay to make up for the difference between her substitute pay and her regular teacher pay.

The following year, Ms. Lancaster was told that another teacher was retiring from the sixth grade and needed to work one additional week before she could retire. Ms. Lancaster was therefore told that she would be working as a substitute for the first seven to 10 days. Even though she was given this information, Ms. Lancaster opened her sixth-grade classroom as the regular teacher on the first day of school, and worked in that classroom the entire year. Although Ms. Lancaster was initially paid as a substitute for those first few days, she was thereafter paid retroactively the difference between her substitute and her regular teacher pay back to August 21, 2006, the first day of school.

The District designates Ms. Lancaster's seniority date as August 30, 2006. There was insufficient evidence to explain how the District arrived at this date. Ms. Lancaster asserted that her seniority date should be September 19, 2005, the first day she began teaching in the sixth grade at Birney. Ms. Lancaster's assertion is persuasive.

Ms. Lancaster must be treated the same as the respondents hired during the leveling process. (Findings 28 through 39.) Before Ms. Lancaster started working as a sixth-grade teacher on September 19, 2005, she was not given or asked to sign any documents that notified her of her classification. When she started working, she assumed the full responsibilities of a sixth-grade teacher. When the District retroactively made up the difference between her initial substitute pay and her regular teacher pay from the first day she worked, the District thereby nullified any argument that Ms. Lancaster was a substitute from her first work day until she signed her temporary contract. Under the reasoning set forth in *Kavanaugh*, Ms. Lancaster cannot be deemed to have been a temporary employee when she began working because she was not notified that she was temporary before her first work day. Under *Kavanaugh*, Ms. Lancaster must be designated as a probationary employee from September 19, 2005, her first day of service as a sixth-grade teacher. In accordance with section 44845, Ms. Lancaster's seniority date must therefore be changed to September 19, 2005.

48. Yeng Vang. On August 17, 2006, Ms. Vang began working at Mayfair Elementary School. Two weeks before she began working, the Mayfair principal offered her the position of kindergarten teacher. When the principal offered her this position, he did not tell her she was going to be a substitute. Prior to beginning work, she did not receive or sign any documents notifying her that she was being hired as a substitute. After she started working, she initially received substitute pay and signed substitute sign-in sheets. On October 24, 2006, she signed a temporary contract, which stated that she would be starting as a temporary employee on October 26, 2006. After she signed her temporary contract, she was retroactively paid the difference between substitute pay and regular teacher pay back to her first day of work. The District has designated Ms. Vang's seniority date as August 16, 2007. Ms. Vang asserts that her seniority date should be August 17, 2006. Ms. Vang's assertion is persuasive.

Ms. Vang must be treated the same as the respondents hired during the leveling process. (Findings 28 through 39.) Before Ms. Vang began working on August 17, 2006, she was not given or asked to sign any documents that notified her of her classification. When she started working, she assumed the full responsibilities of a kindergarten teacher. When the District retroactively made up the difference between her initial substitute pay and her regular teacher pay from the first day she worked, the District thereby nullified any argument that Ms. Vang was a substitute from her first work day until she signed her temporary contract. Under the reasoning set forth in *Kavanaugh*, Ms. Vang cannot be deemed to have been a temporary employee when she began working because she was not notified that she was temporary before her first work day. In accordance with *Kavanaugh*, Ms. Vang must be designated as a probationary employee from August 17, 2006, her first day of service as a kindergarten teacher. In accordance with section 44845, Ms. Vang's seniority date must therefore be changed to August 17, 2006.

49. Laura Marquardt. On October 27, 2005, Ms. Marquardt began working for the District as a long-term substitute to replace a kindergarten teacher on medical leave. She worked in this long-term substitute position for the remainder of the 2005-2006 school year. On the first day of school at the beginning of the 2006-2007 school year, she began working as a second-grade teacher. When she began working at the beginning of the 2006-2007 school year, she was not given any written documents to read or sign that notified her of her classification. She understood from her principal that she was being hired as the second-grade teacher. On August 29, 2006, she signed a temporary contract, which stated that the District was employing her as a temporary teacher beginning on August 29, 2006. Ms. Mecum signed that temporary contract on July 11, 2006. The District has designated August 29, 2006, the date Ms. Marquardt signed her temporary contract, as Ms. Marquardt's seniority date. Ms. Marquardt asserts that her seniority date should be changed to October 27, 2005.

From her testimony, it was clear that Ms. Marquardt knew that she was being hired as a long-term substitute when she started working on October 25, 2005. Because she did not start as a long-term substitute until October 25, 2005, she did not work at least 75 percent of the 2005-2006 school year. Consequently, she is not entitled to the tacking set forth in section 44918, subdivision (a). As a result, Ms. Marquardt did not establish that her seniority date should be changed to October 25, 2005.

But the evidence established that Ms. Marquardt began working as a regular second-grade teacher on the first day of school at the beginning of the 2006-2007 school year. Before she began this work, she was not notified of her classification. Under *Kavanaugh*, in the absence of any written notice to the contrary, Ms. Marquardt must be deemed to have been a probationary employee as of the beginning of the 2006-2007 school year. The District could not thereafter make her a temporary employee. Ms. Marquardt's seniority date must therefore be corrected to her first day of paid service at the beginning of the 2006-2007 school year. There was not sufficient evidence to establish what day that was. The District should determine that day, and change Ms. Marquardt's seniority date accordingly.

50. After correcting the seniority dates of Ms. Drake (Finding 43), Mr. Larmer (Finding 44), Ms. Baker (Finding 45), Ms. Gutierrez (Finding 46), Ms. Lancaster (Finding 47), Ms. Vang (Finding 48), and Ms. Marquardt (Finding 49), the District must determine whether these respondents' new seniority dates cause them to be more senior than any certificated employees who were not given Preliminary Notices and who have been retained to render services that these respondents are credentialed and competent to render. If there are more junior certificated respondents who have been retained to render services that respondents are certificated and competent to render, the District must rescind respondents' Preliminary Notices on a one-to-one basis, starting with the most senior respondent.

#### *Other Individual Seniority Issues for Respondents Holding Multiple Subject Credentials*

51. There were some respondents who raised issues regarding their seniority dates that did not fall within to the two general categories addressed above:



52. Rosalinda Torres. The District has designated August 16, 2007, as Ms. Torres's seniority date. At the hearing, Ms. Torres asserted that her seniority date should be changed to August 13, 2007. According to Ms. Torres, she attended an orientation day and an institute day starting on August 13, 2007. In support of her assertion, Ms. Torres submitted: (1) her temporary contract, which she signed on August 13, 2007, effective August 16, 2007; and (2) a document entitled "Assumption Program of Loans for Education," on which her principal indicated that her hire date was August 13, 2007. These documents do not indicate whether Ms. Torres received any pay for attending the orientation or institute day. Consequently, Ms. Torres did not submit sufficient evidence to establish that her first day of paid service in a probationary position was August 13, 2007. As a result, Ms. Torres did not establish that her seniority date should be changed to August 13, 2007.<sup>13</sup>

53. Grace Daniels. The District has designated August 16, 2007, as Ms. Daniels's seniority date. At the hearing, Ms. Daniels asserted that her seniority date should be changed to January 8, 2007, when she began working as a teacher. The evidence showed that, on January 3, 2007, Ms. Daniels signed a temporary contract, which stated that she would begin working as a temporary teacher for the District on January 8, 2007. Because Ms. Daniels signed her temporary contract before she started working as a temporary teacher, the rationale of *Kavanaugh* does not apply. In addition, because Ms. Daniels did not start as a temporary teacher until January 8, 2007, she did not work at least 75 percent of the 2006-2007 school year. Consequently, she is not entitled to the tacking set forth in section 44918, subdivision (a). In sum, Ms. Daniels did not establish that her seniority date should be changed to January 8, 2007.

54. Yee Moua. Ms. Moua began working as a teacher for the District on January 2, 2007. According to Ms. Moua, when she was hired, her principal told her that she was being hired as a full-time teacher. Before she started working on January 2, 2007, she was not given any documents to read or sign that notified her that she was a substitute or temporary employee. On January 31, 2007, she signed a temporary contract, which stated that she was being hired as a temporary teacher for the 2006-2007 school year, beginning on January 31, 2007. Although Ms. Moua was originally paid as a substitute, after she signed this temporary contract, she was given retroactive pay back to January 2, 2007, to make up for the difference between her substitute pay and her regular teacher pay. On July 3, 2007, Ms. Moua signed a temporary contract, which stated that she was being hired as a temporary teacher for the 2007-2008 school year, beginning August 16, 2007. The District asserts that Ms. Moua's seniority date is August 16, 2007. Ms. Moua asserts that her seniority date should be changed to January 2, 2007. Ms. Moua's assertion is persuasive.

The exhibit showing the pay that Ms. Moua received from the District in December 2006 and January 2007, indicates that on January 2, 2007, Ms. Moua began working in a vacant position described as "Winchell – Additional KDG Position Authorized." The exhibit

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<sup>13</sup> Ms. Torres also raised concerns with regard to the number of points she was awarded during the tie-breaking process. Her concerns are addressed below.

also includes a Personnel Requisition from the principal at Winchell Elementary School, asking that Ms. Moua be hired to fill a new position beginning on January 2, 2007. Before Ms. Moua started in this new position on January 2, 2007, the District did not notify her that she was a substitute or temporary teacher. For all the reasons set forth above (Findings 28 through 39), in accordance with *Kavanaugh*, Ms. Moua must be deemed to have been a probationary employee on January 2, 2007. As a result, under section 44845 (Finding 24), Ms. Moua's seniority date must be changed to January 2, 2007, her first day of paid service in a probationary position.<sup>14</sup>

55. Janet Renteria. The District has designated self-represented respondent Renteria's seniority date as August 16, 2007. During the hearing, Ms. Renteria testified that she was hired as a long-term substitute in February 2007. Because she did not start as a long-term substitute until February 2007, she did not work at least 75 percent of the 2006-2007 school year. Consequently, she is not entitled to the tacking set forth in section 44918, subdivision (a). Ms. Renteria did not submit sufficient evidence to establish that her seniority date should be changed.

56. Respondents Ana Sepulveda, Brandy Higley, Brooke Kindberg, Kelley Klassen, Melanie Moreno, Denise Silveira, Karen Vang, and Pamela Guizar did not testify at the hearing, but they submitted documents relating to their seniority dates, which were admitted into evidence as administrative hearsay under Government Code section 11513, subdivision (d).<sup>15</sup> There was not, however, sufficient evidence submitted with regard to these respondents to order any changes to their designated seniority dates.

#### Tie-Breaking Issues of Multiple Subject Credential Holders

57. As part of its PKS Resolution, the Governing Board adopted the following tie-breaking criteria to be applied when determining the order of termination of certificated employees with the same seniority date:

- A. Authorization for English Language Instruction
  - +3 BCLAD (if teaching in bilingual)
  - +2 BCLAD (if not teaching in bilingual)
  - +2 CLAD/LDS
  - +1 Other EL Certification (i.e., SB1969/SB 395)

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<sup>14</sup> Ms. Moua also raised concerns about the number of points she was awarded during the tie-breaking process. Her concerns are addressed below.

<sup>15</sup> Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

- B. Certificates to Teach in Special Programs
  - +1 (Reading Specialist, Special Education)
- C. Type of Credential(s) Held
  - 0 Emergency /PIP/STSP
  - +1 Internships
  - +2 Regular credential (preliminary or clear)
  - +3 National Board Certification
- D. Credentials that Permit Supplementary Authorization
  - +1 (i.e., multiple subjects plus supplementary math)
- E. Credentials to Teach or Serve in a Particular Program/Subject or Provide a Particular Service of Need by the District
  - +1 For credential in high need areas  
(Science, Foreign Language-Spanish, PPS and Administrative)
- F. Earned Degrees beyond BA/BS Level
  - +2 Doctorate
  - +1 MA
- G. Total Years of K-12 Teaching Experience with Regular Teaching Credential
  - +3 8 years or more
  - +2 4 to 7 years
  - +1 1 to 3 years

In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery. FTA will be notified in advance and may have a representative present when such lottery is conducted.

58. Rosalinda Torres. Ms. Torres holds a clear multiple subject credential and a BCLAD. Her seniority date is August 16, 2007. (Finding 52.) She is currently teaching in the dual immersion program at Leavenworth Elementary School. She is utilizing her BCLAD to teach in this program. She teaches all her classes in Spanish, even though many of her students speak only English. The District awarded her five points on the tie-breaking chart. She asserts that she was not given sufficient points for the fact that she is utilizing her BCLAD in teaching in the dual immersion program, and that, under the tie-breaking point system, she should have received seven points. Ms. Torres's assertion is persuasive.

There was no evidence submitted during the hearing to explain how the District awarded Ms. Torres five points. Based upon the tie-breaking point system, Ms. Torres should have received three points for using her BCLAD to teach in a bilingual program, two points for her clear multiple subject credential, and two points for her seven years of teaching, for a total of seven points. Ms. Torres's point score on the tie-breaking chart should therefore be changed from five to seven.

59. Yee Moua. Ms. Moua holds a clear multiple subject credential with a CLAD. She also has a master's degree. As set forth in Finding 54, her seniority date is January 2, 2007. The District awarded her six points on the tie-breaking chart. She asserts that under the tie-breaking point system, she should have received seven points. Her assertion is persuasive.

There was no evidence submitted during the hearing to explain how the District awarded Ms. Moua six points. Based upon the tie-breaking point system, Ms. Moua should have received two points for her CLAD, two points for her clear multiple subject credential, one point for her master's degree, and two points for her seven years of teaching, for a total of seven points. Ms. Moua's point score on the tie-breaking chart should therefore be changed from six to seven.

#### Other Issues Regarding Multiple Subject Credential Holders

60. Maria Vallecillo. The District has designated December 1, 2008, as Ms. Vallecillo's seniority date. Ms. Vallecillo began working at the Edison-Bethune Charter Academy School (Edison-Bethune) on August 16, 1999. On November 25, 2008, she signed a temporary contract to begin working as a temporary employee for the District on December 1, 2008. She began working for the District as a third-grade teacher on December 1, 2008. Ms. Vallecillo asserted that she should be given seniority credit for the period of time she worked at Edison-Bethune. Ms. Vallecillo's assertion is not persuasive.

Effective July 28, 1999, the District entered into a Charter School Agreement with The Edison Project, Inc. to convert Bethune Elementary School to a charter school. The Charter School Agreement, in relevant part, provided:

Teachers who were not District employees at the time they became employed at the Charter School will be classified as temporary employees by the District throughout the term of their employment at the Charter School. In the event such employees are accepted for transfer to another District school, their years of service and education credits attained while working at the charter school shall count toward their placement on the salary schedule.

Ms. Mecum testified that, pursuant to this provision, certificated employees who were hired by Edison-Bethune after July 28, 1999, accrued no seniority in the District while they worked at Edison-Bethune.

Ms. Vallecillo signed her first temporary contract with the District on November 25, 2008. She began working as a certificated employee for the District on December 1, 2008. Under the Charter School Agreement, she was a temporary employee of the District the entire time she worked at Edison-Bethune. She did not establish that she should be awarded any seniority credit with the District for the time she worked at Edison-Bethune. The District correctly designated her seniority date as December 1, 2008.

61. Shawna Haymond. Ms. Haymond holds a clear multiple subject credential. She was originally employed by the District in 1999. In 2008, she resigned from her District employment. On September 3, 2009, she was rehired by the District. Because she returned to the District within 39 months after she resigned, she retained her permanent status, but her seniority date was reset to September 3, 2009. Ms. Haymond asserted that, under section 44955, subdivision (b), her employment may not be terminated while any probationary employee is retained to render services which she is certificated and competent to render. While Ms. Haymond's statement of the law is correct, she did not submit any evidence to establish that the District is retaining any probationary employees, other than those properly skipped under section 44955, subdivision (d)(1), who are rendering any services which she is certificated and competent to render.

#### Home Economics Positions

62. As set forth above (Finding 2), in the PKS Resolution, the Governing Board approved the reduction of 46 home economics positions. As a result, all of the District's home economics positions are being eliminated as part of a reorganization of its Sociology for Living program. Many of the home economics teachers who received Preliminary Notices have seniority dates in the 1980's or 1990's.

63. In the PKS Resolution, the Governing Board adopted the following competency standard for bumping purposes:

To be considered competent for an assignment, [an] employee must be "highly qualified" to teach the specific subject matter as defined by the No Child Left Behind Act and applicable state law.

64. At the hearing, District witnesses explained that the Governing Board adopted this competency standard because: (1) under NCLB and related state law, school districts are required to have highly-qualified staff teaching certain core subjects; (2) the District has a significant number of underperforming schools that are required to have highly-qualified teachers; (3) some of the grant funding that the District receives is conditioned upon the District's having highly-qualified staff; and (4) parents may demand that their children be taught by highly-qualified staff if an assigned teacher is not highly qualified under NCLB. Respondents did not object to this competency standard. The District established that the NCLB competency standard relates to the skills and qualifications of its teachers. Its adoption was therefore a reasonable and proper exercise of the Governing Board's discretion. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 567 ["The mandate

is that the governing board establish a standard of competency that relates to the skills and qualifications of the teacher.”].)

65. Before sending Preliminary Notices to home economics teachers, the District determined whether any of these teachers were credentialed and competent under the NCLB competency standard to teach in any other subject areas. When senior home economics teachers were credentialed and met the NCLB competency standard in other subject areas, the District allowed them to bump more junior teachers. The District served Preliminary Notices on home economics teachers who either did not have credentials other than their single subject home economics credential, and/or did not meet the NCLB competency standard to teach any other subjects.

66. During the hearing, respondents raised the following arguments in opposition to the layoff of home economics teachers: (1) Sociology for Living is an excellent class that should not be eliminated or redesigned; (2) home economics teachers were not given adequate notice of their impending layoff to become NCLB-compliant in subject matter areas other than home economics before the March 15, 2011 deadline; and (3) home economics teachers should be permitted to bump more junior certificated employees teaching in assignments such as Campus Culture, AVID, transition positions, intervention positions, and alternative education programs. Each of these arguments is addressed below.

67. Some of the home economics teachers who testified spoke eloquently about the significant role that the Sociology for Living class plays in their students’ lives. They raised important concerns and considerations. But the District has been forced by severe economic conditions to make difficult choices about what positions will be cut. There was no showing that the District will not be able to meet any state or federal requirements after making the proposed reductions in home economics. Consequently, respondents did not show that the District has abused its discretion by eliminating all home economics positions.

68. There was testimony from home economics teachers who were not aware that the District was going to eliminate all home economics positions until the first or second week of March 2011. According to these teachers, before then, given their early seniority dates, they assumed that they would not be affected by a reduction in force. These teachers felt “blind-sided” when they learned that they would be laid off. They believed that the District should have notified them earlier in order to give them adequate time before the March 15, 2011 deadline to become NCLB-compliant in subject areas other than home economics.

69. While it is understandable that long-time home economics teachers who received Preliminary Notices may feel resentful about the lack of prior notice, respondents did not establish that the District violated any provisions of the Education Code by the manner in which it notified them of their impending layoffs. Section 44949, subdivision (a), provides that a school district must give certificated employees notice of their impending layoffs no later than March 15. The District met this deadline. As a result, respondents failed to raise a legally valid challenge to the amount of prior notice they received.

70. Respondents argued that home economics teachers who have received Preliminary Notices should be allowed to bump more junior teachers who are teaching in assignments that do not require particular credentials or NCLB compliance. The types of assignments enumerated by respondents included Campus Culture, AVID, transition positions, intervention positions, and alternative education programs.

71. According to the District, assignments such as Campus Culture and AVID are partial FTE assignments that supplement other assignments to complete a teacher's full 1.0 FTE. In *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334 (*Hildebrandt*), the court ruled that, when a school district lays off certificated employees because of a reduction in force, under section 44955, a senior part-time teacher is not entitled to bump a more junior full-time teacher. Under *Hildebrandt*, the District is not required to allow a home economics teacher with more seniority to partially bump a junior teacher from any assignments, such as Campus Culture or AVID, which constitute less than the junior teacher's full FTE.

72. In addition, the District argued that because intervention (including Corrective Reading), transition, and alternative education courses directly impact student instruction, certificated employees who teach these courses must be highly qualified under NCLB. Pursuant to its NCLB competency standard, the District is not required to allow a senior home economics teacher to bump a junior certificated employee teaching one of these courses unless the more senior home economics teacher is highly qualified under NCLB.

73. Respondents did not identify any particular junior employees who are teaching full-time in assignments that more senior home economics teachers are credentialed and competent under the NCLB competency standard to teach. Consequently, except as set forth below with regard to specific teachers, respondents did not establish that any of the home economics teachers designated for layoff may bump more junior teachers who did not receive Preliminary Notices.

#### *Issues Regarding Individual Home Economics Teachers*

74. Kathleen Powers. At the hearing, Ms. Powers challenged her designated seniority date and the District's failure to recognize her as a highly-qualified multiple subject credential holder.

- a. Seniority Date. The District has designated Ms. Powers's seniority date as September 7, 1983. At the hearing, Ms. Powers asserted that her seniority date should be changed to August 25, 1983. According to Ms. Powers, she was hired as a coach and was required to work with her team two weeks before school started. Ms. Powers testified that she was paid for this time. Ms. Powers did not, however, submit any documentation to establish that she was paid as a probationary employee for two weeks before September 7, 1983. Consequently, she did not provide sufficient information to support a change to her designated seniority date.

b. Highly-Qualified Status. Ms. Powers holds a clear multiple subject credential, a clear single subject credential in home economics, a SDAIE<sup>16</sup> certificate, and a master of arts in reading and language arts instruction. Ms. Powers testified that the first indication she had that she was going to be laid off was when she received her Preliminary Notice on March 10, 2011. Although she had heard rumors about an impending layoff in February, she assumed that, given her 1983 seniority date and her multiple subject credential, she would not be adversely affected by the layoff.

On March 10, 2011, when Ms. Powers received her Preliminary Notice, she attempted to call the District's Human Resources Department (HR), but she could not get through. On March 14, 2011, Ms. Powers met with Priscilla Robbins, an HR Analyst, to discuss whether the information that Ms. Powers brought with her would allow her to be "HOUSSEd",<sup>17</sup> i.e., determined to be highly qualified as a multiple subject credential holder under NCLB.

The testimony at the hearing about the meeting between Ms. Powers and Ms. Robbins was conflicting. According to Ms. Powers, she brought with her to the meeting sufficient information to allow Ms. Robbins to determine that Ms. Powers had the experience, expertise and training to be HOUSSEd. This information included agendas of training that Ms. Powers had given while she was employed by the District. In addition, Ms. Powers testified that the District had a record of her master's degree since 2003. According to Ms. Powers, Ms. Robbins stated that she would verify the agendas and get back to Ms. Powers.

When Ms. Robbins initially testified, she asserted that Ms. Powers did not present enough information on March 14, 2011, to obtain sufficient points to be HOUSSEd. According to Ms. Robbins, all the training agendas that Ms. Powers provided related to home economics, so Ms. Robbins could not award Ms. Powers sufficient points to be HOUSSEd.

When Ms. Powers was testifying, the District conceded that she had presented sufficient information to establish that she was highly qualified as a multiple subject credential holder to be HOUSSEd. The District argued, however, that because Ms. Powers did not provide all this information before March 15, 2011, her Preliminary Notice should not be rescinded.

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<sup>16</sup> "SDAIE" stands for "Specially Designed Academic Instruction Delivered in English."

<sup>17</sup> "HOUSSE" stands for "High, Objective, Uniform State Standard of Evaluation." It is an alternate method for an experienced teacher to demonstrate subject-matter competency under NCLB, which recognizes, among other things, the teacher's experience, expertise, and professional training.



The District's assertion is not persuasive. Although the District argued that Ms. Powers did not provide sufficient information before March 15, 2011, it did not identify what information Ms. Powers produced after March 15, 2011, that caused it to reverse its initial determination that Ms. Powers was not highly qualified. The information submitted by Ms. Powers includes two declarations dated April 2011, from Sharon Owyang, a retired home economics teacher, supporting Ms. Powers's highly-qualified status. But these declarations appear to be based upon the same information that Ms. Powers provided to Ms. Robbins on March 14, 2011. From the evidence submitted at the hearing, prior to March 15, 2011, Ms. Powers submitted sufficient information to the District to permit the District to conclude that she was highly qualified as a multiple subject credential holder. Given Ms. Powers's 1983 seniority date, there are more junior employees with multiple subject credentials who are teaching in assignments which Ms. Powers is credentialed and competent under the NCLB competency standard to teach. Ms. Powers's Preliminary Notice must therefore be rescinded.

75. Mary Jo Stott. At the hearing, Ms. Stott challenged her designated seniority date and the District's failure to recognize her art authorizations.

a. Seniority Date. The District has designated August 20, 1998, as Ms. Stott's seniority date. Ms. Stott asserted that her seniority date should be changed to August 21, 1997. Ms. Stott's assertion is persuasive.

On October 31, 1997, Ms. Stott signed a temporary contract that stated that she was being hired as a temporary employee for the period commencing August 21, 1997. Pursuant to *Kavanaugh*, the District could not retroactively make Ms. Stott a temporary employee. Ms. Stott must therefore be deemed to have been a probationary employee when she began working on August 21, 1997. In accordance with section 44845, her seniority date must therefore be changed to August 21, 1997.

b. Art Authorizations. Ms. Stott holds a single subject credential in home economics. Prior to March 15, 2011, Ms. Stott held a supplementary authorization in introductory art. A supplementary authorization does not automatically confer NCLB compliance. On March 23, 2011, the Commission on Teacher Credentialing (CTC) issued Ms. Stott subject matter authorizations in two-dimensional art and introductory art. A certificated employee who has a subject matter authorization is automatically deemed to be highly qualified under NCLB in that subject matter.

At the hearing, Ms. Stott testified that the first time she heard that the District was eliminating all home economics positions was from the FTA during the first or second week of March. Initially, she was not concerned because she had a supplementary authorization in art. But after she received her Preliminary Notice, she was informed that, in order to be deemed to be

highly qualified under NCLB, she needed to show the District that she had subject matter authorization in art before March 15. According to Ms. Stott, by the time she learned this information, it was too late for her to obtain subject matter authorization by the March 15 deadline.

Ms. Stott argued that the District had enough information in her file before March 15 to determine that she had sufficient art credits to be deemed to be highly qualified in art under NCLB. Ms. Stott did not, however, provide adequate evidence to support this argument.

Because Ms. Stott did not submit adequate evidence to demonstrate that she provided sufficient documentation to the District to establish that she was highly qualified in art before the March 15, 2011 deadline, the District is not required to take into consideration her March 23, 2011 subject matter authorization for the purposes of this layoff. (*Campbell Elementary Teachers' Association, Inc. v. Abbott* (1978) 76 Ca.App.3d 796, 815.) Consequently, Ms. Stott did not establish that her Preliminary Notice should be rescinded due to her subject matter authorizations in art.

76. Isabel Moon. The District has designated August 20, 1998, as Ms. Moon's seniority date. At the hearing, Ms. Moon asserted that her seniority date should be changed to August 21, 1997, because that was the day she first began working full-time for the District. Ms. Moon did not, however, submit any documentation to support her assertion that her seniority date should be changed. Consequently, there was not enough evidence submitted at the hearing to change her designated seniority date.

77. Grace Chavoor. Ms. Chavoor has a single subject credential in home economics. Her seniority date is September 4, 1997. In addition to other assignments, she is currently assigned as an AVID coordinator. Ms. Chavoor did not submit sufficient evidence to establish that her current assignment as an AVID coordinator constitutes cause to rescind all or any part of her Preliminary Notice.

78. Karen Murray. Ms. Murray holds a clear single subject credential in home economics. Her seniority date is August 15, 2006. Ms. Murray was not served with a Preliminary Notice. At the hearing, the District conceded that its failure to serve Ms. Murray with a Preliminary Notice was a mistake. The appropriate action to remedy this mistake is for the District to rescind the Preliminary Notice served upon the most senior respondent holding a single subject home economics credential. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.)

79. Debbie Trafican-Heinz. Ms. Trafican-Heinz has a seniority date of August 20, 1998. She holds a single subject health science credential and a CLAD. She is currently a transition teacher at Wawona Middle School. Although Ms. Trafican-Heinz does not hold a home economics credential and is not currently teaching in a home economics assignment, the District served Ms. Trafican-Heinz with a Preliminary Notice as part of its layoff of home economics positions. Ms. Trafican-Heinz asserted that there was no legitimate reason for her

to be included with the home economics teachers. During the hearing, the District did not offer any evidence to explain why it laid off Ms. Trafican-Heinz with the home economics teachers. In the absence of any evidence to support the District's inclusion of Ms. Trafican-Heinz in the reduction of home economics positions, Ms. Trafican-Heinz's Preliminary Notice must be rescinded.

80. In sum, respondents with single subject home economics credentials who either established after March 15, 2011, or intend to establish in the near future, highly-qualified status in subject areas other than home economics did not show that their Preliminary Notices should be rescinded. The District should, however, continue to update its seniority list, tie-breaking chart, and bumping chart to ensure that any highly-qualified status that these teachers may obtain after March 15, 2011, will be considered for purposes of their reemployment rights.

### Certificated Tutor Positions

81. As set forth in the PKS Resolution (Finding 2), the Governing Board approved the reduction of 45 certificated tutor positions. The District issued Preliminary Notices to all its certificated tutors.<sup>18</sup> Certificated tutors hold multiple subject credentials. They work part time, generally with small groups of students who need remedial help in reading or math. Six certificated tutors testified at the hearing: Doua Vu, Cynthia Boul, Diane Shamshoian, Cynthia Hooker, Cynthia Paulson, and Judy Mitsuyoshi. Four of these certificated tutors (Vu, Boul, Shamshoian, and Mitsuyoshi) had, at some points during their District teaching careers, worked full time. Two of them (Boul and Paulson) had worked different percentages of FTE's during their teaching careers. During the 2010-2011 school year, the District designated all of these respondents as part-time certificated tutors.

82. The District asserted that, when the certificated tutors who were once full time moved to part-time status, they gave up their right to return to full-time status. The District conceded, however, that, in the past, it had allowed part-time teachers, including certificated tutors, to voluntarily return to full-time status. But the District argued that it was under no obligation to permit its current certificated tutors to bump more junior full-time teachers from all or part of their current full-time assignments. The District's argument is persuasive.

83. When the certificated tutors became part time, they gave up their right to insist on returning to full-time status. Although it was the District's prerogative in the past to allow part-time certificated tutors to voluntarily return to full-time positions from time-to-time, the District is not now obligated to allow its part-time certificated tutors to bump, either

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<sup>18</sup> As set forth in footnote 4, Ms. Wilkins testified that it was her understanding that certificated tutors at the Persistently Low Achieving Schools have been skipped. There was, however, no evidence submitted during the hearing as to the names or seniority dates of the skipped certificated tutors.

partially or fully, more junior certificated employees who are currently teaching full time. (*Hildebrandt, supra*, 172 Cal.App.4th at pp. 343-344.)

84. The certificated tutors also argued that they should be allowed to bump more junior teachers who are currently working part time under job-share contracts. The District argued that teachers currently involved in job-share contracts are not amenable to bumping. According to the District, the two teachers who enter into a job-share contract must: (1) obtain authorization from the school site principal to share a teaching position; (2) resign from their 1.0 FTE position; (3) agree which of the two of them will remain employed by the District as a 1.0 FTE in the event that their job-share contract is subsequently dissolved; (4) agree which of the two teachers will receive health and welfare benefits from the District; and (5) prepare a plan with the assistance of the principal to ensure that the instructional program will remain intact, and that all requirements regarding staff development, meetings, conferences, parent contacts, and report cards will be met. In addition, the job-share contract requires the school site principal to certify that the job share will not disrupt the learning opportunities of the affected students. The District argued that, given these prerequisites, certificated tutors should not be allowed to bump more junior teachers currently involved in job-share contracts.

85. The District's argument is persuasive. Given the multiple prerequisites that must be met before job-share contracts are approved, the certificated tutors did not establish that they should be allowed to bump more junior teachers currently involved in job-share contracts.

86. In sum, other than as set forth below with regard to Ms. Mitsuyoshi, the certificated tutors did not show that there were any more junior part-time teachers who were retained by the District who have FTE's that are equal to or less than theirs and who are not involved in job-share contracts. Consequently, the certificated tutors did not establish that they should be allowed to bump more junior teachers.

#### *Individual Issues Relating to Certificated Tutors*

87. Judy Mitsuyoshi. During the hearing, Ms. Mitsuyoshi challenged both her seniority date and her current designation as a certificated tutor.

a. Seniority Date. Ms. Mitsuyoshi began working as a regular teacher for the district on August 10, 1994. On October 12, 1994, she signed a temporary contract, which stated that she was hired to serve as a temporary employee as of August 10, 1994. The District asserts that Ms. Mitsuyoshi's seniority date is August 9, 1995. Ms. Mitsuyoshi asserts that her seniority date is August 10, 1994. Ms. Mitsuyoshi's assertion is persuasive.

On October 12, 1994, Ms. Mitsuyoshi signed a temporary contract that stated that she was being hired as a temporary employee for the period commencing August 10, 1994. Pursuant to *Kavanaugh*, the District could not retroactively make Ms. Mitsuyoshi a temporary employee. Ms. Mitsuyoshi

must therefore be deemed to have been a probationary employee when she began working on August 10, 1994. In accordance with section 44845, her seniority date must therefore be changed to August 10, 1994.

b. Certificated Tutor Designation. Ms. Mitsuyoshi currently has a .53 FTE position. During her 17-year career with the District, she has been both a full-time and a part-time teacher. Since October 15, 2009, she has been designated as a certificated tutor. At the hearing, Ms. Mitsuyoshi testified that, in the 2005-2006 school year, she was a full-time teacher. From the 2006-2007 through 2008-2009 school years, she was a part-time teacher, teaching .53 FTE in a reading intervention position. Near the end of the 2008-2009 school year, she went to the overage fair, and obtained a job offer to return to a full-time teaching position at King Elementary School, which she accepted. She taught full-time at King from August to October 4, 2009, when she was told that, because she had a .53 FTE position during the 2008-2009 school year, she had no right to a 1.0 FTE position at King. She was informed that a mistake had been made and that she would be placed in an equivalent .53 FTE position. On October 15, 2009, she began teaching as a .53 FTE teacher at Sunset Elementary School. In this .53 FTE position, she teaches seventh-grade language arts, eighth-grade language arts, and reading intervention with fifth and sixth graders. After she started teaching at Sunset, she was given a Terms of Employment, which identified her position title as a certificated tutor. Ms. Mitsuyoshi questioned this designation, but was informed that she was designated as a certificated tutor due to her part-time FTE. According to Ms. Mitsuyoshi, unlike certificated tutors who are responsible for small groups of students in larger classes who may need remediation assistance, she is currently performing all the duties of a language arts teacher. Ms. Mitsuyoshi argued that, in light of her current assignments, she should be deemed to be a regular teacher, and not a certificated tutor.

Ms. Mitsuyoshi's argument is persuasive. There was no indication that before Ms. Mitsuyoshi began teaching at Sunset, she was informed that she would be designated as a certificated tutor. She was not provided with any documents to read or sign explaining that she was going to be a certificated tutor. The duties she has been performing at Sunset are not consistent with those of a certificated tutor. Instead, they are the duties of a regular teacher. Although Ms. Mitsuyoshi is not entitled to return to a 1.0 FTE, because she was not given any notice that she would be designated as a certificated tutor before she started working in a .53 FTE position at Sunset, under the reasoning set forth in *Kavanaugh*, the District could not thereafter retroactively make her a certificated tutor. Because Ms. Mitsuyoshi is performing the job duties of a regular teacher, she must be considered to be a permanent, part-time teacher, and not a certificated tutor. Given Ms. Mitsuyoshi's 1994 seniority date, she is more senior than many multiple subject teachers who have been retained by the District. Consequently, Ms. Mitsuyoshi's Preliminary Notice must be rescinded.

### ROP/Vocational Education Positions

88. As set forth in the PKS Resolution (Finding 2), the Governing Board approved the reduction of ROP/Vocational Education Positions by 21 FTE.<sup>19</sup> Two respondents – Matthew Estes and Matthew Marhenke - challenged their receipt of Preliminary Notices under this PKS reduction.

89. Matthew Estes. Mr. Estes's seniority date is September 25, 1991. He has a single subject physical education credential and a CLAD. He is currently teaching physical education for .80 FTE, and ROP sports medicine for .20 FTE. This is his first year teaching ROP sports medicine. Prior to this year, his entire 1.0 FTE was devoted to teaching physical education. The District served a Preliminary Notice upon him to eliminate his .20 FTE teaching ROP sports medicine. Given his seniority date, Ms. Estes asked to be reassigned back to teaching physical education 1.0 FTE.

90. Matthew Marhenke. Mr. Marhenke's seniority date is August 14, 2002. He holds a single subject art credential. He is currently teaching art for .60 FTE, and ROP art and design for .40 FTE. This is his fifth or sixth year teaching ROP art and design. The District served a Preliminary Notice upon him to eliminate his .40 FTE teaching ROP art and design. Given his seniority date, Mr. Marhenke asked to be reassigned back to teaching art 1.0 FTE.

91. As set forth above (Finding 71), the court in *Hildebrandt*, *supra*, 172 Cal.App.4th at pp. 344-345, ruled that, when a school district lays off certificated employees because of a reduction in force, a senior part-time teacher is not entitled to bump a more junior full-time teacher. The analysis in *Hildebrandt* makes clear that the court's focus was on preventing a senior teacher, whose position was being eliminated, from forcing a school district to create two part-time positions – one for the senior teacher and one for the more junior teacher being partially bumped. That is why the reasoning in *Hildebrandt* applies to the reductions involving the home economics teachers (Finding 71) and certificated tutors (Finding 83). This reasoning does not apply with regard to Mr. Estes and Mr. Marhenke. These teachers are both full-time teachers. By reducing these teachers' ROP FTE's, the District is thereby creating two part-time positions. Thus, by the District's own actions, two certificated employees' full-time positions will have to be partially reduced. Because two employees' positions will have to be reduced to part time, under the mandate of section 44955, subdivision (b), the two employees whose positions should be reduced should be the most junior employees holding these positions. The District did not submit any evidence to show that it would be inefficient or impractical for it to comply with section 44955, subdivision (c), and "make assignments and reassignments in such a manner" as to retain the more senior respondents to render full-time services which their seniority and qualifications entitle them to render. Because both Mr. Estes and Mr. Marhenke are more senior than other certificated employees holding the same credentials and teaching in the same subject areas,

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<sup>19</sup> "ROP" stands for "Regional Occupational Program."

they should be allowed to bump more junior employees and retain their full-time teaching positions. Consequently, the Preliminary Notices served on Mr. Estes and Mr. Marhenke must be rescinded.

### Business Positions

92. In the PKS Resolution (Finding 2), the Governing Board approved the reduction of business positions by 13 FTE. Three respondents – Victor Lopez, Grady Lane, and Curtis Carlton – challenged their receipt of Preliminary Notices under this PKS reduction.

93. Victor Lopez. Mr. Lopez's seniority date is July 1, 2000. He holds a clear designated subjects vocational education teaching credential in computer applications and computer maintenance and repair, and a CLAD. For the past three years, he has been teaching computer classes at Edison High School, which are not designated as vocational education. Before he began teaching these classes, he received approval from the District that his vocational education credential qualified him to teach these classes. At the hearing, Ms. Robbins testified that, for the past three years, Mr. Lopez has been misassigned, because his vocational education credential does not authorize him to teach the classes he has been teaching. Although Mr. Lopez's entire department has received Preliminary Notices under the PKS reduction of business positions, Mr. Lopez testified that the computer courses he is currently teaching will to be offered at Edison High School next year. He asserted that he should be retained to teach these courses. His assertion was not persuasive.

The District is not estopped by the incorrect information that it gave Mr. Lopez three years ago from now requiring that the teacher who is assigned during the 2011-2012 school year to teach the courses that Mr. Lopez is now teaching is certificated and competent to do so. Mr. Lopez did not establish that his vocational education credential authorizes him to continue to teach non-vocational education computer courses. Mr. Lopez also did not establish that he should be allowed to bump a more junior employee. Consequently, Mr. Lopez did not establish that his Preliminary Notice should be rescinded.

94. Grady Lane. Mr. Lane's seniority date is August 15, 2006. Prior to April 28, 2011, he held a clear single subject credential in business, with a supplementary authorization in U.S. government and civics. On April 28, 2011, he obtained a Temporary County Certificate from the Fresno County Office of Education, which granted him subject matter authorization in government and civics for one year. Mr. Lane is currently teaching four sections of exploring computers and two sections of technical education at Cooper Middle School. Both of these classes are Career Technical Education (CTE) courses. Mr. Lane asserted that his subject matter authorization in government and civics should allow him to bump a more junior teacher who is teaching in these areas. Mr. Lane's assertion was not persuasive.

Prior to March 15, 2011, Mr. Lane had a supplementary authorization in government and civics, which did not confer NCLB highly-qualified status. He also had a political science degree on record with the District. He asked Ms. Robbins whether his political

science degree made him highly qualified under NCLB in government and civics. Because Ms. Robbins did not know the answer, she contacted an analyst at Fresno State, who told her that a political science degree did “not necessarily” confer highly-qualified status. When all the evidence is reviewed, Mr. Lane did not show that, prior to March 15, 2011, he provided the District with sufficient information to demonstrate that he was highly qualified to teach government and civics to meet the District’s NCLB competency standard. Consequently, he did not establish that he should be allowed to bump a more junior teacher currently teaching courses in government and civics, or that his Preliminary Notice should be rescinded.

95. Curtis Carlton. During the hearing, Mr. Carlton challenged both his seniority date and the failure of the District to retain him to teach economics classes in the 2011-2012 school year.

- a. Seniority Date. The District has designated August 16, 2007, as Mr. Carlton’s seniority date. The District asserted that Mr. Carlton began working as a long-term substitute on October 19, 2006. In order to obtain the tacking benefit set forth in section 44918, subdivision (a) (Finding 25), Mr. Carlton would have had to have started as a long-term substitute on October 18, 2006. During the hearing, Mr. Carlton asserted that he believes that he began as a long-term substitute before October 19, 2006, but the substitute sheets submitted by the District do not support his assertion. In the absence of sufficient evidence to support Mr. Carlton’s assertion, his seniority date cannot be changed.
- b. Economics Positions. Mr. Carlton holds a clear single subject credential in business, with a supplementary authorization in economics. During this school year, Mr. Carlton has been teaching AP computer science, advanced science, and two periods of economics at Edison High School. Although Mr. Carlton asserted that he is credentialed and competent to teach economics, he did not submit sufficient evidence to establish that he is highly qualified under NCLB. A supplementary authorization in economics does not confer NCLB compliance in that subject area. Mr. Carlton asserted that he has enough college credits in economics to confer NCLB highly-qualified status, but at the hearing, he did not submit sufficient evidence to demonstrate this, nor did he show that he provided the District with adequate evidence of his college credits before the March 15, 2011 deadline to establish that he is highly qualified under NCLB. In the absence of adequate evidence to demonstrate that Mr. Carlton is credentialed and competent under the District’s NCLB competency standard to teach economics, he did not show that he should be allowed to bump a more junior economics teacher. Consequently, Mr. Carlton did not establish that his Preliminary Notice should be rescinded.



### Adult Education

96. In the PKS Resolution (Finding 2), the Governing Board approved the reduction of “Designated Subjects/Voc. Ed. Positions” by 12 FTE. During the hearing, the District explained that, under this reduction, it issued Preliminary Notices to adult education teachers.<sup>20</sup> Three respondents – Paul Smith, Deborah Schmidt, and Sherri Watkins – disputed the Preliminary Notices issued to them under this PKS reduction.

97. All three of the adult education respondents who testified challenged their designated seniority dates. At the beginning of the hearing, the District submitted an adult school seniority list. At the hearing, adult school respondents asserted that: (1) prior to 2006, the adult school only hired part-time teachers; and (2) the District did not consistently designate seniority dates for adult school teachers who had previously worked part-time. During the District’s rebuttal, the District submitted a corrected adult school seniority list. According to Ms. Robbins, she corrected the adult school seniority list to comply with section 44929.25, which, in relevant part, provides:

Notwithstanding any other provision to the contrary, any person who is employed to teach adults for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 44954.

Ms. Robbins testified that the corrected adult school seniority list accurately determines the adult school teachers’ seniority dates based upon when they began working more than 60 percent of a full-time assignment.

98. Paul Smith. During his testimony, Mr. Smith challenged both his seniority date and the failure of the District to serve a Preliminary Notice on Karen Murray, who was hired by the District to assist Mr. Smith given his disability.

a. Seniority Date. Mr. Smith holds a clear designated subjects vocational education teaching credential in food and beverage services. On the corrected seniority list, the District has designated his seniority date as July 19, 1999. Mr. Smith asserted that his seniority date should be March 23, 1998, when he first began working at the Fresno Adult School. Mr. Smith did not provide any evidence to support that his seniority date should be changed to March 23,

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<sup>20</sup> There was no dispute at the hearing that the reduction of “Designated Subjects/Voc. Ed. Positions” properly described the adult education positions that the District reduced. (See, e.g., *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 638 [finding that “classroom teaching” at the elementary level is a particular kind of service].)

1998. In the absence of sufficient supporting evidence, Mr. Smith's seniority date cannot be changed.

b. Karen Murray. Mr. Smith asserted that he should not have received a Preliminary Notice when Karen Murray, the more junior teacher who was hired to assist him, did not receive a Preliminary Notice. As set forth in Finding 78, the District conceded that its failure to serve Ms. Murray with a Preliminary Notice was a mistake. The appropriate action to remedy this mistake is for the District to rescind the Preliminary Notice served upon the most senior respondent holding a single subject home economics credential. Mr. Smith did not establish that the District's failure to have served Ms. Murray warrants the rescission of his Preliminary Notice.

99. Deborah Schmidt and Sherri Watkins. The District's corrected adult school seniority list designates Ms. Schmidt's seniority date as September 25, 2006, and Ms. Watkins's seniority date as August 28, 2008. Both of these respondents asserted that their designated seniority dates were incorrect and should be changed to earlier dates. Neither of them submitted any documentary evidence to support their assertions. In the absence of sufficient supporting evidence, Ms. Schmidt and Ms. Watkins failed to establish that their seniority dates should be changed or their Preliminary Notices rescinded.

100. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

101. There was no evidence presented at the hearing to indicate that the District has failed to properly take into consideration any positively assured attrition in this matter.

102. There was no evidence that the District proposes to eliminate any services that are mandated by state or federal laws or regulations.

103. No junior employees are being retained to render services that more senior respondents are certificated and competent to perform, except in those specific circumstances specifically addressed above and where the District demonstrated compliance with section 44955, subdivision (d)(1).

104. The District's reductions of particular kinds of services and certificated employees relate solely to the welfare of the District's schools and pupils.

## LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in sections 44949 and 44955.

2. The services identified in the PKS Resolution are particular kinds of services that may be reduced or discontinued under section 44955. The Governing 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 discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

3. Persistently Low Achieving Schools Skip. As set forth in Findings 7 through 23, the District demonstrated that it has a specific need for the junior teachers it has skipped at its three Persistently Low Achieving Schools to teach the specific courses of study provided at these schools. The District also demonstrated that the skipped junior teachers have been provided with special training and experience necessary to be Persistently Low Achieving School teachers that more senior respondents do not possess. The District therefore established compliance with section 44955, subdivision (d)(1). Accordingly, the District properly applied the skipping criteria set forth in its PKS Resolution to skip these junior certificated employees. The District's application of these skipping criteria should therefore be upheld. (*Bledsoe, supra*, 170 Cal.App.4th at p. 143.)

4. Seniority Dates of Multiple Subject Credential Holders. As set forth in Findings 28 through 56, in order to comply with the California Supreme Court's decision in *Kavanaugh, supra*, 29 Cal.4th at pp. 917-922, the District should change the following respondents' seniority dates:

<u>Name</u>	<u>Current Seniority Date</u>	<u>Correct Seniority Date</u>
Milena Fast	September 20, 2006	August 15, 2006
Maria Magana	September 28, 2006	August 17, 2006
Leslie Malone	September 20, 2006	August 15, 2006
Marcia McComb	August 31, 2006	August 18, 2006
Elizabeth Ortiz-Salazar	September 22, 2006	August 15, 2006
Kathy Pauls	September 20, 2006	August 15, 2006
Kalleah Ray	September 20, 2007	August 16, 2007
Larissa Shafer-Lopez	September 12, 2007	August 16, 2007
Michelle Sheehan	September 15, 2006	August 15, 2006
Lana Twitty	October 3, 2007	August 16, 2007
Yeng Vang	October 26, 2006	August 17, 2006
Mary Xiong	September 7, 2006	August 18, 2006
Robin Drake	September 20, 2006	October 12, 2005
Gregory Larmer	August 16, 2007	October 5, 2006
Michelle Baker	October 11, 2007	October 5, 2006
Virginia Gutierrez	September 21, 2007	August 21, 2006
Heather Lancaster	August 30, 2006	September 19, 2005
Yeng Vang	August 16, 2007	August 17, 2006
Yee Moua	August 16, 2007	January 2, 2007

As set forth in footnote 11, before changing any seniority dates, the District should verify that the corrected seniority date for each listed respondent is the first day that respondent was paid for services that are deemed probationary under sections 44916, 44918, and 44845, and *Kavanaugh*.

In addition, the District should change the seniority date of Laura Marquardt from August 29, 2006, to her first day of paid service at the beginning of the 2006-2007 school year. (Finding 49.)

After correcting the seniority dates of these respondents, the District must determine whether their new seniority dates cause them to be more senior to any certificated employees who were not given Preliminary Notices and who have been retained to render services that these respondents are credentialed and competent to render. If there are more junior certificated respondents who have been retained to render services that these respondents are certificated and competent to render, the District must rescind these respondents' Preliminary Notices on a one-to-one basis, starting with the most senior respondent.

5. All other seniority date issues raised by multiple subject teachers who received Preliminary Notices were not supported by the evidence or the law, and must therefore be rejected.

6. Tie-Breaking Points of Multiple Subject Teachers. As set forth in Finding 58, Rosalinda Torres's point score on the tie-breaking chart should be increased from five to seven.

7. As set forth in Finding 59, Yee Moua's point score on the tie-breaking chart should be increased from six to seven.

8. Reduction of Home Economics Positions. As set forth in Finding 74, Kathleen Powers did not demonstrate that her September 7, 1983 seniority date should be changed. Ms. Powers did, however, establish that, prior to March 15, 2011, she provided the District with sufficient information to show that, under NCLB, she was a highly-qualified multiple subject credential holder. Given her highly-qualified status as a multiple subject credential holder and her September 7, 1983 seniority date, Ms. Powers is credentialed and competent to render services that more junior teachers have been retained to render. Her Preliminary Notice must therefore be rescinded.

9. As set forth in Finding 75, Mary Jo Stott established that her seniority date should be changed from August 20, 1998, to August 21, 1997. (*Kavanaugh, supra*, 29 Cal.4th at pp. 917-922.) Ms. Stott did not, however, establish that her subject matter authorizations in two-dimensional art and introductory art, issued by the CTC on March 23, 2011, must be taken into consideration for purposes of this layoff.

10. As set forth in Finding 78, because the District mistakenly failed to serve a Preliminary Notice on Karen Murray, the District must rescind the Preliminary Notice served upon the most senior respondent holding a single subject home economics credential. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.)

11. As set forth in Finding 79, because the District did not offer any evidence to explain why it laid off Debbie Trafican-Heinz with the home economics teachers, Ms. Trafican-Heinz's Preliminary Notice must be rescinded.

12. All other issues raised by home economics teachers who received Preliminary Notices were not supported by the evidence or the law, and must therefore be rejected.

13. Reduction of Certificated Tutor Positions. As set forth in Finding 87, the seniority date of Judy Mitsuyoshi should be changed from August 9, 1995, to August 10, 1994. In addition, because the District did not properly designate Ms. Mitsuyoshi as a certificated tutor, her designation should be changed to permanent, part-time certificated employee. Given her 1994 seniority date, she is more senior than multiple subject teachers who have been retained to render services that she is credentialed and competent to render. Ms. Mitsuyoshi's Preliminary Notice must therefore be rescinded.

14. All other issues raised by certificated tutors who received Preliminary Notices were not supported by the evidence or the law, and must therefore be rejected.

15. Reduction of ROP/Vocational Education Positions. As set forth in Findings 88 through 91, Matthew Estes and Matthew Marhenke established that their partial Preliminary Notices should be rescinded.

16. Reduction of Business Positions. As set forth in Finding 93, Victor Lopez did not show that he should be assigned to teach non-vocational education computer courses, or that he should be allowed to bump a more junior teacher. Consequently, he did not establish that his Preliminary Notice should be rescinded.

17. As set forth in Finding 94, Grady Lane did not show that, prior to March 15, 2011, he provided the District with sufficient information to demonstrate that he was highly qualified under NCLB to teach government and civics. Consequently, he did not establish that he should be allowed to bump a more junior teacher retained to teach these subjects, or that his Preliminary Notice should be rescinded.

18. As set forth in Finding 95, Curtis Carlton did not submit sufficient evidence to establish that his seniority date should be changed, or that he should be allowed to bump a more junior certificated employee who is teaching economics. Consequently, Mr. Carlton did not establish that his Preliminary Notice should be rescinded.

19. Reduction of Adult Education Positions. As set forth in Findings 98 and 99, neither Paul Smith, Deborah Schmidt, nor Sherri Watkins demonstrated that their designated seniority dates are incorrect. Consequently, these respondents did not establish that their seniority dates should be changed, or their Preliminary Notices rescinded.

20. Except as set forth in Legal Conclusions 4, 8, 10, 11, 13, and 15, the District correctly identified the certificated employees providing the particular kinds of services that the Governing Board directed be reduced or discontinued in the PKS Resolution.

21. No junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render, except in those circumstances addressed above and where the District demonstrated compliance with section 44955, subdivision (d)(1).

22. Except as set forth in Legal Conclusions 4, 8, 10, 11, 13, and 15, cause exists to give notice to respondents that their services will be reduced or will not be required for the 2011-2012 school year because of the reduction and discontinuance of particular kinds of services.

### RECOMMENDATIONS

1. Cause exists for the reduction of 522 full-time equivalent certificated positions at the end of the 2010-2011 school year.

2. The District's skip of junior certificated employees at the Persistently Low Achieving Schools is upheld.

3. The District shall change the seniority dates of the respondents identified in Legal Conclusion 4. After correcting the seniority dates of these respondents, the District shall determine whether their new seniority dates cause them to be more senior to any certificated employees who were not given Preliminary Notices and who have been retained to render services that these respondents are credentialed and competent to render. If there are more junior certificated respondents who have been retained to render services that these respondents are certificated and competent to render, the District shall rescind these respondents' Preliminary Notices on a one-to-one basis, starting with the most senior respondent.

4. As set forth in Legal Conclusion 6, the District shall increase the point score that Rosalinda Torres received during tie-breaking from five to seven.

5. As set forth in Legal Conclusion 7, the District shall increase the point score that Yee Moua received during tie-breaking from six to seven.

6. As set forth in Legal Conclusion 8, the District shall rescind the Preliminary Notice served on Kathleen Powers.

7. As set forth in Legal Conclusion 9, the District shall change the seniority date of Mary Jo Stott to August 21, 1997.

8. As set forth in Legal Conclusion 10, because the District mistakenly failed to serve a Preliminary Notice on Karen Murray, the District shall rescind the Preliminary Notice served upon the most senior respondent holding a single subject home economics credential.

9. As set forth in Legal Conclusion 11, the District shall rescind the Preliminary Notice served on Debbie Trafican-Heinz.

10. As set forth in Legal Conclusion 13, the District shall change the seniority date of Judy Mitsuyoshi to August 10, 1994, and shall rescind Ms. Mitsuyoshi's Preliminary Notice.

11. As set forth in Legal Conclusion 15, the District shall rescind the Preliminary Notices served on Matthew Estes and Matthew Marhenke.

12. Other than as set forth in Recommendations 3 through 11, notice may be given to respondents that their services will be reduced or will not be required for the 2011-2012 school year. Notice shall be given in inverse order of seniority.

DATED: May 18, 2011

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KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings