

BEFORE THE  
GOVERNING BOARD OF THE  
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT  
COUNTY OF SACRAMENTO  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE SACRAMENTO  
CITY UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. 2019030573

**PROPOSED DECISION**

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 24 through 26, 2019, in Sacramento, California.

Gabriela Flowers and Kate Holding, Attorneys at Law, of Lozano Smith, represented the Sacramento City Unified School District (District).

Lesley Beth Curtis, Attorney at Law, of Langenkamp Curtis Price, represented respondents identified in Attachment A attached hereto and incorporated herein by reference.

No respondent appeared on his or her own behalf.

Oral and documentary evidence was received. The parties filed simultaneous closing briefs on May 1, 2019. The District's brief was marked as exhibit 43, and respondents' brief was marked as exhibit KKK. The record was closed and the case was submitted for decision on May 1, 2019.

**FACTUAL FINDINGS**

1. The District is a large urban school district that provides services to approximately 43,000 students in and surrounding the City of Sacramento. The District employs approximately 2,000 certificated employees.

2. Cancy McArn is the District's Chief Human Resources Officer. She, with her staff, compiled the data that led to recommendations to the District Governing Board (Board) regarding the reduction of particular kinds of services (PKS). The actions of Ms. McArn and the Board, were taken in their official capacities.

3. The District has experienced declining enrollment, reduced funding, and increased District program needs, leading to a significant budget deficit that is projected to grow without intervention. It is now facing a \$35 million deficit for school year 2019-2020. The District must make difficult fiscal decisions to remain solvent, and to avoid a "state takeover," or receivership, which will result in deeper financial cuts. Ms. McArn and her staff met and developed proposals for programs and services to be reduced and/or eliminated to address the anticipated budget deficit.

4. Ms. McArn presented her findings and alternative recommendations to the Board at its regular meeting on February 21, 2019, proposing to reduce particular kinds of services, and a corresponding reduction in certificated employees (Resolution #3053). She also presented a proposed resolution specifying criteria to be used to determine the order of termination of certificated employees with equal seniority (Resolution #3054 – tie-breaking criteria), and criteria for deviation from terminating a certificated employee in order of seniority (Resolution #3055 – skipping criteria). As a result of the District's current financial situation, the Board determined that it must reduce particular kinds of services throughout the organization.

5. Cindy Nguyen is the District's Employee Relations Director. Together with Ms. McArn, she recommended to the Board that particular kinds of services being offered by the District be discontinued or reduced. Their report stated the reasons for the recommendation and the method of accomplishing the reduction. The Board approved the recommendations and, following the adoption of Resolution #3053, directed that the recommendation be implemented. The Board also directed the Superintendent or a designee to identify an equivalent number of certificated personnel and give those certificated employees notice in writing of the recommendation that their services would not be required for the ensuing school year. The recommendation of certificated personnel to be identified for layoff from employment with the District was not related to their skills or performance as teachers.

6. On February 21, 2019, the Board adopted Resolution #3053. The Board resolved that the District needs to reduce or eliminate particular kinds of services as recommended; it was resolved that it is necessary to terminate the employment of an equivalent number of certificated employees of the District due to the reductions. Exhibit A to Resolution #3053 authorized the Superintendent or designee to take action to reduce or discontinue the following particular kinds of services for the 2019-20 school year:

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<u>Services</u>	<u>Number of Full-Time Equivalent Positions</u>	
<u>Vacant:</u>		
Teacher, Adult Ed, Hourly	1.4	
Teacher, Elementary	6.0	
Teacher, Elem, Spec Subj	1.0	
Teacher, K-8	1.0	
Teacher, Middle	1.0	
Teacher, High	2.8	
Teacher, Resource	.20	
Teacher, ROTC	1.0	
Training Specialist	1.0	
Lead School Nurse	1.0	
	Sub Total	16.4 <u>FTE</u>
<u>Adult Education</u>		
ADULT ED: Administrative Assistant	1.00	
ADULT ED: Cisco IT Essentials/Networking	0.60	
ADULT ED: Court Reporting	1.00	
ADULT ED: Optometry	1.00	
	Sub Total	3.60 <u>FTE</u>
<u>Child Development</u>		
Teacher, Resource	3.0	
Parent/Preschool Ad Teacher	2.0	
Child Development (10 month) Teacher, Child Development (12 month)	2.0	
	Sub Total	7.0 <u>FTE</u>

<u>K-12 Teachers:</u>		
Art	.40	
Clinician Psych/Social Worker	.60	
Computers (Business)	3.0	
Counselors	3.7	
English	8.0	
FL: Chinese	1.0	
FL: Spanish	1.0	
Librarian	.40	
Math	3.5	
Music	1.4	
Physical Education	6.7	
ROP: Auto	1.0	
School Nurse	.89	
School Psychologist	1.2	
Science: Biology	3.0	
Science: Physics	1.0	
Social Science	7.10	
Social Worker	4.4	
Teacher, Elementary	55	
Teacher, Middle (CORE)	1.8	
Teacher, Resource	8.9	
Training Specialist	3.6	
Teacher, Elementary, Special Subject: Physical Education	4.6	
Teacher, Elementary, Special Subject: Library	.40	
Teacher, Elementary, Special Subject: Computer	.40	
Teacher, Elementary, Special Subject: Music	.40	
	Sub Total	123.39 <u>FTE</u>
	<b>Total Elimination:</b>	<b>150.39</b>

The proposed reductions total 150.39 FTE, with an equivalent number of certificated positions.

7. Resolution #3055 specified skipping criteria where there was a specific need within the District for certificated employees qualified to serve the needs of K-12 students with respect to the following programs, services and qualifications:

- A. Individuals fully-credentialed and currently serving in classes requiring Bilingual Cross-Cultural Language and Development (BCLAD) certification, to the extent necessary to staff BCLAD positions.
- B. Individuals fully credentialed to serve in a special education assignment.
- C. Individuals fully credentialed and currently serving in classes requiring, and has completed formal training/coursework in, the Waldorf method of teaching.
- D. Individuals fully-credentialed and currently serving in classes requiring a Single Subject, Mathematics credential or a Single Subject, Science credential, to the extent necessary to staff math or science-required positions.

Fully-credentialed, as applied to the above, means an employee who possesses a preliminary, clear, or internship credential.

The Board noted a special need to retain certificated employees who possess these qualifications, regardless of seniority, pursuant to Education Code section 44955, subdivision (d).

8. At the same meeting, the Board also adopted Resolution #3054. This Resolution set forth criteria for breaking ties when two or more certificated employees with the same first day of paid service were facing potential layoff. The Board listed categories for consideration, and assigned weights to each category, as follows: Category I – Professional Preparation: (1) Each single subject, multiple subject or service credential (3 points per credential); (2) Each supplemental or subject matter authorization (1 point per authorization); (3) Each limited assignment permit (1/2 point per permit); (4) Doctorate degree held (1 point per degree held); (5) Master’s degree held (1 point per degree held); (6) National Board certification (1 point for certification). These criteria were to be applied independently, and in case of ties continuing through listed criteria, Category II – Lottery, was to be used to break such ties.

9. The services set forth in Resolution #3053 are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The reduction or elimination of the particular kinds of services set forth in Resolution #3053 constituted a proper exercise of the Board’s discretion, within the meaning of Education Code section 44955.

10. At the Board's regular meeting on February 21, 2019, it was presented with and adopted Resolution #2018-19-C. This resolution directed the release and reassignment of 7.2 FTE administrator positions. Administrators are not subject to the layoff procedures of Education Code sections 44955 and 44949. They are released per Board resolution, notified of their release by March 15, and reassigned as of June 30. On June 30, the end of the school year, the released administrators become teachers. As teachers, their seniority dates are identified and adjusted, and they become part of the pool of teachers who are either laid off, or assigned to a teaching position, depending on their credentials.

11. On March 7, 2019, at a special meeting of the Board, Ms. McArn presented additional resolutions for the Board's consideration. Resolution #3058 is nearly identical to Resolution #3053, in that it is introduced by an explanation for the need for a District reduction of particular kinds of services, and directed the Superintendent or a designee to send layoff notices to the certificated employees in reduced or eliminated positions. Exhibit A to Resolution #3058 authorized the Superintendent or designee to take action to reduce or discontinue the following particular kinds of services for the 2019-20 school year:

<u>Certificated Management: Full-Time.</u>	Number of Full- Time Equivalent Positions	
<u>Currently Vacant:</u>		
Coordinator, Child Development Programs	1.0	
Coordinator II, ROP	1.0	
Coordinator I, Instructional Technology	1.0	
	Sub Total	3.0 <u>FTE</u>
<u>Currently Filled, to be eliminated in the 2019-20 School Year:</u>		
Assistant Principal on Special Assignment	1.0	
Coordinator, Child Development Programs	1.0	
Coordinator II, Foster Youth Services	.20	
Coordinator II, Multilingual Literacy	1.0	
Coordinator I, Visual and Performing Arts	1.0	
Coordinator II, New	1.0	

Teacher Induction		
Coordinator II, Linked Learning	1.0	
Coordinator III, Curriculum & Instruction, Science	1.0	
Coordinator III, Gate and AP Programs	1.0	
Director I, Master Schedule & Instruction	1.0	
Director II, Social & Emotional Learning	1.0	
Director II, Innovative Schools	1.0	
Assistant Superintendent, Labor Relations	1.0	
	Sub Total	12.2 <u>FTE</u>
<u>Services</u>		
<u>K-12 Teachers:</u>		
Music	1.0	
Teacher, Elementary	7.0	
Social Science	2.0	
Science: Biology	1.0	
Counselors	2.0	
	Sub Total	13 <u>FTE</u>
	<b>Total Elimination:</b>	<b>28.2 <u>FTE</u></b>

12. At hearing, the District explained that most administrators have “return rights” to teaching positions if their positions are reduced or reassigned. Resolution #3058 identifies 15.2 FTE administrator positions that will no longer be needed in the 2019-20 school year. Three of those positions are vacant. It also lists 13 FTE teaching positions that the District made available so that those administrators can return to teaching positions. The resolution is poorly crafted. The District is not eliminating 28.2 positions in addition to the 150.39 positions identified in Exhibit A to Resolution #3053. Rather, the District is eliminating 15.2 FTE administrator positions, three of which were vacant. A total of 12.2 FTE administrators will be released from their positions and reassigned to teaching positions. Once the Board decided to eliminate 12.2 FTE administrator positions, it was left with a larger pool of teachers (by 12.2 FTE), which had a larger impact on the District budget. Aware that the District intended to reduce salary expenditures by \$5.1 million, Ms. McArn identified 13 FTE teaching positions whose certificated employees would receive layoff notices so that the

12.2 administrators could be reassigned in those positions. The PKS reduction was not in the 13 FTE teaching positions because while those certificated employees in those positions received layoff notices, the actual positions remain, and an administrator will be reassigned to fill those positions.

13. On March 7, 2019, at its special meeting, the Board also adopted Resolutions #3063 and #3064. These resolutions are identical to the tie-breaking and skipping criteria in Resolutions #3054 and #3055.

14. In total, the District identified 178.59 FTE positions to be eliminated. After accounting for attrition and vacant positions, the District identified 109 employees whose positions were being eliminated. On March 12, 2019, the District served via certified mail a written preliminary notice that advised permanent and probationary certificated employees, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year. The preliminary notices were served on 109 certificated permanent and/or probationary employees of the District. Each written notice set forth the reasons for the recommendation and noted that the Board had adopted Resolutions 3053 and 3058, which were attached to the preliminary notice. Other than the employees specifically discussed below, the District received timely requests for hearing from all respondents.

15. Ms. McArn made and filed the Statements of Reduction in Force<sup>1</sup> (Statements) against each certificated employee who timely requested a hearing after receiving the preliminary notice. The District asserted it mailed all Statements by certified mail, return receipt requested. The Statements were sent on two dates: March 28, 2019, and April 12, 2019. The District provided respondents' counsel with lists of respondents who were included in those mailings.

16. Of the 109 District employees served with Statements, 27 did not request a hearing. Four employees failed to timely request a hearing, and two appeared at hearing to explain their reasons. Any certificated employee who failed to file a request for hearing and/or a Notice of Participation, and is not addressed below, waived his or her right to a hearing, and may be laid off.

#### *Stipulations at Hearing Regarding Rescission*

17. At hearing, the District stated that the following layoff notices have been or will be rescinded: Morgan Komure (Science), Andrew Pena (Spanish), Christine Schoenfeld (school psychologist), one training specialist, and one resource teacher, neither of which are yet identified. Kai Phan is an administrator with return rights. He received a layoff notice, which the District states will be or has been rescinded, because he was found to be able to bump a less senior teacher with a multi-subject credential.

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<sup>1</sup> Historically referred to as the Accusation.



18. The District found cause to eliminate 1.2 FTE school psychologist positions. It sent two layoff notices for a total of 2.0 FTE positions: one to Christine Schoenfeld, and one to Glenda Feece. At hearing, the District stated Christine Schoenfeld's notice had been rescinded. One additional school psychologist position will open because Cynthia Vierra will move from being a school psychologist to a special education teacher. The District could not say for certain whether Glenda Feece's notice would therefore be rescinded. The District is directed to determine whether Ms. Feece's notice should be rescinded, or whether another more senior teacher would bump into her position.

#### *Late Requests for Hearing*

19. Colleen Vaughn-Waggoner, Alfredo Decali, Erika Hernandez, and Yesenia Sanchez filed late Requests for Hearing.<sup>2</sup> Erika Hernandez and Yesenia Sanchez did not receive a Statement packet. Ms. Hernandez was included in respondents' counsel's Group Notice of Participation. Ms. Sanchez filed a Notice of Participation separately. They did not appear at hearing, and were deemed to have waived their right to hearing.

20. Colleen Vaughn-Waggoner signed her Request for Hearing on March 19, 2019, the date it was due to the District office. She called or emailed the District office and asked if she could return the form electronically, and was told she would have to personally bring it in. Respondent Vaughn-Waggoner coaches varsity softball, in addition to teaching physical education. She is generally unavailable from the start of the school day until sometime after 6:30 p.m., due to softball practice and games. On March 20, 2019, she made arrangements for another teacher to cover her morning class, and she filed her Request for Hearing at 8:05 a.m. with the District. Over the District's objection, Respondent Vaughn-Waggoner was permitted to participate.

21. Alfredo Decali signed his Request for Hearing on March 19, 2019, the date it was due to the District office. On that day, he called Human Resources and asked whether he could scan the form and send it electronically. He was informed that he had to return it in person and have the form date-stamped. On March 19, 2019, Mr. Decali had a "health issue" and medical appointments that prevented his taking the Request for Hearing to the District office personally. The following morning, Mr. Decali went to the District office and his Request for Hearing was date-stamped "March 20 2019." At hearing, the District withdrew its objection to Mr. Decali's participation and he was permitted to participate.

#### *Non-receipt of Statement of Reduction in Force*

22. Several certificated employees testified or informed counsel that they did not receive the packet including the Statement. The District countered that the Statements were mailed by certified mail, which satisfied the jurisdictional requirement.

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<sup>2</sup> The District alleged that Christine Schoenfeld also submitted a late Request for Hearing. As addressed above, her layoff notice was rescinded at hearing, and the issue is moot.

23. Amber Kadrie testified that she never received the Statement packet. The District produced evidence that it was mailed by certified mail to her address of record on March 28, 2019. Kristie Corcoran also testified that she did not receive the Statement packet. The District produced evidence that it was mailed by certified mail to her address of record on April 12, 2019.

24. The District argued that mailing the Statement packets by certified mail to the address of record satisfied the service requirement. The District's assertion is supported by the Education Code. Education Code section 44924 provides that once an employee returns the request for hearing, "the proceeding shall be conducted and a decision made in accordance with" the Administrative Procedures Act (APA). Limited exceptions apply. The APA, in Government Code section 11505, subdivision (c), provides: "Service by registered mail shall be effective if a statute or agency rule requires the respondent to file the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation or District Statement of Reduction in Force and accompanying material is mailed, addressed to the respondent at the latest address on file with the agency." District employees are required to update the District with any change of address. See, for example, PSL-F027, the District's change of address form, which contains the directive: "Employees are to fill out a Change of Address Form . . ." and provide to Human Resources. Thus, service of the Statement is deemed effected when made by registered mail to the employee's last known address of record. Accordingly, service is deemed effective on Ms. Kadrie and Ms. Corcoran.

#### *District's Failure to Mail Statement of Reduction in Force*

25. Respondents alleged that the District did not send 12 other teachers the Statement packets as required after those teachers submitted timely or deemed-timely Requests for Hearing.<sup>3</sup> The District could not produce evidence at hearing that those packets had been mailed. The 12 respondents contend that they must be returned to work because accusations were neither prepared for, nor served upon them. They note that under Education Code section 44955 an employee is deemed reemployed for the ensuing school year if the employee "is not given the notices and a right to a hearing as provided for in section 44949." They contend that there can be no jurisdiction over them in these layoff proceedings.

26. The District erred by not mailing the Statement packets to the identified individuals who timely submitted a Request for Hearing. Sacramento City Teachers Association (SCTA), the teachers' union, filed a group Notice of Participation that included these 12 individuals. These employees submitted to and were brought within the jurisdiction of these proceedings. SCTA had the power of representation and was on notice as to the

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<sup>3</sup> Cameron Collins, Kaylee Creevan, Douglas Dammarell, Angela DuBose, Molly Durst Roman, Randy Laforteza, Jaime Musillani Macias, Gabriella Orozo, Melanie Ota, Erin Pressley, Christopher Rasmussen, and Brittany Rogers.

proceedings with regard to all of its members. It was actively involved in representation, securing counsel, discovery and interaction with the District in this process.

27. These 12 individuals suffered no prejudice by the District's apparent failure to serve Statement packets on them because SCTA and their counsel represented their interests and answered by filing the notices of defense. Their interests were well represented at hearing. The District's failure to individually serve an accusation upon them was not prejudicial. It constituted a non-substantive procedural error and should not constitute cause for dismissing the charges. (Ed. Code, § 44949, subd. (c)(3).)

#### *Respondents' Failure to File Notice of Participation*

28. Neither Paul Yenovkian nor Ger Yang filed a Notice of Participation with the District, as required under Education Code section 44949, subdivision (c)(2). Ger Yang did not appear at hearing; she is deemed to have waived her right to hearing.

29. Paul Yenovkian appeared at the second day of hearing and was permitted to testify to explain why he did not file the Notice of Participation, and why he should be permitted to participate in the hearing. He testified that he filed a timely Request for Hearing, and because he was away with his sixth grade class during the time of the "union meeting," he did not understand that there was a second step, which was filing the Notice of Participation with the District. When an SCTA representative contacted him to remind him, he returned his Notice of Participation to SCTA on April 15, 2019, but did not forward it to the District.

30. Education Code section 44949 provides:

The respondent shall file his or her notice of participation, if any, within five days after service upon him or her of the District Statement of Reduction in Force and he or she shall be notified of this five-day period for filing in the District Statement of Reduction in Force.

31. The District's sample Statement directed the recipient to return the Notice of Participation within five days. At hearing, because the District did not receive Mr. Yenovkian's Notice of Participation, it was determined that the court lacked jurisdiction over him, and he was not permitted to participate at hearing.

#### *District's Failure to Serve Preliminary Notice to Address of Record*

32. Dekeithi Walton did not receive a Preliminary Notice at his address of record on or before March 15, 2019. He appeared at hearing to explain his circumstances. Mr. Walton moved between the time he was hired with the District and August 13, 2018, when he submitted a Form PSL-F027 to the Human Resources office to change his address of record. The form is stamped "Received August 13 2018 Human Resource Services." Below

the updated information, the form has two spaces for a human resources representative to initial and date. The first states "Information Taken By," and the second, "On Line." Both spaces were initialed and dated. Respondent believed he had taken all necessary steps to inform the District of his new address.

33. On January 11, 2019, Mr. Walton signed the Seniority Verification Form. That form contained his prior address. Mr. Walton did not make changes to the form. He received his paychecks by Direct Deposit, but his paystubs were mailed to his house. He testified that the paystubs were mailed to his old address, and forwarded to his new address. He did not receive the Preliminary Notice postdated on March 15, 2019, or before.

34. Mr. Walton argued that the District's failure to send the preliminary notice to his properly updated address necessarily means his layoff notice should be rescinded based on the District's jurisdictional deficiency. Education Code section 44955, subdivision (c) provides: In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

35. Education Code section 44949, subdivision (a)(1) provides:

No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a school district that has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

Education Code section 44949, subdivision (d) states:

Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

36. The District argued that Mr. Walton's preliminary notice was properly and timely sent to his last known address of record, which was the address on the Seniority Verification Form. He signed the form, and was given an opportunity to update his address. Mr. Walton eventually received the Preliminary Notice, but not before March 15, 2019. The District offered no explanation regarding why Mr. Walton's address was not properly updated when he submitted the change of address form. The District argued that Education Code section 44949, subdivision (c)(3) controls. That subdivision states: "Nonsubstantive

procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.” The District contends that because Mr. Walton ultimately received the Preliminary Notice, filed a request for hearing, and subsequently filed a Notice of Participation, he enjoyed all of the due process rights afforded others timely served, and no prejudice occurred from this nonsubstantive procedural error.

37. For the District to prevail, the harmless error provision must be read to include the failure to serve a timely preliminary notice. Even then, the omission must be construed as “nonsubstantive.” If those conditions are met, the District would prevail because no prejudice was established apart from the absence of the earlier notice contemplated by the statute. The District’s position is untenable for the reasons explained below.

38. Education Code section 44949, subdivision (a)(1) requires a school District to issue preliminary notices by the March 15 deadline. The certificated employee may then request a hearing by the date provided in the preliminary notice. (Ed. Code, § 44949, subd. (b).) Education Code section 44949, subdivision (c) explains the procedures that follow the request for hearing:

(c) If a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:

(1) The respondent shall file his or her notice of participation, if any, within five days after service upon him or her of the District Statement of Reduction in Force and he or she shall be notified of this five-day period for filing in the District Statement of Reduction in Force.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the District Statement of Reduction in Force, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils of the schools. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a

recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

39. Exceptions (1) through (3) are not broadly applied to section 44949. They specifically apply to subdivision (c), which lists exceptions to the hearing procedures required by Government Code section 11500, et seq. There is no suggestion in Education Code section 44949, subdivision (c)(3), that nonsubstantive errors by the District or Board apply to the requirement that the employee “must be given written notice” by March 15.

40. Education Code section 44949 includes many procedural obligations including those specified in the formal hearing provisions of the Administrative Procedure Act (APA) adopted by reference in the statute. These include notice provisions relating to the filing of the statement of reduction in force and notice of participation, discovery rights, and procedures relating to the administrative hearing and issuance of a proposed decision. None of these procedures includes language mandating a particular consequence for failure to comply. Limiting the application of section 44949, subdivision (c)(3), to procedures other than the notice requirements for the preliminary and final notices comports with a plain reading of the statutory language. More importantly, this interpretation gives continued significance to the clear language in Education Code section 44955 requiring the reemployment of a teacher if the preliminary notice is not provided in a timely manner.

41. This reading is also consistent with the rule that specific provisions are paramount over general ones. (See *Taylor v. Board of Trustees* (1984) 36 Cal.3d 500, 513). Section 44955, subdivision (c), is a specific provision dealing with the consequences for a school district’s failure to give timely preliminary or final notices to teachers. As such, it prevails over the general provisions of Education Code section 44949, subdivision (c)(3), addressing procedural errors generally.<sup>4</sup>

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<sup>4</sup> Additionally: “Exceptions to the general provisions of a statute are to be narrowly construed; only those circumstances that are within the words and reason of the exception may be included.” (*Corbett v. Hayward Dodge* (2004) 119 Cal.App.4th 915, 921.)

42. Even if the harmless error provision were read to include the failure to serve a timely preliminary notice, the District must also establish that the failure is nonsubstantive. *Ward v. Fremont Unified School Dist.* (1969) 276 Cal.App.2d 313, at page 321, ruled that the May 15 deadline (in an earlier version of Education Code section 44955) was “jurisdictionally mandatory.” The Court recited the legal principle, followed in California and the majority of other jurisdictions, that “when a consequence is enunciated for failing to comply with an act on a given date, that date is deemed to be jurisdictionally mandatory, not directory.” (*Ibid.*, citing *Thomas v. Driscoll* (1940) 42 Cal.App.2d 23, 27, and *Shaw v. Randall* (1860) 15 Cal. 384.) In *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, the Court held that the “notices” in Education Code section 13447 (later renumbered section 44955) which must be served to avoid the consequence that the employee “be deemed reemployed,” include the March 15 preliminary notice and the required specifications of reasons. (*Id.* at page 363.)

43. There is no jurisdiction over Mr. Walton. He timely updated his address with the District, the District failed to complete the change. Mr. Walton’s address of record is the address he provided the District on August 13, 2018. He received no Preliminary Notice at that address on or before March 15, 2019.

#### *Jurisdiction, Generally*

44. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

#### *August 30, 2018 Seniority Date*

##### SENIORITY VERIFICATION FORM

45. Prior to the winter break in December 2018, the District sent a packet to all site and department principals or administrators with a cover letter offering instruction for the “annual notification procedures for certificated seniority verifications.” The principals and administrators were to distribute the enclosed “Employee Information Report 298e,” (Seniority Verification Form) to each certificated employee. A list of all certificated employees was also included for the principal or administrator to use as a checklist as the forms were returned. The packet included one form for each certificated employee, which contained the employee’s employee identification number, position, contact information, seniority date, and credentials, among other information. At the bottom was a line for a signature and date.

46. Ms. Nguyen explained that she printed one Seniority Verification Form per certificated employee, provided the forms for a school or site to the site principal or administrator, and requested that the forms be returned to her no later than January 18, 2019. She used this information to confirm the seniority dates and credentials of all certificated employees.

47. Respondents explained that prior to winter break, they were handed this form and asked to sign it and return it. The instruction sheet with the purpose for the form was not provided. The Seniority Verification Form does not state to what the employee is attesting by signing the form.

48. The District argued that respondents were given the opportunity to contest their seniority dates when they were provided the Seniority Verification Form, and they, in essence, waived their right to contest the dates at hearing. The District's argument is not persuasive. First, it is problematic that certificated teachers were provided the form and asked to sign it, often without further instruction. Second, Education Code section 44924 provides:

any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void.

"This chapter" refers to Chapter 4 of the Education Code regarding "Employment of Certificated Employees." Education Code section 44845 in the same chapter states:

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.

49. Thus, certificated employees do not waive their actual seniority date by way of the Seniority Verification Form. To the extent the form is an express or implied agreement to such a waiver, it is null and void. Respondents' arguments regarding their individual seniority dates must be addressed.

#### NEW TEACHER ORIENTATION

50. For the 2018-19 school year, teachers who were new to the District were informed that on August 21, 2018, and again on August 28, 2018, the District would hold a New Teacher Orientation (NTO). The one-day NTO was co-sponsored by SCTA, which provided sign-in sheets, lunch, and assistance throughout the day. Various communications from the District to new employees referred to the NTO as "mandatory."

51. The District's salary schedule defines the rates of pay for employees in particular classes and steps. The salary is based on 181 "service days." The District argued that the first date of the 181 service days, and the new employee start date for the 2018-19 school year was August 30, 2018, per the District's instructional calendar. The District argued that the Collective Bargaining Agreement (CBA<sup>5</sup>) provides that NTO is exempted

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<sup>5</sup> The District offered the CBA effective July 1, 2004, through June, 30, 2011, and the Tentative Agreement based on negotiations facilitated by Mayor Darrell Steinberg in



from service days because it is neither paid nor mandatory. No teacher was disciplined for not attending, and no teacher was paid to attend.

52. To support this contention, the District cited Article 12, Section 12.7.4 of the CBA, which states:

All certificated personnel who voluntarily perform duties authorized by the Personnel Services Office which are beyond their normal service day shall be paid at their per session rates of pay, except for assignments and meetings as set forth in Article 5, Sections 5.9 through 5.10.7, and Sections 12.8.4 through 12.9.8 of this Article.

53. Ms. Nguyen explained that Article 12, Section 12.7.4 provides that if a teacher provides a voluntary service, the teacher shall be paid their “per session rate of pay” (hourly rate), rather than the daily rate. There are exceptions, however. For example, no per session pay is given for staff meetings; and social workers, program specialists, psychologists, child welfare and attendance counselors, and others have designated lengths of their service year over the standard 181 days of service, for which no per session rate is given. Article 5, section 5.9.8<sup>6</sup> also excepts the following:

New teachers shall have no more than one (1) additional day of service required for all District-wide meetings in addition to whatever requirements exist for all teachers.

54. Thus, new teachers are not paid the per session rate for attending NTO, because it is specifically excepted from the per session service rate for voluntary services. Ms. Nguyen acknowledged that Section 5.9.8 refers to NTO, but stated that new teachers are not paid for this day. She averred that new teachers do not attend NTO to “provide a service,” therefore this day does not qualify for purposes of “service days,” or seniority.

55. Ms. Nguyen’s assertion does not comport with the reality of the NTO or the language of the CBA. The CBA specifically contemplates that new teachers will have 182 days of service rather than 181 days of service. The CBA requires teachers new to the

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November 2017. The Tentative Agreement states it is “effective July 1, 2016, through June 30, 20[ ].” No evidence that it was approved by the Board was submitted. Both agreements are relied on herein to the extent they were referred to at hearing.

<sup>6</sup> This Section is renumbered and in the Tentative Agreement, and was amended to read: “New teachers shall have no more than one (1) additional day of service required for all District-wide meetings in addition to whatever requirements exist for all teachers. In addition, the Parties agree to negotiate a new and mutually agreeable Article 5.9.8.1 to reflect the New Employee Orientation requirements.” This additional language does not impact the analysis regarding NTO.

District to have “no more than one additional day of service.” NTO is a one-day, District-wide meeting to orient new teachers to the District. An additional service day is built in to the contract for all new teachers, which explains why it is excepted from the per session rate of pay: it is already included in new teachers’ salary. It is only logical that NTO is that additional service day, especially considering that new teachers were informed the NTO was mandatory.

56. The District argues that NTO was not mandatory because there were no penalties for not attending, and the District did not consider it mandatory. The evidence showed that the District communicated to the teachers that the training was mandatory, specifically using the word “mandatory,” in fact. Because it is part of the first-year contract, and was mandatory, the District’s arguments that it did not discipline teachers who did not attend is not persuasive.

57. Finally, the CBA defines “service year” as “[t]he school year plus the additional workdays required for specific job classifications within the bargaining unit.” New teachers are required to work an additional workday as part of their contract, which is therefore included in their service year. In 2018-19, NTO was provided on August 21, 2018, and August 28, 2018, which are the days that define new teachers’ service year, depending on their dates of attendance.

#### *Other Meetings, Paid or Unpaid*

##### NEW EMPLOYEE ORIENTATION

58. Education Code section 44845 states: 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.” (Emphasis added.) Additionally, when explaining tie-breaking, Education Code 44955 states that seniority is determined by the date the employee “first rendered paid service to the district . . . .”

59. New Employee Orientation (NEO) provides information about being a District employee, and is required by the Human Resources Department. Several respondents argued that the NEO was their first day of service to the district because it was mandatory and they were told in no uncertain terms that they could not assume their positions until this was completed. One respondent even recalled being told she would not get paid until the NEO was completed. These arguments are not persuasive. NEO is not a paid service to the District, but a function of human resources to orient the employee to her new employment. Thus, NEO is not a date any respondent can use to establish seniority.

##### PEST CERTIFICATION

60. Many respondents were informed that they would be required to obtain District-training in pest management, or as one respondent described it: “how to keep pests out of the classroom.” After completing the training, the participant received a certificate of

completion. No evidence was presented that this was a paid service. Like the NEO, taking the pest management training is not a date a respondent can use to establish seniority, but is more akin to a human resources function to educate new employees regarding the methods the District uses for pest control.

#### BENCHMARK TRAINING AND NGSS

61. In addition to the mandatory NTO, the District offers various training sessions for all teachers, both new and continuing, during the summer months. These include Benchmark Training, English Language Arts/English Language Development (ELA/ELD), comprehensive sexual health education, and Next Generation Science Standard (NGSS). Several teachers testified at hearing that they believed that as first year teachers, they were required to participate in the summer trainings, and their seniority dates should be updated to reflect these trainings. The teachers were paid the per session rate for participating in the trainings. The District argued that these trainings do not establish seniority date, that the proper seniority date should be the one in the Seniority Verification Form, and that the trainings were voluntary and cannot be considered as required service.

62. For the reasons stated above, the argument regarding the Seniority Verification Form is without merit. Based on the evidence that respondents were paid per session rates for these trainings, the trainings are not “required” under the terms of the contract. Otherwise, per Ms. Nguyen’s testimony, respondents would have been paid a daily rate.

63. The respondents’ argument is without merit. Seniority credit is given for training when it occurs during the first school year in which the employee serves in a probationary capacity. In this case, the beginning of that school year was the start date reflected in the contract between the employee and the District. If the training was given during that school year, probationary credit should have been given if the training was mandatory and if the attendee was paid as part of his/her regular salary. The District’s summer training does not satisfy those criteria.

64. The fact that some of the teachers who took the summer training believed the training was required by the District does not affect its status as voluntary. Even if it did, the training did not occur during the school year, and it was not paid for through teachers’ regular salaries. The District’s exclusion of these summer training sessions was reasonable.

#### *Adjusted Dates of Seniority*

65. To avoid repetitive testimony, respondents’ counsel produced a chart to outline what trainings or orientation respondents participated in, and on what date. The chart was accepted as argument as it is a compilation of evidence, rather than evidence itself. The chart provides information on NTO, NEO, ELA/ELD, NGSS, Benchmark Training, and Pest Management Training. As discussed above, the NTO is built in to the new teachers’ service year, and constitutes “rendering a paid service” to the District, under Education Code section 44845.

The District is directed to adjust seniority dates for respondents who attended NTO. Based on the chart and evidence presented, the following dates apply, subject to verification:

Rocio Almanza	August 21, 2018 (NTO)
Veronica Avelar*	August 21, 2018 (NTO)
Brittany Barbone* <sup>7</sup>	August 21, 2018 (NTO)
Michelle Bohlin*	August 21, 2018 (NTO)
Lisa Brown*	August 21, 2018 (NTO)
Lily Busher*	August 21, 2018 (NTO)
Angela Cook	August 20, 2018 (ELA)
Kristie Corcoran*	August 21, 2018 (NTO)
Kaylee Creevan*	August 21, 2018 (NTO)
Douglas Dammarell*	August 21, 2018 (NTO)
Melina Diaz*	August 21, 2018 (NTO)
Angela DuBose	August 21, 2018 (NTO)
Molly Durst Roman	August 21, 2018 (NTO)
Briana Fonseca*	August 21, 2018 (NTO)
Nicole Fossum*	August 21, 2018 (NTO)
Matthew Garber*	August 21, 2018 (NTO)
Erica Hernandez*	August 21, 2018 (NTO)
Kristine Hiatt*	August 21, 2018 (NTO)
Tori Horton*	August 21, 2018 (NTO)
Andrew Jones*	August 21, 2018 (NTO)
Nancy Khang*	August 21, 2018 (NTO)
Kathryn Kiley*	August 21, 2018 (NTO)
Randy Laforzeza*	August 21, 2018 (NTO)
Julie Law-Marin*	August 21, 2018 (NTO)
Tabitha Lichtenhan*	August 21, 2018 (NTO)
Mabeth Lopez*	August 21, 2018 (NTO)
Brittany Martin*	August 21, 2018 (NTO)
Jaime Masillani-Macias*	August 21, 2018 (NTO)
Jacelyn Neumann*	August 8, 2018 (Benchmark)
Yessenia Ortiz*	August 21, 2018 (NTO)
Melanie Ota*	August 21, 2018 (NTO)
Michael Petzold <sup>8</sup> *	August 21, 2018 (NTO)

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<sup>7</sup> One \* indicates the certificated employee's name appears on SCTA's sign-in sheet for August 21, 2018. Two \*\* indicates the employee's name appears on SCTA's sign-in sheet for August 28, 2018 NTO. Both sign-in sheets were admitted at hearing.

<sup>8</sup> Respondent Petzold established that he was paid to provide new-student orientation on August 28, 2018. This paid service postdates the NTO he attended, however, and whether it constitutes a basis to adjust seniority is not considered.

Erin Pressley*	August 21, 2018 (NTO)
Samuel Prowell*	August 21, 2018 (NTO)
Christopher Rasmussen*	August 21, 2018 (NTO)
Lobelia Robinson	August 30, 2018
Lindsey Rodriguez <sup>9</sup>	August 30, 2018
Brittany Rogers*	August 21, 2018 (NTO)
Michelle Rogers*	August 21, 2018 (NTO)
Amanda Sacks*	August 21, 2018 (NTO)
Jenna Smith*	August 21, 2018 (NTO)
Victoria Tacherra*	August 21, 2018 (NTO)
Natalie Tamblyn*	August 28, 2018 (ELA/ELD)
Graciela Uribes*	August 21, 2018 (NTO)
Colleen Vaughn-Waggoner*	August 21, 2018 (NTO)
Mariela Ventura*	August 21, 2018 (NTO)
Dustin Watson*	August 21, 2018 (NTO)
Jennifer Yang*	August 21, 2018 (NTO)
Eric Yee*	August 21, 2018 (NTO)
Carolyn Zierenberg*	August 21, 2018 (NTO)

### *Skipping*

66. Economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed and competent to teach. That displacement of a junior teacher is known as “bumping.” In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. (Ed. Code, § 44955, subd. (c).)

67. The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such “skipping” is recognized by statute and appellate law. (See Ed. Code, § 44955, subd. (d)(1); *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831).

68. To depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d)(1), requires the District to “demonstrate a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee [to be skipped] has special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess.”

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<sup>9</sup> Respondent Rodriguez testified at hearing that she did not attend New Teacher Orientation in August 2018.

69. As discussed above in Factual Findings 7 and 14, the Board adopted Resolutions #3055 and #3064 to define those categories in which the District identified a “specific need for personnel to teach the courses or courses of study.” Generally, they are credentialed teachers currently serving in classes requiring BCLAD, credentialed special education teachers, teachers fully credentialed and currently serving in classes requiring a formal training/coursework in the Waldorf method, and who have completed training or coursework in Waldorf; and fully credentialed and currently serving in classes requiring single subject mathematics or science.

70. Respondents do not challenge special education credentials. They also do not challenge BCLAD or single subject math and science credentials as areas appropriate for skipping. They do challenge, however, the method used to identify which fully credentialed BCLAD, math, and science teachers were skipped, if they had the same seniority date as respondents.

#### WALDORF SKIP

71. Ms. McArn presented to the Board a resolution to skip Waldorf-trained or experienced teachers. She and Ms. Nguyen suggested that all of the information that was presented to the Board on February 21, 2019, and March 7, 2019, was a result of the “one-stop staffing” process. Through this process, each school site or department worked with a human resource analyst to identify the projected budget and staffing allocation, and from there, staffing cuts were determined. The principals of the District’s three Waldorf schools identified a need for teachers with specialized training and experience to teach at Waldorf schools. Five teachers were skipped based upon their current assignments as Waldorf teachers. All of the teachers currently work at A.M. Winn, one of the District’s Waldorf schools, and all have a seniority date of August 30, 2018, except one, whose seniority date is September 12, 2018. They represent teachers who would have received a layoff notice based on their seniority, but were skipped based on their specialized training or experience.

72. Two Waldorf principals testified at hearing regarding the importance of a teacher who teaches at a Waldorf school to have specific Waldorf training, and the extent of the training the Waldorf teachers have received. Mechelle Horning is the principal at Alice Burney Waldorf school. She explained the particular differences between a Waldorf classroom and a traditional classroom. She categorized Waldorf experience and/or training for Waldorf teachers as “essential.” First, Waldorf is child-development based, and the curriculum is based on what the Waldorf method characterizes as “developmentally appropriate” for a student’s age. Waldorf is a “hands-on” method, and introduces concepts to students through experiential input. As an example, Principal Horning stated, “In a first grade classroom, students would be introduced to letters through the artistic work of the teacher with drawing and painting, chalkboard work, clay, beeswax modeling.” The curriculum is not based on the textbooks that are used in traditional classrooms in the District. The teachers create lessons “following a Waldorf roadmap” of what is appropriate for the age-level. This roadmap is part of Waldorf training. Principal Horning asserted that

the Board has adopted a “separate document” from the common core standards applied in traditional classrooms.

73. Nischa Turturici, Principal at A.M. Winn, added to this testimony, stating that teachers, “need to come in with training because there is no scripted curriculum provided for them.” They need to use “12 senses” to incorporate within their instruction in the classroom, understand the alliance standards document, and also incorporate music, movement, and other activities within the classroom-setting, which is “expected by their colleagues as well as the parents.” She stated that Waldorf teachers have particularized training.

74. A summary of the training of the teachers at Alice Burney and A.M. Winn was presented at hearing. The teachers have varying levels of education and experience particular to the Waldorf method. But what each teacher has in common is hundreds of hours of Waldorf-specific training. All five of the Waldorf teachers at A.M. Winn who were skipped completed the Rudolf Steiner College<sup>10</sup> two-year Teacher Certification Program (675 hours), along with many other training programs. Many participated in Waldorf training that the District provided, in addition to other Waldorf training.

75. Ms. Nguyen prepared the “skip list” of teachers to be skipped who fall within the categories above. She stated that based on the comments given at Board meetings by Waldorf teachers and community members, the District has acknowledged Waldorf as a unique program. She acknowledged that non-Waldorf teachers “might” have been assigned to a Waldorf school in the surplus process previously. She stated that in developing the skip-list, if she saw anything “related to Waldorf” regarding a teacher who would otherwise have received a layoff notice, she put that name on the skip list. Her testimony on this point was vague and unhelpful.

76. The District has the burden under Education Code section 44955 to establish a “specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.” (See also, *Bledsoe v. Biggs Unified School District*, *supra*, 170 Cal.App.4th at p. 138.) Through the principals’ testimony, and the chart showing the extent of training and experience for each teacher at A.M Winn and Alice Burney, the District presented sufficient evidence to support its resolution skip criterion regarding Waldorf teachers.

#### SPECIAL EDUCATION SKIP

77. The special education skipping criteria states that an individual will be skipped if she is fully credentialed to serve in a special education assignment. Cynthia Vierra was skipped, but is currently filling a school psychologist position, though she is credentialed in

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<sup>10</sup> A Waldorf-specific college in the Sacramento region.

special education. Respondents argued that the District cannot “stockpile” credentials, and a teacher can only be skipped if she is fully credentialed *and* will be teaching in a capacity to *use* that credential.

Appellate case law supports respondents’ arguments. *Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, 576, analyzed a district’s skipping criteria that resulted in retaining junior teachers who had bilingual credentials but were not using them. The court found that it was an abuse of discretion to skip junior teachers with less college units (in math, in that case) and teaching experience than more senior teachers solely because the junior teacher was bilingual.

78. At hearing, the District dispensed with this challenge by stipulating that Cynthia Vierra will in fact be assigned to teach special education in 2019-20.

#### MATH AND SCIENCE SKIP

79. Respondents do not argue that the needs of the District and its students are best served by being fully staffed in the areas of math and science. They contend, however, that the three teachers with single subject biological science credentials were skipped arbitrarily, when other teachers with the same credentials were not. The District explained that the only teachers who were skipped were people who held the appropriate credential and are currently required to use it. Skipping credentialed math and science teachers who are currently teaching in positions requiring those credentials is reasonable. Mr. Petzold argued that he should be skipped because he holds a single subject in Science: Biological Sciences, and Psychology, with ELA. Mr. Petzold is not currently teaching high school biology, and while he has a single subject biology credential, his position as a middle school biology teacher does not require that credential. He does not fit within the skipping criteria, criteria which is found to be reasonable.<sup>11</sup>

#### *Tie breaking*

80. As discussed in Factual Finding 8, the Board adopted criteria to apply when two teachers have equal seniority. Respondents did not contest the criteria, but several teachers testified regarding additional points that were not accounted for. Additionally, at the time of hearing, the District, in conjunction with SCTA had not conducted a lottery to determine the position of each teacher under Category II. At hearing, the District acknowledged that Angela Cook had not been granted an additional point for an advanced degree in Category I. Her total points were increased.

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<sup>11</sup> There was an assertion at hearing that the District may intend to rescind one notice for a biology teacher. There was no stipulation on this point, and it cannot be definitively considered here. The District is reminded to consider Mr. Petzold’s updated seniority date when making the calculation regarding this rescission.



81. Melanie Ota received a Master of Arts in Teaching at the University of California, Irvine (UCI) in 2018. When the District hired her, Ms. Ota's official transcripts post-high school were requested. At hearing, she produced the official transcript from UCI that she provided the District on August 7, 2018. The transcript shows Ms. Ota completed 76 units toward her master's degree, and she "advanced to candidacy" on May 30, 2018. Ms. Ota believes this is evidence she was conferred that degree. She also produced a letter at hearing from UCI confirming that she had earned a master's degree as of September 12, 2018. She did not provide this letter to the District.

82. The District argued that the letter is not evidence she received her degree, which may be true, but it is also evidence that on August 7, 2018, at the time she provided the District with her transcript, the District was on notice that Ms. Ota had completed the necessary coursework for a master's degree. The information she provided at hearing confirmed this. Ms. Nguyen testified that the District requires an official transcript indicating the date a degree was issued by the university by March 15 for it to be considered in the layoff process. The District did not provide any documentation to demonstrate that certificated employees were informed that any advanced degrees must be confirmed with the District by March 15, other than Ms. Nguyen's unsupported assertion. Indeed, one reason for an employee to file a Request for Hearing is to present evidence contrary to the District's assumptions.

Ms. Ota's reliance on this transcript was reasonable. She presented sufficient evidence that she should be allotted an additional point based on the transcript she provided the District.

83. Gabriela Uribes produced her curriculum vitae at hearing, and described her efforts to provide all of her transcript to the District, including a master's degree and a doctorate. She also has a BCLAD in Spanish, and an administrative services credential. She was not given points, per the tie-breaking criteria, for her additional services credential. The District agreed that three points were due to Ms. Uribes, for a total of eight points. This moves Ms. Uribes to position one for purposes of the lottery.

### *Administrators*

84. As discussed in Factual Finding 13, the District identified 15.2 FTE administrator positions that will be reduced or eliminated in 2019-20. Those administrators were previously certificated classroom teachers, and on June 30, 2019, will be classified as such again. They have return rights to positions that align with their seniority, certification, and competency. The District did not produce a seniority list for administrators, but identified their adjusted seniority dates and credentialing on its "bump chart." This chart also shows that three administrators who are bumping less senior teachers do not have a Crosscultural, Language and Academic Development (CLAD), authorization, though the position requires it.

85. Kai Phan, as discussed above, will have his layoff notice rescinded, because he was found to be able to bump into a position requiring an MS credential. Mr. Phan does not have a CLAD authorization, nor do two other released administrators: Debra Hetrick and Linda Kingston. Ms. Hetrick bumped a less senior teacher, and Ms. Kingston was issued a layoff notice. The CLAD is an authorization, not a credential, and is required for a teacher to teach in a position that has English language learning students. The District asserted it would apply for an emergency CLAD authorization on the teachers' behalf, which is its practice if a teacher qualifies for the authorization.

86. Respondents argue that because they do not have the CLAD, these administrators are not qualified to bump less senior teachers. The District explained that the administrators have seniority and are qualified to move into the identified positions based on their credentialing. The CLAD, though required, is an authorization that can be applied for on an emergency basis if a teacher is qualified. Allowing these teachers to bump on this basis was appropriate.

87. Respondents also argue that there was no evidence presented, and Ms. Nguyen could not confirm, that current administrator Aaron Pecho, who bumped a biology teacher, has classroom experience in biology, such that he is "certificated and competent." They further argue that he is not "currently serving in classes" requiring a biology certificate. This confuses the District's skipping criteria with bumping. A teacher who bumps another teacher must be found to be "certificated and competent." (Ed. Code, § 44955, subd. (b).) Biology is not included in the District's "competency criteria" in Resolution #3055. Nevertheless, the District's reliance on Mr. Pecho's single subject biology and chemistry credential with ELA is a reasonable measure of his competency.

### *Reasonableness of Layoff*

#### OVER-NOTICING

88. The District engaged in over-noticing. Ms. Nguyen testified that when she conducted the layoff analysis, based on the FTEs identified in the Board's resolutions, certain reductions would have required splitting up positions to match the exact FTE reduced. Resolution #3053 identified, for example, .9 FTE for librarians, and the bump chart accounts for a 1.0 FTE reduction. Similarly, the resolution identified .4 FTE in art, and the bump chart shows a 1.0 FTE reduction. It has been held that it is "within the scope of a school district's discretion . . . to define a position as full time if the district concludes that the assignment cannot be as well performed on a part-time basis. . . . So long as the determination is reasonable and made in good faith, neither section 44955 nor any other provision of the Education Code precludes a school district from defining a position, or 'service,' as full time." (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, 343-344.) Respondents argue that there is no basis to determine that a position "cannot be as well performed on a part-time basis" in many situations. It is true that the District did not lay out in the resolution or at hearing its basis for making that

determination. Nevertheless, it was in the District's discretion to do so, and that determination is not unreasonable.

89. The evidence shows that the District properly considered and accounted for positively assured attrition when identifying individuals subject to layoff, including attrition caused by retirement, resignation, and non-reelection known to the District as of March 15, 2019. Ms. Nguyen testified that attrition after March 15 is eventually taken into account via the surplus process, which post-dates the May 15 final layoff notices.

90. Respondents argue that the District should consider not only positively assured attrition prior to March 15, but also attrition up to the date of final layoff notices: May 15. In so doing, five additional layoff notices would be rescinded. They argue that Education Code section 44955 states that layoffs must be "necessary," and if there is positively assured attrition prior to the final layoff notice, a corresponding number of layoffs are not necessary. Respondents also identify a split of authority in whether to consider attrition up to May 15. (Cf. *San Jose v. Allen* (1983) 144 Cal.App.3d, 627, 635-636, and *Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977, 980-983.)

91. School boards must find that reducing particular kinds of services and the layoffs that follow are necessary. (Ed. Code, § 44955, subd. (b).) No one disputes that the District must consider all positively assured attrition. Prior to issuing layoff notices, which were reduced from the initial identified FTE positions, the District considered all retirements, non-reelections, and resignations. The layoff process is not static. Even up to the time of and throughout hearing, rescissions were issued, additional attrition was identified, and further credentials were accounted for. Requiring the District to respond to movement of a variety of factors on a daily basis would render the layoff process so cumbersome and uncertain that no decision could be made. Ms. Nguyen stated at hearing that all positively assured attrition after March 15 *will* be considered, whether in the surplus process or by rescinding additional notices. The District has demonstrated its commitment to continue to consider attrition, though perhaps not on a deadline that works for all parties involved.

#### RATIOS

92. Respondents argued that psychologists and counselors, for example, will be out of ratio following this layoff, which violates the CBA. The District has listed as a justification for the layoff that it is attempting to bring teacher/student ratios "up to contract." This hearing is not devised to determine whether the CBA has been, or will be, violated, or whether the District's layoff will create ratios within the CBA. Those determinations are beyond the scope of these proceedings.

#### ARBITRARY AND CAPRICIOUS

93. Respondents argue that the entire layoff was arbitrary and capricious because in addition to over-noticing, the District could not point to a specific document or point in time that led to its determination that 178.59 positions should be reduced or eliminated.

Respondents argue that the enrollment numbers projected for 2019-20 are arbitrarily low, and cannot be relied on. They further argue that the data that arose from the one-stop process shows a reduction far less than those listed on the District's resolutions. The Board determined that a reduction of \$5.1 million through the one-stop process was essential to contribute to addressing the District's debt. But when respondents calculate the average cost per teacher at approximately \$90,000 with salary and benefits, they figured that a reduction of 56.67 FTE would adequately address that. Moreover, this amount could have been addressed by attrition (prior to March 15) alone. Ms. Nguyen, who drafted Resolutions #3053 and #3058, could not clarify how she came to the number 178.59, except to say that in determining the layoff list, she had to rely on what the Board adopted. This circular reasoning understandably causes respondents to question the entire process.

94. Respondents' focus on each point in time, each calculation, and when all available information was considered, and by whom, avoids two simple points. First, the District is facing a \$35 million deficit, and it crafted its PKS reduction so as to affect the least number of teachers, while working toward remaining solvent. Second, the District's primary mission and responsibility is not to ensure that its teachers remain employed, but to educate the students in the community in serves. There is no doubt that the District's human resources team, principals, and budget analysts could have provided more complete and comprehensible information.

95. Schools districts have broad discretionary decision-making when determining the particular kinds of service to reduce. *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627,636 found: "Where the governing board determines to discontinue or reduce a particular kind of service . . . it is within the discretion of the board to determine the amount by which it will reduce a particular service." The court explained that this decision is "not tied in with any statistical computation, such as reduction in the number of students." (*Ibid.*) A school board may determine whether a particular kind of service should be reduced or discontinued, and it cannot be concluded that the governing board acted unfairly or improperly simply because it made a decision it was empowered to make. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.)

96. "In determining whether the decision of a school board is reasonable as distinguished from fraudulent, arbitrary, or capricious, its action is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject." (*Arthur v. Oceanside-Carlsbad Junior College Dist.* (1963) 216 Cal.App.2d 656, 663.) Thus, respondent's calculations and second-guessing undermines the District's authority to determine the amount by which services will be reduced. The difference of opinion regarding the Board's determination is understandable, but the decisions are not unreasonable.

#### *Individual Arguments, Not Addressed Above*

97. Melody Mo. Resolution #3053 provides for 1.0 FTE to be eliminated in Foreign Language: Chinese. Melody Mo teaches Chinese at Hiram Johnson High School.

Her seniority date is October 20, 2015. She has a master's degree in Chinese and a Single Subject credential. Each year she teaches about 150 students Chinese. She asserted that for the 2019-20 school year, 153 students have already signed up to take Chinese at Hiram Johnson. This is not an estimate. These are students who have determined their classes for 2019-20.

98. Ms. Mo received a layoff notice. The result of the one-stop process was that one Chinese position would be reduced at John F. Kennedy High School. The Chinese teacher at JFK is senior to Ms. Mo, and did not receive a notice; that teacher also anticipates a full class load in 2019-20 based on students who have already signed up. There are only two Chinese teachers at the high school level in the District. Ms. Mo argues that by allowing students to sign up for classes at both John F. Kennedy High School and Hiram Johnson High School, the District has implied it is not reducing 1.0 FTE in Foreign Language: Chinese.

99. Ms. Mo's argument is reasonable. But there was no testimony to establish that if students sign up for a class in the Spring, the class will necessarily be available in the Fall semester. The District is directed to determine whether a Chinese language position will be eliminated in 2019-20 based on student enrollment.

#### *Welfare of the District and Its Students*

100. Other than that set forth particularly above, the Superintendent's designees correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, unless skipped, as set forth above.

### LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met.

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

3. Legal cause exists to reduce or eliminate 178.59 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils, within the meaning of Education Code section 44949.

4. Cause exists to retain teachers who are fully-credentialed to serve in special education assignments, and teachers who are fully credentialed to and will serve in classes requiring BCLAD certification, as set forth in Resolutions #3055 and #3064, regardless of seniority. (Findings 70 and 71.)

5. Cause also exists to retain teachers who are fully-credentialed to serve in classes requiring Single Subjects: Mathematics credential, and Single Subjects: Biology credential, but only to the extent that retained (skipped) teachers are assigned, or will be assigned next school year, into positions requiring these credentials. (Finding 80.)

6. As explained in Factual Findings 72 through 77, the District demonstrated a specific need for teachers with specialized training and experience to teach at its Waldorf Methods Schools, and therefore the application of skipping criteria to teachers currently in the Waldorf program is sustained.

7. As set forth in Factual Finding 44, the District must rescind the layoff notice to Dekeithi Walton. The District does not have jurisdiction over Mr. Walton based on improper notice required by Education Code section 44949, subdivision (a)(1).

8. If it has not already done so, the District must rescind layoff notices issued to Morgan Komure, Andrew Pena, Christine Schoenfeld, Kai Phan, one training specialist, and one resource teacher. (Finding 18.) The District must also determine the impact of Cynthia Vierra's move to special education from being a school psychologist. (Finding 19.)

9. The District engaged in over-noticing. As explained in Factual Findings 89 through 92, the District's determination of the number of FTE positions to notice was reasonable and made in good faith. That determination is not unreasonable and is upheld. Similarly, the District's reliance on attrition prior to March 15 was reasonable. The District is obligated to consider all positively assured attrition that occurs after March 15, which it has asserted it will do.

10. After considering the District's need to account for administrators bumping into positions, application of tiebreak criteria, rescinded notices, positively assured attrition, and assignments/reassignments into partial positions, the number of layoff notices issued by the District was neither unreasonable nor an abuse of its discretion. The matters set forth in Findings 94 through 97 have also been considered. The layoff as a whole was not arbitrary and capricious.

11. As explained in Factual Findings 46 through 58, the District will make corrections to the seniority of those new teachers who attended New Teacher Orientation.

The seniority will be adjusted as laid out in Factual Finding 66. New Employee Orientation, Pest Management Training, Benchmark training, and Next Generation Science Standard training do not establish seniority dates, as explained in Factual Findings 59 through 65.

12. The District applied bumping rules with some consistency, and generally allowed bumping based upon the more senior employee holding a credential or authorization to teach the assignment of the less senior teacher. The District articulated the rationale for its bumping rules. The District must update its tie-breaking chart, and personnel records to include credentialing and other information brought to its attention by Angela Cook, Gabriela Uribes, and Melanie Ota. (Findings 81 through 84.) Once the tie-breaking chart is complete, a new lottery must be performed.

13. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2018-2019 school year pursuant to Education Code sections 44949 and 44955. Other than the foregoing, no employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render. Except as set forth above, the District's Governing Board may give final notice to remaining respondents whose preliminary notices have not been rescinded before May 15, 2019, that their services will not be required for the ensuing school year, 2019-2020.

#### RECOMMENDATION

Cause exists for the reduction of 178.59 full-time equivalent certificated positions at the end of the 2018-2019 school year. After making the adjustments set forth in the Factual Findings and Legal Conclusions, notice shall be given to remaining respondents that their services will be reduced or will not be required for the ensuing school year, 2019-2020, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: May 6, 2019

DocuSigned by:  
*Heather M. Rowan*  
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HEATHER M. ROWAN  
Administrative Law Judge  
Office of Administrative Hearings

## Attachment A

### Respondents Represented by Counsel

1	Rocio Almanza	38	Amber Kadrie	75	Colleen Vaughn-Waggoner
2	Veronica Avelar	39	Nancy Khang	76	Mariela Ventura
3	James Ballenger	40	Kathryn Kiley	77	Timmy Vo
4	Brittany Barbone	41	Morgan Komure	78	Dekeithi Walton
5	Michelle Bohlin	42	Cristin Kosakowski	79	Dustin Watson
6	Lisa Brown	43	Randy Laforteza	80	Ger Yang
7	Lily Busher	44	Julie Law-Marin	81	Jennifer Yang
8	Adrienne Camacho	45	Ian Leary	82	Mai Yang
9	Samantha Clevenger	46	Tabitha Lichtenhan	83	Eric Yee
10	Rhianna Clifton	47	Mabeth Lopez	84	Pail Yenovkian
11	Gary Coartney	48	Brittany Martin	85	Carolyn Zierenberg-Senge
12	Bethany Coburn	49	Mee Miranda		
13	Cameron Collins	50	Melody Mo		
14	Angela Cook	51	Jaime Masillani-Macias		
15	Kristie Corcoran	52	Jacelyn Neumann		
16	Kaylee Creevan	53	Peter Newman		
17	Douglas Dammarell	54	Gabriella Orozco		
18	Alfredo Decali	55	Yessenia Ortiz		
19	Melina Diaz	56	Melanie Ota		
20	Rachelle Dowd	57	Gregory Palmer II		
21	Angela DuBose	58	Andrew Pena		
22	Molly Durst Roman	59	Michael Petzold		
23	Candace Evans	60	Erin Pressley		
24	Glenda Feece	61	Samuel Prowell		
25	Melissa Ferguson	62	Christopher Rasmussen		
26	Briana Fonseca	63	Lobelia Robinson		
27	Nicole Fossum	64	Lindsey Rodriguez		
28	Matthew Garber	65	Brittany Rogers		
29	Jessica Gonzalez	66	Michelle Rogers		
30	Anna Gutierrez	67	Amanda Sacks		
31	Tiffany Harris	68	Yesenia Sanchez		
32	Erica Hernandez	69	Christine Schoenfeld		
33	Kristine Hiett	70	Jenna Smith		
34	Tori Horton	71	Victoria Tacherra		
35	Myisha James	72	Natalie Tamblyn		
36	Dezarae Johnson	73	Jonathan Thackeray		
37	Andrew Jones	74	Graciela Uribe		