

BEFORE THE  
BOARD OF EDUCATION  
SAN JUAN UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation (Layoff):

PROPOSED REDUCTION OR  
ELIMINATION OF PARTICULAR KINDS  
OF SERVICES BY 278.17 FULL TIME  
EQUIVALENT CERTIFICATED  
EMPLOYEES

OAH No. N2004030113

Respondents.

**PROPOSED DECISION**

On April 21 and 22, 2004, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Diana D. Halpenny, General Counsel, represented the San Juan Unified School District (School District).

Joan Maredyth, Attorney at Law, assisted by her Paralegal Robin Thompson, represented all of the respondents.

Evidence was received and the record was left open until April 26, 2004, for the receipt of written closing arguments. The School District's written closing argument was received on April 26, 2004 and was marked for identification as School District's Exhibit 22. Respondent's written closing argument was received on April 26, 2004, and was marked for identification as Respondent's Exhibit G. The record was closed and the matter was submitted on April 26, 2004.

## FACTUAL FINDINGS

1. On or before March 15, 2004, Dianna R. Garcia (Garcia), Assistant Superintendent for Human Resources of the School District, sent a written recommendation to the Board of Education (Board) of the School District for the reduction or discontinuation of particular kinds of services.

2. On or before March 15, 2004, Garcia served on respondents written notices of the recommendation to the Board that respondents' services would not be required for the ensuing school year due to a reduction or discontinuation of particular kinds of services (PKS). The notices set forth the reasons for the recommendation, as required by Education Code sections 44949 and 44955.

Attached to the notices were blank Request for Hearing forms.

3. On or before March 15, 2004, the recommendation was placed on the agenda of the Board. During that meeting, the Board found that the reduction or discontinuation of the particular kinds of services was in the best interests of the School District and the students due to the need to reduce expenditures because of the uncertainty in the amount of revenue the School District would receive from the State for the ensuing school year.

At that meeting, the Board adopted Resolution No. 2299 reducing or discontinuing particular kinds of services and thus eliminating 278.17 full time equivalent (FTE) certificated positions at the end of the 2003-2004 school year.

The Resolution provided for the reduction or discontinuation of the following particular kinds of services:

### **A. SCHOOLS AND PROGRAMS**

<u>ADMINISTRATORS</u>	<u>FTE</u>
Middle school vice principals	3.00
High school vice principals	5.00
<b><u>Sub-total</u></b>	<b>8.00 FTE</b>

### **NON-ADMINISTRATIVE CERTIFICATED SERVICES**

K-6 Teachers	90.00
Special Education Pilot Program	2.00
Counselors K-12	10.00
Elementary Specialists	75.31
English 7-12	10.60
Math 7-12	8.00
Social Science 7-12	8.00

Science 7-12	5.30
Physical Education 7-12	5.30
Foreign Language 7-12	2.60
Industrial Arts 7-12	2.00
Fine Arts 7-12	2.60

<b><u>Sub-total</u></b>	<b>221.71 FTE</b>
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**B. GRANTS AND CATEGORICAL CERTIFICATED SERVICES**

**ADMINISTRATORS**

Title I Elementary Vice Principal	0.50
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<b><u>Sub-total</u></b>	<b>0.50 FTE</b>
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**NON-ADMINISTRATIVE CERTIFICATED SERVICES**

21 <sup>ST</sup> Century Community Policing	
Nurse	0.40
Counselor	0.40
Comprehensive School Reform Demonstration Program	
Teacher – Resource	1.60
General Bilingual	
Teacher – Language Specialist	1.00
Teacher – ELD	1.00
Healthy Start Nurse	1.35
II/USP	
Counselor	1.00
Teacher	4.16
Teacher – Resource	0.55
Indian Education	
Teacher – Resource	1.00
PAR/BTSA	
Teacher-Consulting	3.00
Parent Institute	
Teacher – Adult Education	0.20
SIP	
Traveling Music Teacher	0.05
Traveling PE Teacher	0.13
Title I	
Counselor	2.35
Librarian	0.30
Nurses	1.55
Teacher	18.19
Teacher – Reading Specialist	0.60
Teacher – Resource	6.64

Title II	
Teacher – Resource	2.00
Visual Performing Arts/IMF/Staff Development	
Teacher – Resource	0.50
<b><u>Sub-total</u></b>	<b><u>47.96 FTE</u></b>
<b><u>TOTAL REDUCTION OR ELIMINATION OF PARTICULAR KINDS OF SERVICES</u></b>	<b><u>278.17 FTE</u></b>

At the same meeting, the Board also adopted Resolution No. 2300, which established criteria to break ties among certificated staff (teachers) with the same date of hire. The Governing Board based the criteria upon the needs of the School District and of its students, and acted within its discretion in creating the tie breaking criteria.

4. Respondents timely filed Requests for Hearing to determine whether there is cause for not re-employing them for the ensuing school year pursuant to Education Code section 44949(b).

5. Pursuant to Resolution No. 2299, on April 5, 2004, Garcia signed and had timely served upon respondents the Accusation. Garcia acted in her official capacity.

6. Respondents timely signed and served Notices of Defense pursuant to Education Code section 44949(c)(1) and Government Code section 11506.

Thereafter, the matter was set for hearing.

7. Respondents are certificated employees of the School District.

8. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

9. Tenure is the relationship between a teacher and the School District which gives the teacher greater job security.

Seniority is the relationship between the teachers within a School District. Among the teachers credentialed to provide a given service, greater seniority in the School District gives a greater legal entitlement to a position, see *Ferner v. Harris* (1975) 45 Cal.App.3d 363.

A teacher who serves over 75 percent of the regular school year either as a temporary or in one position replacing one teacher partially as a long term substitute and partially as a temporary, receives credit toward tenure for the whole school year. In either instance, the teacher receives credit toward seniority from the start of service as a temporary if rehired at the start of the ensuing school year without a break in service. If there is a break in service,

even of one day, then seniority starts after the break in service, see Education Code section 44909 and *Kamin v. Governing Board* (1977) 72 Cal.App.3d 1014.

Thus, if there is a break in service between the qualifying service for working over 75 percent of a school year and the start of service in the next school year, whether the break is at the end of the one school year or at the start of the next school year, then the teacher is given credit toward tenure for the earlier school year but credit toward seniority starts with the first day of paid service of the later school year.

The School District correctly applied these rules in determining the tenure date and date of hire (seniority) for the teachers affected by this layoff.

10. The School District offered an early retirement incentive program through the Public Agency Retirement Systems (PARS) to all qualified certificated employees and took into account the resulting attrition, thereby reducing the number of layoffs in like amount, when sending notices for this layoff.

As a result of the PARS program, 48 management employees, some of whom may have been non-certificated employees, and 208 certificated non-management employees will retire at the end of the current school year because they elected to participate in the early retirement incentive program.

Although the School District is not legally required to consider positively assured attrition when reducing or eliminating particular kinds of services, it did in this case. The School District factored the positively assured attrition due to retirements under PARS into the layoff and identified the particular assignments and FTE's of the PARS participants and offset that attrition against the reductions or eliminations of PKS authorized in the Board's Resolution.

11. In category A of the Resolution, there were generally less retirements than the number of authorized PKS reductions or eliminations, so the difference between the two numbers is, in most instances, the number to be laid off. However, in some of the subject areas, the number of retirees and their FTE positions exceeded the authorized reductions in FTEs in certain particular kinds of services, and thus, there were vacancies identified.

After the Resolution, the School District decided not to reduce or eliminate Elementary Specialists, so that reduction of 75.31 FTE was not taken, which reduced the total FTE to be eliminated from 278.17 to 202.86.

In addition, due to a severe shortage of special education teachers, no FTE were reduced in the special education area. The School District justified retaining these teachers pursuant to Education Code section 44955(d)(1) to meet special needs for which they have special credentials and competence.

As a result of the application of the PARS-related positively assured attrition and other known attrition, the following number of FTE in Category A are subject to layoff:

1.	High School vice-principal	1.00
2.	K-6 teachers	26.60
3.	Math 7-12	2.60
4.	Science	1.30
Subtotal – Category A		31.50 FTE

All of the other reductions in category A are being absorbed through attrition created by PARS.

12. As a result of application of the positively assured attrition, vacancies were actually generated in certain categories. Those vacancies were as follows:

1.	Counselors	1.40
2.	English	6.87
3.	Social Science	0.40
4.	PE	3.40
5.	Foreign Language	4.20
6.	Industrial Arts	2.60
7.	Fine Arts	5.80

13. Category B involves the reduction or elimination of a total of 47.96 FTE, so the combined total FTE from Category A and B was 79.46, at this stage.

The elementary bump occurred by taking the 90.00 FTE identified in the PKS resolution, and subtracting 63.40 PARS participants, leaving a remainder of 26.60 FTE to be reduced.

The second application of the PKS reduction was in Math, for 2.60 FTE. However, due to a shortage of math teachers, the two individuals who possess Math credential authorizations were not sent layoff notices. The School District justified retaining these two teachers pursuant to Education Code section 44955(d)(1) to meet a special need for which they have special credentials and competence.

The other two teachers affected by the Math cut, Gregory Snyder and Todd Cardoso, do not have math authorizations and were laid off. There is no one less senior than either of these two respondents who is being retained to render a service which either respondent is credentialed and competent to render.

With respect to the Science reduction, 1.3 FTE least senior probationary employees teaching Science were identified on the Science seniority list as Jason Sare, 1.0 FTE, who resigned prior to the hearing, and Timothy Cunningham, 0.3 FTE. Due to a shortage of

science teachers, Mr. Cunningham was retained. The School District justified retaining this teacher pursuant to Education Code section 44955(d)(1) to meet a special need for which he has special credentials and competence.

The Category B cuts include a 0.50 FTE in the elementary Title I funded vice principals. The person occupying this position, Karen Adicoff, bumped Michael Doerr, a middle school vice principal, but he was not laid off due to a PARS retirement.

The remaining programs had the specific individuals identified and the portion of the person's assignment that came from the funding source being reduced. If the person was credentialed to teach in one of the areas identified as having a vacancy, the person was put into the vacancy rather than bumping a less senior employee. When the vacancies for each subject area were exhausted, then those remaining whose positions were affected by the cuts in category B moved into the bumping process and, depending on seniority, credentials and competence, bumped into the assignments of those less senior.

14. Before the hearing it was discovered that the number of PARS participants at the elementary level was 65.5 FTE rather than 63.40 FTE, a difference of 2.10 FTE. This reduced the number of elementary reductions needed from 26.60 FTE to 24.50 FTE. Thus there was an over-noticing of elementary teachers by 2.10 FTE, which was corrected during the hearing.

Specifically, the School District corrected the seniority list to change the status of two respondents, Ellen Brown (Brown) and Sara Ferris (Ferris), from probationary to permanent. The School District then dismissed the Accusation against Brown and Ferris because it had retained two probationary employees to teach classes that Brown and Ferris are credentialed and competent to teach. Their retention partially offset the over noticing of elementary teachers.

During the bumping process, the last bump into an elementary position was for 0.12 FTE against Theresa Altieri. The School District used the remaining 0.1 FTE left over from the over noticing and dismissed the Accusation against her, the most senior elementary teacher on the list for layoff.

15. At the start of the hearing, the School District corrected the seniority list to change the date of hire also referred to as DOH (seniority date) of Abigail Jacinto from June 9, 2003 to November 22, 2002.

16. At the start of the hearing, the School District dismissed the Accusation against Timothy Baucom (Baucom), date of hire October 1, 2002, because it had retained a less senior employee to teach a class that Baucom is certificated and competent to teach.

17. The above modifications and corrections in those to be laid off do not affect the total reduction in particular kinds of services nor the total number of FTE certificated

positions subject to the layoff but they do reduce the number of respondents subject to the layoff to the following FTE's:

Category A

High school vice principal	1.0 FTE
Elementary Teachers	24.0
Math	0.0
Science	0.0
Subtotal	25.0 FTE

Category B

As stated in Exhibit A to the Resolution	47.96 FTE
<b><u>Combined Total</u></b>	<b>72.96 FTE</b>

The number of respondents originally noticed for layoff was forty-five (45). Of those, the following individuals were restored:

Lori Hansen	1.0 FTE
Sara Ferris	1.0 FTE
Ellen Brown	1.0 FTE
Theresa Altieri	1.0 FTE
Timothy Baucom	1.0 FTE

Therefore, the number of respondents still subject to layoff is forty (40). Clearly, the number is far less than what is authorized in the original PKS, and substantially less than the remaining reductions once all the various adjustments are made.

During the process, the PARS program resulted in additional positively assured attrition totaling 24.67 FTE. Subtracting this 24.67 from the number of FTEs still to be laid off of 72.96 reduces the total subject to layoff to 48.29 FTE certificated employees, which exceeds the number of respondents still subject to layoff.

18. In late December of 2003, the School District sent individual letters to each credentialed employee soliciting input regarding: their address; first date of paid service; credentials; and other relevant information. The School District asked that they respond to Human Resources on the form provided by February 5, 2004, and that they sign the form. Damon Smith (Smith) a teacher with the School District received the letter and responded to it.

Human Resources incorporated any new or changed information received on the forms into its records and the seniority list. It applied the tie breaking criteria to those with the same date of hire (first date of paid service without a break in service) to determine their individual ranking on the list and then produced an updated the seniority list. The application of the tie breaking criteria was fair and appropriate.



The School District posted copies of the Seniority List in two formats: one in alphabetical order and one by date of hire (i.e. seniority) to allow teachers to point out any inaccuracies.

The School District relied upon the teachers' addresses, as updated in response to the December 2003 letter, when it sent out the various notices. Specifically, when Human Resources mailed the March 12 notices to the teachers, it sent Smith's notice by certified mail to the address on file with Human Resources. However, Smith had moved soon after responding to the letter and then failed to provide written notice of the new address to Human Resources, so the notice was sent to Smith's prior address. Fortunately for Smith, respondents' attorney Maredyth filed a Request for Hearing and a Notice of Defense on behalf of respondents, Smith was one of that group and is thus a respondent in this hearing.

19. To determine which teachers would be affected by the layoff, the School District first bumped those teachers in temporary or provisional positions, then worked its way up the seniority list. The School District is not required to bump and re-bump to save a particular teacher nor is it required to do bumping in any particular way. Nor does it have to make assignments and reassignments to transfer more senior employees to other positions in order to retain more junior employees. Thus, the School District has the discretion to determine how it carries out the bumping process and so long as it does not act arbitrarily or capriciously, the process is valid.

Deborah Koerner, date of hire February 9, 1987, has both a multi-subject credential and an art supplementary credential. It was within the School District's discretion to use her elementary credential rather than her art credential in the bumping, especially since she is currently assigned at the elementary school level and her art credential would only allow her to teach through the ninth grade curriculum. This choice was not an abuse of discretion.

20. Martha Gutierrez is a school district intern who was hired on August 21, 2001. In the bumping process, she bumped a less senior probationary teacher who is fully credentialed. Under the federal No Child Left Behind law, interns, like fully credentialed teachers, are deemed to be "highly qualified teachers." Her intern credential authorizes her to render the service she will provide next year.

Specifically, Education Code section 44325 authorized the Commission on Teacher Credentialing to issue "district intern credentials," section 44326 defines the scope of such credential and section 44326(b) authorizes the holder of a district intern credential to teach in grades kindergarten to 8, in a self-contained classroom if certain criteria are met. There was no evidence that Ms. Gutierrez failed to meet those criteria.

Education Code section 44830.3 sets forth the requirements for a school district intern program and section 44885.5 requires districts to classify as probationary employee any person employed as a school district intern pursuant to section 44830.3.

The appellate court in *Welch v. Oakland Unified School District* (2001), 91 Cal.App.4th 1421, interpreted Education Code sections 44450 et seq, which deal with university interns, and 44830.3(a), which deals with school district interns. The court noted an important distinction between the two types of interns; school district interns are probationary employees pursuant to the statutes but university interns are not.

As a school district intern, Gutierrez is a probationary employee of the School District, accrues seniority and can bump those less senior.

21. At the start of the hearing, the parties provided argument and evidence on the issue of whether regular School District employees could bump into the Adult School, and the Administrative Law Judge ruled on the issue.

The School District operates an adult education program, also referred to as night school in the statutes. It is established as a statutorily separate program from the regular school K-12 program, is funded separately, has a separate tenure track and a different salary schedule than the regular schools. Pursuant to Education Code section 44929.25, adult school teachers employed 0.6 FTE or less are classified as temporary and do not become probationary or tenured. If an adult school teacher is eligible for tenure in both the adult school and the regular school, also referred to as day school in the statutes, that teacher must choose in which program to be tenured and cannot be tenured in both, Education Code section 44926.26. Service in adult (night) school does not count toward tenure in regular (day) school, section 44929.26.

Therefore, adult school teachers do not have tenure or seniority in regular school and cannot bump into it and regular school teachers do not have tenure or seniority in adult school and cannot bump into it, see *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167 and *Kamin v. Governing Board* (1977) 72 Cal.App.3d 1014.

22. At the start of the hearing, the parties provided argument and evidence on the issue of whether regular School District employees could bump into the Head Start Program, and the Administrative Law Judge ruled on the issue.

The District employs two nurses, one probationary and the other temporary, in its Head Start program and did not notice either of those nurses as part of this layoff.

The Head Start Program is one of several programs in the federal Early Childhood Education (ECE) Program. It is a federally funded and operates subject to the requirements of federal laws and regulations. Pursuant to federal requirements parents participate in the management and operation of the Head Start Program, see 45 Code of Federal Regulations (CFR) section 1304.50, which is entitled "Program Governance." It creates a "Policy Council" and "Policy Committees" and requires that at least fifty-one percent of the members of the Council and the Committee be parents of students enrolled in the Head Start Program, see subsection 1304.50(b)(2). The Council and the Committee are known collectively as the "Policy Groups." Section 1304.50(c) provides that "[a]t a minimum, the policy groups must

be charged with the responsibilities described in paragraphs (d), (f), (g), and (h) of this section and repeated in appendix A of this section." Paragraph (d)(xi) requires that the Policy Groups be involved in: "Decisions to hire or terminate any person who works primarily for the Early Head Start or Head Start program of the grantee or delegate agency."

Thus, pursuant to the requirements of the above Federal Regulations, the Policy Groups are involved in and must approve the hiring and termination of employees in the Head Start Program and the School District cannot unilaterally make such decisions. Consequently, regular school employees cannot bump into the Head Start program.

Based upon this ruling, the School District dismissed the Accusation against the nurse in the Head Start program Lori Hansen.

23. The School District is the chartering agency for four charter schools. Two of the charter schools, Visions for Education and Choices Charter School, contract with the School District for certain administrative services, but do their own hiring, although the hirees are submitted to the district's board for approval. While the original charters for Visions and Choices provide return rights for teachers who left district employment to teach at them, those charters will expire on June 30, 2004. The proposed new charters that have been submitted, which will take effect this coming school year, do not provide any return rights. Therefore, employees who wish to work in either of these charter schools will have to resign their employment with the district in order to become employed in the charter school.

The other two charter schools, Options for Youth and Humane Education Learning Center (HELC), are entirely independent of School District operations, do not contract with the district for services, their employees do not have any employment rights in the district, and their hiring decisions are not subject to approval by the School District's Board of Education.

The teachers hired by the charter schools are not on the tenure track with the School District and do not have probationary or permanent status; instead all are "at-will" employees. They are not part of the district's teacher bargaining unit and they are not paid the same rate as School District teachers because the charter schools establish their own salary schedules. In addition, the School District cannot involuntarily assign teachers to a charter school, see Education Code section 47605(e).

Thus, the charter schools are separate and distinct from the School District and School District employees cannot bump into charter schools.

24. Education Code section 44865 states in relevant part:

A valid teaching credential, based on a bachelor's degree, student teaching, and special fitness to perform, shall be deemed qualifying for assignment as a teacher in the following assignments, provided that the assignment of a teacher to a position for which qualifications are prescribed by

this section shall be made only with the consent of the teacher: . . . (a) Home teacher. . . . (c) Hospital classes. . . . (e) Continuation schools. (f) Alternative schools.

Section 44865 permits a school district, with the teacher's consent, to assign teachers to teach outside their normal credential authorization in small programs that require flexibility, but does not create a bumping right into that program based strictly on seniority, especially with the requirements for "highly qualified teachers" under the federal No Child Left Behind statute.

25. The Independent Study High School (Independent Study) is an alternative for high school students who voluntarily transfer into the program for a variety of reasons and who qualify for admission based on an assessment of their ability to learn independently. Teachers are specifically hired to teach in Independent Study based on the needs of the program and the teacher's special qualifications.

The Independent Study High School is accredited by the Western Association of Schools and Colleges (WASC) and has its own California Department of Education code number. The students are subject to the state standardized testing program and the High School Exit exam. Like all schools, Independent Study is subject to the highly qualified teacher requirements of the federal No Child Left Behind Act, also known as NCLB or nicklebee. Teachers are hired because they possess credentials in the specific subject areas to be taught.

Barbara Kitz (Kitz) was hired on October 15, 2002 for a new Outreach program that assists high school students entering school during the midst of a semester. Kitz has counselor and multi-subject credentials. She works half-time as a counselor at San Juan High School and half-time as an Outreach teacher. She was previously employed in the Independent Study program and was already familiar with the Independent Study paperwork. There was no evidence that any respondent was similarly qualified to fill this part time Independent Study position, nor that any had consented to such an assignment prior to March 15.

David Wilson (Wilson) was hired on September 3, 2002 and holds a single subject credential in Social Science. He teaches history and social studies, and is also the short-term independent study teacher. He travels throughout the district serving students who will be absent from class for short periods of time, so the district can capture the average daily attendance for those students. Again, there was no evidence that any respondent was similarly qualified to fill this Independent Study position, nor that any had consented to such an assignment prior to March 15.

The District's Independent Study program operates as a separate and distinct alternative education program for students. Education Code section 44865 permits the district to assign a teacher to the Independent Study program, with the teacher's consent, if

the teacher meets the requirements of section 44865, including having a special fitness to perform.

None of the respondents consented to reassignment to the Independent Study program prior to March 15, so the School District could not have bumped them into the Independent Study program. Respondents are estopped from asserting that the School District should have bumped them into the Independent Study program because they failed to notify the School District of their consent to reassignment in that program prior to the March 15 deadline for the District to notice employees in that program of possible layoff.

26. The School District's Health Services Department operates the Home and Hospital program to serve students who are temporarily ill or injured and unable to attend the regular schools. The teachers in this program are part-time, hourly employees hired to fill special needs at specific times as needed, and only for as long as needed.

Many of the teachers in the Home and Hospital program teach only one or two students at a time. The student population fluctuates a great deal and peaks at the end of each semester. The Home and Hospital program is not a school; rather it is a program that supports the schools by helping students stay current in their assignments. Students range in age from three to twenty-two, may be special education or regular education students, may be non-English speaking or may be accelerated academically. Consequently, the Home and Hospital program has a cadre of part-time teachers with a variety of special skills in order to meet the wide range of needs of the students.

None of the respondents consented to reassignment to the Home and Hospital program prior to March 15, so the School District could not have bumped them into the Home and Hospital program. There was no evidence that any respondent possessed the special qualifications required to work in the Home and Hospital program. In addition, it would make no sense to order the District to bump regular teachers into the Home and Hospital program where the employees have no assurance that they will work any specific the number of hours a week.

27. Elizabeth Sibitz-Smith (Sibitz-Smith) is credentialed to teach English and has a date of hire of September 3, 2002. She teaches in the continuation high school. The Education Code allows, but does not require, the district to assign a teacher, with the teacher's consent, to teach outside the teachers credential authorization in a continuation high school; but the School District only assigns teachers in the continuation high school to teach within their credentials authorization, in compliance with the federal No Child Left Behind Act. Therefore, during this layoff, no teacher was bumped into an assignment for which they were not credentialed, and no teacher senior to Sibitz-Smith is being laid off who has an English credential.

State law does not require the district to assign teachers to teach outside their credential area as part of the bumping process. None of the respondents consented to

reassignment to the continuation high school prior to March 15, so the School District could not have bumped them into it.

28. No permanent or probationary certificated employee junior to respondents is being retained to perform a service which respondents are certificated and competent to render. Those certificated employees junior to respondents being retained will provide services which respondents are not certificated and competent to perform.

29. The services identified in the Governing Board Resolution are particular kinds of services that can be reduced under Education Code section 44955. The Governing Board's decision to reduce the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

30. The reduction of the particular kinds of services, and the resultant reduction in 202.86 full time equivalent certificated positions is for the welfare of the School District and the pupils. The decision was made because of a variety of factors affecting the School District including the State budget crises with the resultant possible loss of revenue from the State, a decline in enrollment and loss of funding for some programs. The School District will save money as a result of the reduction in particular kinds of services. The reduction in particular kinds of services is the sole cause for not re-employing respondents.

## LEGAL CONCLUSIONS

1. Education Code section 44949 provides:

(a) 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 district which 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.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to

subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event 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 therein, except that all of the following shall apply:

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

(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 accusation, 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 thereof. 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.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) 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.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in relevant part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. 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.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the



governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. 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.

The governing board 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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates 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.

3. Education Code section 44956(a)(1) provides:

(a) Any permanent employee whose services have been terminated as provided in Section 44955 shall have the following rights:

(1) For the period of 39 months from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, in the order of original employment as determined by the board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render. However, prior to reappointing any employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or

the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

4. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner, see *Gallup v. Board of Trustees* (App. 4 Dist. 1996) 49 Cal.Rptr.2d 289; 41 Cal.App.4th 1571, rehearing denied, review denied and *California Teachers Ass'n v. Board of Trustees of Goleta Union School Dist.* (App. 2 Dist. 1982) 182 Cal.Rptr 754; 132 Cal.App.3d 32.

5. In the course of reducing, discontinuing or eliminating a particular kind of service, the Governing Board may retain certificated employees junior to respondent/s to perform services which respondent/s is/are not certificated and competent to render, see *Moreland Teachers Ass'n v. Kurze* (1980) 109 Cal.App.3d 648; 167 Cal.Rptr. 343, and *Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977; 133 Cal.Rptr 385.

6. A school board may reduce services within the meaning of statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. *Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.

7. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.

8. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

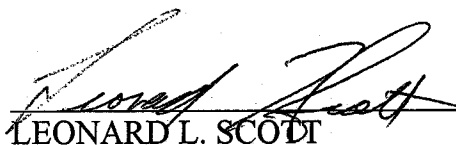
9. Cause exists for the reduction or discontinuation of the particular kinds of services and of 202.86 full-time equivalent certificated positions at the end of the 2003-2004 school year, pursuant to Education Code sections 44949 and 44955. Therefore, cause exists pursuant to Education Code sections 44949 and 44955 to give notice to respondents that their services will not be required for the ensuing school year, 2004-2005.

ORDER

Notice shall be given to respondents that their services will not be required for the ensuing school year, 2004-2005, because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

Dated:

April 28, 2004

  
LEONARD L. SCOTT

Administrative Law Judge  
Office of Administrative Hearings