

BEFORE THE  
ORANGE COUNTY SUPERINTENDENT OF SCHOOLS  
STATE OF CALIFORNIA

In the Matter of the Accusations  
Against:

ERICA ALVAREZ, LEWIS LEE  
LESTER IV, JESSICA LOPEZ, WENDY  
LYNNE PARENT, CARRIE SAVAGE, and  
PEGGY LYNNE THOMAS,

Respondents.

OAH No. L-2008030361

**PROPOSED DECISION**

This matter was heard by Vincent Nafarrete, Administrative Law Judge, on April 28, 2008, at Costa Mesa. Complainant Orange County Superintendent of Schools was represented by David C. Larsen, Attorney at Law.

Respondents Lewis Lee Lester IV, Wendy Lynne Parent, and Peggy Lynne Thomas were present and represented by Marianne Reinhold, Attorney at Law. Respondents Erica Alvarez, Jessica Lopez, and Carrie Savage were not present or represented at the hearing.

Documentary and stipulated evidence having been received, oral argument heard, and the matter submitted for decision, the Administrative Law Judge finds as follows:

**FACTUAL FINDINGS**

1. The Administrative Law Judge takes official notice that, on April 3, 2008, the Accusations were made and filed by Nina Boyd in her official capacity as Assistant Superintendent for Human Resources and Support Services of the Orange County Department of Education and as a designee of the Orange County Superintendent of Schools (hereinafter Department).

2. Respondents, and each of them, are permanent or probationary certificated employees of the Department.

3. (A) Through its Special Schools program, the Department provides special education and services to students with significant or profound needs. Twenty-eight school districts in Orange County refer the students to the Department when the school districts cannot provide services to them. In recent years, the school districts have referred a lesser number of students to the program. Last school year, the Department offered services to students in the Special Schools program in small classroom settings.

(B) On or prior to March 4, 2008, the Assistant Superintendent of Business Services for the Department performed an estimate and analysis of the anticipated funding and budget of the Department's Special Schools program for the 2008-2009 school year. The Assistant Superintendent has determined that the Special Schools program must reduce its expenditures by \$2.1 million. The need to reduce the Department's expenditures arises not only from the declining number of students in the Special Schools program but also from the impending state budget crisis which will result in the projected loss of revenue for public education. The Assistant Superintendent for Business Services has further determined, in part, that the discontinuance or reduction of 12.0 full-time equivalent (FTE) positions in classroom teaching programs is necessary and will result in a budget savings of \$900,000. In addition, the Department plans to lay-off or terminate the employment of classified personnel who provide support services in those classroom teaching programs.

4. (A) On March 4, 2008, pursuant to Education Code sections 44949 and 44955, the Orange County Superintendent of Schools (Superintendent) determined that the Orange County Department of Education does not expect to have the financial ability or resources for the 2008-2009 fiscal year to provide all of the services that it is currently providing and must reduce or discontinue programs and services in the 2008-2009 fiscal year to maintain a balanced budget and provide for essential services. The Superintendent further determined that it is necessary to reduce or discontinue particular kinds of services which are now being rendered by certificated personnel and the reduction or elimination of such services for the 2008-2009 fiscal year may result in the reassignment and the layoff of probationary and/or permanent certificated employees.

(B) On March 4, 2008, the Superintendent resolved that particular kinds of services must be discontinued or reduced in administration by 3.0 FTE positions and in classroom teaching by 13.0 FTE positions no later than the beginning of the ensuing school year. The Superintendent further resolved that, because of the reduction or discontinuance in particular kinds of services, it is necessary to terminate at the end of the current 2007-2008 school year probationary and/or permanent certificated employees equal in number to the positions affected and services reduced or discontinued. The Superintendent directed the Assistant Superintendent of Human Resources and Support Services as his designee to give written notice under Education Code section 44955 to certificated employees prior to March 15, 2008. The Superintendent also adopted tiebreaking criteria to be used in determining the order of termination of certificated employees who first rendered paid service to the Department on the same date (Resolution, Exh. A).



5. On or about March 4, 2008, pursuant to the resolution of the Superintendent and the provisions of Education Code sections 44949 and 44955, the Assistant Superintendent as designee of the Superintendent gave written notices to respondents, and each of them, that the Superintendent had recommended that their services will not be required for the ensuing 2008-2009 school year. The written notices included the resolution of the Superintendent to reduce and/or discontinue certain services or programs in the Department and a request for hearing. Respondents, and each of them, requested a hearing to determine if there is cause for not re-employing them for the ensuing school year.

6. The notice dated March 4, 2008, was sufficient in providing notice to respondents under Education Code sections 44949 and 44955. Respondents were not prejudiced by errors in the notice, if any, with respect to the description of their current assignments or any other matters. No claims were raised that the notice was, in fact, deficient.

7. On or about April 3, 2008, the Department served respondents, and each of them, with an Accusation, Statement to Respondent, copies of Education Code sections 44949 and 44955 and Government Code sections 11500, 11505, 11506, 11507.5-11507.7, 11509, and 11520, Notice of Defense form, and Notice of Hearing. Except for respondents Erica Alvarez and Jessica Lopez, all respondents filed timely notices of defenses, requesting a hearing to determine if there is cause not to employ them for the ensuing school year. All prehearing jurisdictional requirements have been met by the parties.

8. On March 4, 2008, pursuant to his Resolution and Findings, the Superintendent resolved and took action to reduce or discontinue certain services or programs offered by the Department for the 2008-2009 school year in the following FTE positions:

<u>Administrative</u>	<u>Full-Time Equivalent Positions</u>
Program Administrator, Special Schools	1.0
Coordinator, Success Project	1.0
Coordinator, Early Education	1.0
 <u>Classroom Teaching</u>	
SDC/Severely Handicapped	8.0
SDC/Emotionally Disturbed	1.0
SDC/Deaf & Hard of Hearing	2.0
SDC/Oral Deaf	1.0
SDC/Itinerant Deaf Program	1.0.

The reduction or discontinuance of the services set forth hereinabove constitute a total of 16.0 full-time equivalent positions.

9. The services set forth in Finding 8 above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Superintendent of the Department to reduce or discontinue these services is within the sound discretion of the Department and is not arbitrary or capricious.

10. (A) With the adoption of the resolution to reduce or discontinue particular kinds of services, the Department has planned to reduce special day classes for students who are severely handicapped (8.0 FTE) and emotionally disturbed (1.0 FTE). In addition, the Department plans to reduce special day classes in total communication for grades 6 through 12 for the deaf and hard of hearing (2.0 FTE) and in oral deaf for students who are three years of age through grade 6 (1.0 FTE). With these reductions by 12.0 FTE, the Department will not be able to offer services in small class settings as in the past but will still be offering 87 classes for special education students for the next school year and will be able to meet all state mandates to its students with the remaining staff.

(B) Further, the Department has obviated the need to reduce or discontinue all of the particular kinds of services described in Finding 8 above by taking into account the personnel changes due to resignations, temporary attrition, and/or reassignment of individual employees within the Department. Since adoption of the Resolution, the Department has determined not to reduce or discontinue the special day classes for the itinerant deaf program by 1.0 FTE and found that the reduction of administrative services by 3.0 FTE would be satisfied by staff retirements and reassignments and not require the termination of any certificated staff. Nevertheless, the Department has determined that these services in classroom teaching, as described in Finding 8 and 10(A), still must be reduced or discontinued to maintain a balanced budget and provide essential services. The issue for decision in this matter is whether cause exists for the termination of respondents and other certificated employees due to the reduction or discontinuance of classroom teaching services for the next school year.

11. Respondents did not raise any issues or claims that the seniority list prepared by the Department is erroneous or incorrect with respect to the dates of first paid service, credentials, or any other matter.

#### Special Day Classes for the Deaf

12. (A) Pursuant to the reduction or discontinuance of special day classes for the Deaf and Hard-of-Hearing program by 2.0 FTE and for the Oral Deaf program by 1.0 FTE, the Department served notices and/or accusations upon respondents Niel C. Thompson and Peggy Lynne Thomas as well as certificated employees Jean Kim and Nancy Wilcox Davis. All four of them have the same seniority date of September 5, 2006. The Department applied the tie-breaking criteria after verifying seniority dates and credentials. After application of the tie-breaking criteria, the Department determined that the inverse order of lay-off for these four certificated teachers with the same seniority date would be as follows: Kim, Thompson, respondent Thomas, and Davis.



(B) On or about March 10, 2008, the Department served a notice upon Niel Thompson, a certificated teacher of the deaf at University High School, that his services in the Deaf and Hard-of-Hearing program will not be needed for next school year. On March 25, 2008, Thompson submitted a letter in which he acknowledged receipt of the notice. He noted that he was one of several certificated teachers in his unit to have been served with a notice and that all of them have the same seniority date of September 5, 2006. In his letter, Thompson volunteered to be the first certificated teacher to be terminated if only one or two teachers from the Deaf and Hard-of-Hearing program were to be terminated from their employment with the Department. Thompson did not file a hearing request.

(C) Jean Kim and Nancy Wilcox Davis, certificated teachers in the Deaf and Hard-of-Hearing program, were duly notified that their services will not be needed next year. Subsequently, Kim admitted to the Department that she did not feel qualified or capable of performing services in the Oral Deaf program for young children. Kim did not file a request for a hearing. Davis filed a request for hearing then withdrew her hearing request.

(D) Respondent Peggy Lynne Thomas is a certificated teacher in the Deaf and Hard-of-Hearing program. Thomas was served with a notice and accusation and filed a request and notice of defense for a hearing. Based on Thompson's express wish to be terminated first, at the hearing on April 28, 2008, the Department dismissed the Accusation and withdrew the notice issued to respondent Peggy Lynne Thomas.

13. Based on Findings 1 – 11 and 12 above, the three certificated employees Jean Kim, Niel C. Thompson, and Nancy Wilcox Davis may be terminated pursuant to the reduction or discontinuance of services by 3.0 FTE of special day classes for the Deaf and Hard-of-Hearing and for the Oral Deaf. It was not established there are any certificated employees with less seniority than these certificated employees who are being retained by the Department to provide services they are credentialed and competent to render.

#### Severely Handicapped and Emotionally Disturbed Programs

14. (A) Pursuant to the reduction or discontinuance of special day classes for the Severely Handicapped program by 8.0 FTE and for the Emotionally Disturbed program by 1.0 FTE, the Department served notices and/or accusations upon respondents Erica Alvarez, Lewis Lee Lester IV, Jessica Lopez, Wendy Lynne Parent, and Carrie Savage.

(B) The Department also duly served notices upon certificated employees Lisa Annette Ehlow, Rana Mohammad Elhatem, Sean Patrick MacDonald, and Karen McBride Miller that their services will not be needed for the next school year. Ehlow, Elhatem, MacDonald, and Miller did not file requests for hearing after being served with the lay-off notices. On April 25, 2008, due to staff reassignments, the Department withdrew the notice against Miller, who was the most senior of these four certificated employees.

(C) Respondents Erica Alvarez and Jessica Lopez both filed requests for hearing after being served with notices under Education Code sections 44949 and 44955 that their services will not be needed next year. Respondents Alvarez and Lopez were then properly served with Accusations, Notices of Defense forms, and Notices of Hearing pursuant to Government Code sections 11505, subdivision (c), 11506, and 11509, but neither filed a notice of defense. The Department may take action against respondents Alvarez and Lopez pursuant to Government Code section 11520, subdivision (a).

(D) Respondent Carrie Savage was properly served with the Accusation and Notice of Hearing pursuant to Government Code sections 11505, subdivision (c), and 11509. Respondent Savage failed to appear at the noticed hearing on April 28, 2008, either in person or by representative, and a default is hereby entered against her. The Department may proceed against respondent Savage in her absence pursuant to Government Code section 11520, subdivision (a).

15. Respondent Lewis Lee Lester IV has a seniority date of August 27, 2007, and holds credentials in mild and moderate disabilities and social science. At the hearing in this matter, the Department determined that Lester can be reassigned to another position based on his social science credential and withdrew the notice and dismissed the Accusation against him. Lester has also taught in the alternative education program.

16. (A) Respondent Carrie Savage is a certificated teacher in the Severely Handicapped program and instructs students with moderate and severe handicaps. She holds an education specialist instruction credential and has a seniority date with the Department of October 5, 2005.

(B) Respondent Jessica Lopez is a certificated teacher in the Severely Handicapped program. Lopez holds an education specialist instruction credential and has a seniority date of September 5, 2006.

(C) Respondent Wendy Lynn Parent is a certificated teacher in the Severely Handicapped program and teaches students with moderate to severe disabilities. She holds an education specialist instruction credential and has a seniority date of September 11, 2006.

(D) Respondent Erica Alvarez is a certificated teacher in the Severely Handicapped program and instructs students with moderate and severe handicaps. She is employed in a part-time position of 0.56 FTE. Alvarez holds a credential in education specialist instruction and has a seniority date of January 8, 2007.

(E) Certificated employees Lisa Annette Ehlow, Rana Mohamad Elhatem, and Sean Patrick MacDonald are teachers in the Severely Handicapped program and hold education specialist instruction credentials. Ehlow's seniority date is July 19, 2006. Elhatem's and MacDonald's seniority date is August 28, 2007.



17. Based on Findings 1 – 11 and 14 – 16 above, respondents Alvarez, Parent, Lopez, and Savage as well as certificated employees Ehlow, Elhatem, and MacDonald may be terminated pursuant to the reduction or discontinuance of services for special day classes for the Severely Handicapped program by 8.0 FTE and for the Emotionally Disturbed program by 1.0 FTE. It was not established there are any certificated employees with less seniority than said respondents or certificated employees who are being retained by the District to provide services that said respondents or certificated employees are certificated and competent to render.

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Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

#### LEGAL CONCLUSIONS

1. Jurisdiction exists for the subject proceedings pursuant to Education Code sections 44949 and 44955, based on Findings 1 – 11 above. All notices, accusations, and other related papers and reports required by these Education Code sections have been provided in timely manner and, as such, the parties have complied with the statutory requirements.

2. Cause exists pursuant to Education Code sections 44949 and 44955 to reduce by 12.0 full-time equivalent positions the concomitant number of certificated employees of the Department due to the reduction or discontinuance of particular kinds of services, as set forth in Findings 1 – 17 above. With respect to those respondents whose employment have been found to be terminable by the District and any other certificated employees who received notices but did not request a hearing, the causes set forth in the Accusations relate solely to the welfare of the Department's schools and pupils within the meaning of Education Code section 44949.

3. Based on Findings 1 – 17, there is no certificated probationary or permanent employee with less seniority than any one of respondents or the certificated employees who is being retained by the Department for the 2008-2009 school year to render services which any one of respondents or certificated employees is certificated and competent to render.

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WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusations against respondents Erica Alvarez, Jessica Lopez, Carrie Savage, and Wendy Lynne Parent are sustained, based on Conclusions of Law nos. 1 – 3 above. The Department may give notice to these four respondents, and each of them, in the inverse order of seniority that their services will not be required for the ensuing 2008-2009 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

2. The Accusations issued against respondents Peggy Lynne Thomas and Lewis Lee Lester IV are dismissed, based on Findings 12(D) and 15, respectively.

3 The Department may give notice to certificated employees Jean Kim, Niel C. Thompson, Nancy Wilcox Davis, Lisa Annette Ehlow, Rana Mohamad Elhatem, and Sean Patrick MacDonald, all of whom were served with notices that their services will not be needed next year but did not file requests for hearing, that their services will not be required for the ensuing 2008-2009 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code sections 44949 and 44955.

4. Before giving notice to respondents and the other certificated employees who did not request a hearing, the Department shall determine and take into account positively assured attrition among certificated employees in deciding how many and when certificated employees should be terminated before the ensuing 2008-2009 school year.

Dated:

Vincent Nafarrete  
Administrative Law Judge  
Office of Administrative Hearings