

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

In the Matter of the Accusation (Layoff):

PROPOSED REDUCTION OR
ELIMINATION OF PARTICULAR KINDS
OF SERVICES OF 173.43 FULL TIME
EQUIVALENT CERTIFICATED
EMPLOYEES,

OAH No. N2005020304

Respondents.

PROPOSED DECISION

On April 13-15, 2005, in Sacramento, California, Catherine B. Frink, 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 (District).

Michael N. McCallum, Attorney at Law, assisted by Paralegal Robin Thompson, represented all of the respondents listed on Exhibit A, attached hereto and incorporated herein by reference (represented respondents).

Respondent Theresa Altieri was present and represented herself.

Respondent Kim Zeltvay was not present and was not otherwise represented by counsel.

Evidence was received, and the record was left open until April 25, 2005, for the receipt of written closing arguments. The District's Post-Hearing Brief was received on April 25, 2005, and was marked as District's Exhibit 34. Respondents' Closing Brief was received on April 25, 2005, and was marked as Respondents' Exhibit X. The record was closed and the matter was submitted on April 26, 2005.

FACTUAL FINDINGS

Jurisdiction

1. Prior to January 25, 2005, Dianna R. Garcia, Assistant Superintendent for Human Resources of the District, sent a written recommendation to the Governing Board of District for the reduction or discontinuation of particular kinds of services (PKS), in order to reduce expenses for the 2005-06 school year. As a result of the Governor's January 2005 budget proposal, the District expected to experience a budget shortfall of \$19 million, in addition to an already existing budget gap due to declining enrollment and other issues. Ms. Garcia recommended the elimination of approximately 483.15 full-time equivalent (FTE) certificated positions, which represented approximately \$26,780,870 in expenditure reduction.

2. On January 25, 2005, the Governing Board of the District adopted Resolution No. 2329, authorizing the reduction or elimination of particular kinds of services, and directed the Assistant Superintendent of Human Resources, or his or her designee, to send notices to certificated employees in 463.97 FTE positions that their services would not be required for the 2005-06 school year. The Governing Board also adopted Resolution No. 2330, Resolution Specifying Criteria to be Used to Determine the Order of Termination of Certificated Employees Who First Rendered Paid Service on the Same Date (tiebreaker criteria). The Governing Board based the criteria upon the needs of the District and of its students, and acted within its discretion in creating the tiebreaker criteria.

3. On March 8, 2005, the Governing Board revised Resolution No. 2329, authorizing the reduction or discontinuation of 488.65 FTE certificated positions for the 2005-06 school year.

4. On or before March 15, 2005, Ms. Garcia caused to be served on all respondents, except for Kim Zeltvay, written notices of the recommendation to the Governing Board that respondents' services would not be required for the ensuing school year due to a reduction or discontinuation of PKS (March 15 Notice). The March 15 Notice set forth the reasons for the recommendation, as required by Education Code sections 44949 and 44955. The March 15 Notice informed respondents that, if they wished to request a hearing to determine if there is cause for not re-employing them for the ensuing school year, the request "must be in writing and be received by Human Resources at 3738 Walnut Avenue, Carmichael, California, **on or before 5:00 p.m., March 22, 2005.**"

Attached to each March 15 Notice was a blank Request for Hearing form.

5. Approximately 316 employees filed Request for Hearing forms by the March 22, 2005 deadline. Five additional employees, including respondent Kristen Edington, submitted requests for hearing after March 22, 2005, but prior to the issuance of the Accusation.

6. Larry Graser, Director of Human Resources for the District, filed the Accusation in his official capacity. The Accusation was served on March 25, 2005.

7. Following service of the Accusation, the District received late requests for hearing from respondents Zachary Lovell, Colleen Kelly and Richard Myers.

8. Pursuant to a Stipulation between the District and counsel for the represented respondents, respondents' counsel filed one Notice of Defense on their behalf, dated March 30, 2005. Respondent Theresa Altieri also filed a timely Notice of Defense pursuant to Education Code section 44949, subdivision (c)(1) and Government Code section 11506.

Thereafter, the matter was set for hearing.

9. Respondent Kim Zeltvay's name was inadvertently omitted from the list of employees to whom the preliminary notices of layoff were sent. When the error was discovered, Larry Graser hand-delivered Ms. Zeltvay's notice to her on March 17, 2005. Ms. Zeltvay submitted a timely request for hearing.¹ She was served with the Accusation by mail on March 25, 2005. She did not file a Notice of Defense as required by Government Code section and did not appear or otherwise participate in the administrative hearing.

10. Respondents are certificated employees of the District.

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

Late Hearing Requests

12. Kristen Edington. Ms. Edington mailed her Request for Hearing form to the District on March 21, 2005, one day before the deadline. The District received the Request for Hearing form in the mail on March 23, 2005, the day after the March 22, 2005 deadline. The March 15 Notice explicitly stated that the request for a hearing had to be received by Human Resources on or before 5:00 p.m. on March 22, 2005. The March 15 Notice further stated, "If you fail to request a hearing on or before this date, your failure to do so shall constitute a waiver of your right to a hearing." Ms. Edington did not testify at the hearing to explain why she mailed the Request for Hearing form instead of delivering it to the District office by the deadline. Under the circumstances, good cause was not established to excuse Ms. Edington's late hearing request; her right to a hearing was waived.

¹ The District contends that the failure to serve Ms. Zeltvay with a March 15 Notice on or before March 15, 2005, as required by Education Code section 44949, subdivision (a), constituted a "non-substantive procedural error" within the meaning of Education Code section 44949, subdivision (c)(3), and Ms. Zeltvay was not prejudiced by the District's error, in that she filed a timely request for hearing and was served with the Accusation. Inasmuch as Ms. Zeltvay did not pursue her rights under the Education Code, in that she failed to file a Notice of Defense and participate in the administrative hearing, no determination is made herein as to whether the District's failure to give notice "no later than March 15" was a substantive (jurisdictional) error requiring the District to dismiss the Accusation against Ms. Zeltvay and rescind the layoff notice previously issued to her.

13. Colleen Kelly. The District received Ms. Kelly's Request for Hearing form on Tuesday, March 29, 2005. Ms. Kelly has been on maternity leave since January 2005. She left town to visit her family in Hawaii on March 13, 2005, before the March 15 Notice was mailed to her. She returned to her home in Placerville on Saturday, March 26, 2005 at about 3:00 a.m. The certified mail slip was at her home, and she picked up the March 15 Notice from the post office on Saturday, March 26, 2005. On Monday, March 28, 2005, Ms. Kelly called the offices of counsel for the San Juan Teachers Association (Union) and made an appointment to come in on Tuesday, March 29, 2005, to sign the Request for Hearing form. At hearing, Ms. Kelly testified that she was unable to go to the office on Monday, March 28, 2005, due to child care issues. No one from the District or the Union contacted Ms. Kelly prior to the issuance of the March 15 Notice to alert her to the possibility that she might be subject to layoff. She did receive a layoff notice in March of 2004, but she did not attend the hearing, and was generally unaware of the process for requesting a hearing.

Under all the facts and circumstances, Ms. Kelly has established good cause for her failure to file a timely Request for Hearing form. She shall be permitted to remain as a respondent and participate in these proceedings.

14. Richard Myers. The District received Mr. Myers' Request for Hearing form on Tuesday, March 29, 2005. Mr. Myers was not specifically told that he would be receiving a layoff notice, but it was "inferred" by his site administrator that he might be laid off. The impending layoffs were also discussed at a Union meeting that Mr. Myers attended. At that meeting, Mr. Myers was told to contact the Union if he received a layoff notice. Mr. Myers left on vacation on Friday, March 18, 2005.² Mr. Myers returned from vacation on Wednesday, March 23, 2005. He went to the post office to pick up the March 15 Notice on that date. He called the Union and learned that the office was closed until Monday, March 28, 2005. On Thursday, March 25, 2005, Mr. Myers called the District office and spoke to Mr. Graser about a credentialing issue. He did not discuss the layoff notice with Mr. Graser. On Monday, March 28, 2005, Mr. Myers went to the Union office to sign a Request for Hearing form. The form was faxed to the District on Tuesday, March 29, 2005. Mr. Myers had not received a layoff notice in his teaching career prior to 2005.

The District contends that Mr. Myers did not act in a timely manner to request a hearing, in part because he waited until the Union office was open to file his Request for Hearing form through the Union. The District noted that Mr. Myers was aware of the fact that the District office was open during spring break, in that he spoke to Mr. Graser on March 24, 2005; the March 15, 2005 letter states that the request for hearing must be filed with the District, and does not mention the Union.

Under all of the facts and circumstances herein, Mr. Myers acted reasonably in waiting until Monday, March 28, 2005 to contact the Union about the March 15 Notice. Mr. Myers was not able to pick up the March 15 Notice until March 23, 2005, one day after the

² Friday, March 18, 2005, was the last day of school before spring break. School was not in session on March 21-25, 2005. However, the District office was open during the week of spring break.

March 22, 2005 deadline; therefore, he would not have been able to meet the statutory timetable, even if he had submitted the Request for Hearing form directly to the District on that date. The District was not prejudiced by Mr. Myers' having filed his Request for Hearing form on Tuesday, March 29, 2005. He shall be permitted to remain as a respondent and participate in these proceedings.

15. Zachary Lovell. The District received Mr. Lovell's Request for Hearing form on Monday, March 28, 2005. Mr. Lovell left Sacramento on Thursday, March 17, 2005, to attend a work-related professional conference. He had not received the March 15 Notice prior to leaving for the conference. Mr. Lovell returned from the conference on Sunday, March 20, 2005. The certified mail notice for the March 15 Notice was in his mail when he returned home. Mr. Lovell testified that he "assumed it was a layoff slip." Mr. Lovell received a second certified mail notice on Monday, March 21, 2005. However, Mr. Lovell did not go to the post office to pick up the March 15 Notice until about 4:30 p.m. on Tuesday, March 22, 2005, the deadline for submission of the Request for Hearing form to the District. Mr. Lovell called the Union office and listened to a recorded message stating that the office was closed until Monday, March 28, 2005. Despite the fact that the District office was open until 5 p.m. on March 22, 2005, Mr. Lovell did not submit the Request for Hearing form that was part of the March 15 Notice packet to the District by the deadline. Mr. Lovell called the District office during the week of March 21-25, 2005, to discuss a credential issue, but he did not discuss the layoff notice with anyone at the District. Mr. Lovell went to the Union office on Monday, March 28, 2005 to sign a Request for Hearing form, which was thereafter faxed to the District. Mr. Lovell had received a layoff notice in the spring of 2003. At that time, he filed his Request for Hearing form through the Union.

Under all of the facts and circumstances, Mr. Lovell did not act diligently to submit his Request for Hearing form by the March 22, 2005 deadline. Consequently, he is deemed to have waived his right to a hearing, and is not entitled to participate in these proceedings.

Reduction/Elimination of PKS

16. Resolution No. 2329, as revised on March 8, 2005, authorized the reduction or elimination of 488.65 FTE positions, including 255.01 FTE K-6 teachers, due to the proposed elimination of elementary class size reduction, and 71.83 FTE Elementary Specialists, due to the elimination of the K-6 planning period. As a result of financial concessions obtained during negotiations with the Union in February and March 2005, the District determined that it would be able to retain certain services that were previously identified for reduction or elimination in Resolution No. 2329. On March 29, 2005, the Governing Board authorized the District Superintendent to rescind the layoff notices for the employees impacted by the elimination of the elementary class size reduction program and elementary preparation. The District identified additional respondents for whom the layoff notices were to be rescinded, due to application of the tiebreaking criteria, or as a result of errors by the District. At a Prehearing Conference held between the parties on April 12, 2005 (PHC), the District filed a Motion to Dismiss Accusation as to Certain Respondents, which was granted. At hearing, the District's motion to dismiss the Accusation as to

respondents Phe Bach, Svetlana Frankenberger, Thomas Shaw, and Timothy Slattery, was granted.

17. As a result of the Governing Board's revisions to Resolution No. 2329, both before and after March 15, 2005, the District proposes the reduction or discontinuation of PKS totaling 173.43 FTE positions, beginning not later than the commencement of the 2005-06 school year, as follows:

A. General Fund/Unrestricted Fund Positions

FTE

Administrators

Director	1.00
Manager	0.50
Principal	3.00
Vice Principal	27.00
Psychologists	0.20
Modernization Coordinators	1.00

Subtotal 32.70

Non-Administrative Certificated Services

K-6 Teacher	40.00
7-12 English Teacher	3.69
7-12 Math Teacher	3.69
7-12 Social Science Teacher	3.69
7-12 Science Teacher	3.69
7-12 Physical Education Teacher	2.05
7-12 Foreign Language Teacher	1.23
7-12 Industrial Arts Teacher	1.23
7-12 Fine Arts Teacher	1.23
ROP Teacher	1.27
Elementary Specialists	0.00
Librarians	4.50
Special Education	2.00
Counselors K-12	33.50
Counselors - Independent Study	2.00
Nurses	3.50

Subtotal 107.27

B. Grants and Categorical Positions

Administrators

Vice Principal	5.00
Curriculum Coordinators	0.00

Subtotal 5.00

Non-Administrative Certificated Services

Title I - resource teacher	14.50
PAR/BTSA - consulting teacher	5.00
IIUSP - resource teacher	2.18
SIP - resource teacher	0.08
Counselors	5.70
Curriculum - resource teacher	0.00
CSRD - resource teacher	1.00
Subtotal	28.46

Total FTE 173.43

Employment Status and Seniority

18. Tenure is the relationship between a teacher and the 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 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.

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 District defines seniority as the first date in paid service under contract without a break in service. The District correctly applied the above rules in determining the tenure date and date of hire or rehire (seniority) for the teachers affected by this layoff.

19. In late November or early December of 2004, the District sent individual letters to each credentialed employee soliciting input regarding: their address; first date of paid service; credentials; and other relevant information. The District asked that they respond to Human Resources on the form provided by January 7, 2005, and that they sign the form.

Human Resources incorporated any new or changed information received on the forms into its computer records, and thereafter generated a Seniority List of over 2,400 certificated teachers.

On February 7, 2005, the District posted the Certificated Non-management Seniority List in the main lobby of the District office in two large binders, by date of seniority and alphabetically. The Seniority Lists were available for review during business hours, to give employees an opportunity to point out inaccuracies.

Bumping and Skipping

20. 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. That displacement of a junior teacher is known as "bumping." 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. 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 (Education Code section 44955, subdivision (d)(1)) and appellate law (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831). In order to depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d)(1), requires the District to "demonstrates 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."

Identification of Employees for Layoff

21. After the District identified PKS to be reduced or eliminated, the District generated a list of employees directly affected by the Governing Board's decision. After identifying teachers in temporary or provisional positions to be given notices of termination of employment, the District looked at the certificated employees affected by the PKS reduction/elimination, beginning with the most senior, and permitted them to "bump" into positions for which they were certificated and qualified, beginning with the least senior certificated employee. The District was not required to bump and re-bump to save a particular teacher nor was it required to do bumping in any particular way. Nor was it required to make assignments and reassignments to transfer more senior employees to other positions in order to retain more junior employees. Thus, the District has the discretion to determine how it carried out the bumping process, and so long as it did not act arbitrarily or capriciously, the process was valid.

"Skipping" of Special Education Teachers

22. The District is retaining all currently employed Special Education teachers, even if they were subject to being "bumped" by more senior certificated employees subject to layoff, because of the great difficulty experienced by the District in recruiting and hiring qualified Special Education teachers. According to John Saylor, Director of Special Education, when a teacher without a full Special Education credential expresses a desire to teach in Special Education and has particular skills or experience, a screening process occurs to determine whether the teacher is sufficiently qualified. If they are, the District may seek an emergency credential on their behalf while they obtain the necessary coursework to acquire a Special Education credential. The screening process involves an interview by a panel made up of a program specialist, a specialist in the particular area needed, and one other panel member.

23. The District is retaining the following Special Education teachers, whose only authorization to teach Special Education is on the basis of an Emergency Credential: Daniel Gillen (seniority date 08/29/03); Jennifer Dorunda (seniority date 08/19/02); Kristin Buckhold (seniority date 08/19/02); and, Maryjo Tommasi (seniority date 08/19/02). According to District records, both Mr. Gillen and Ms. Dorunda are probationary teachers, while Ms. Buckhold and Ms. Tommasi are classified as permanent. Mr. Gillen possesses a Multiple Subject teaching credential in addition to the Emergency Special Education Credential. Ms. Dorunda is not credentialed except for the Emergency Special Education Credential. Ms. Buckhold possesses a Multiple Subject teaching credential in addition to the Emergency Special Education Credential, and Ms. Tommasi possesses a Single Subject Social Science credential in addition to the Emergency Special Education Credential. Respondents with similar credentials and more seniority are being laid off, while these four teachers are being retained on the basis of their emergency credentials only.

24. Respondent Stephanie Floyd-Smith (seniority date 08/19/02) possesses a Multiple Subject teaching credential and National Board Certification. She is classified by the District as a permanent employee. She testified at hearing that she would be willing to teach Special Education on an Emergency Credential and would be willing to comply with the requirements which a teacher must meet to obtain an Emergency Credential; she admitted that she has never expressed that interest to anyone in the District prior to her testimony.

Respondents are not contesting the District's right to "skip" Special Education teachers with emergency credentials. However, respondents note that, as a permanent employee, Ms. Floyd-Smith is more senior than the two probationary teachers, Mr. Gillen and Ms. Dorunda. Education Code section 44955, subdivision (b), states in part that, "...the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." Both Mr. Gillen and Ms. Floyd-Smith possess Multiple Subject teaching credentials, while Ms. Dorunda possesses no base credential. Respondents contend that, as a permanent employee, Ms. Floyd-Smith should have been allowed to "bump" one of these emergency credentialed

teachers, and the District should be required to seek an emergency credential on her behalf. Respondents rely on *California Teachers Association v. Governing Board Of Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, in which the Court stated that the employing school district had an "obligation to apply for the emergency permit" for an otherwise uncredentialed employee in order to carry out its duty to put the employee's contract into effect. (*Id.*, at p. 385.) However, the facts in *Golden Valley* are distinguishable from the facts herein. In *Golden Valley*, the school district had entered into an employment contract for the ensuing school year with a teacher holding an emergency permit; prior to the start of school, that district attempted to abrogate the terms of the employment contract by claiming that "it could not legitimately provide the CTC [Commission on Teacher Credentialing] with a declaration of need to justify the CTC issuing an emergency permit to [the teacher] for the 1999-2000 school year in light of the more than 25 applications Golden Valley received from teachers who were fully credentialed and qualified to teach." (*Id.*, at p. 384). The Court held that the school district had an obligation to perform a diligent search for qualified teachers **before** entering into a contract with a teacher holding an emergency permit; "Furthermore, Golden Valley's obligation to apply for the emergency permit is **imposed by implication under the contract** because such an obligation is necessary to carry the contract into effect." (*Id.*, at p. 385, emphasis supplied). In contrast, there was no contractual obligation between the District and Ms. Floyd-Smith that compelled the District to seek an emergency credential for her to teach Special Education, especially when she did not express any interest in doing so prior to issuance of the March 15 Notice. Respondents' argument is not persuasive.

Over-Noticing of Counselors

25. Pursuant to Resolution No. 2329, as revised³, the Governing Board authorized the reduction of counseling services totaling 41.20 FTE, broken down as follows:

General Fund/Unrestricted Fund Positions

A-19	Counselors K-12	33.50 FTE
A-20	Counselors – Independent Study	2.00 FTE

Grants and Categorical Positions

B-7	Counselors	5.70 FTE
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According to the testimony of Mr. Graser, it was the intention of the District to discontinue counseling services in the District and eliminate all counseling positions. He did not know why Exhibit A-1 contained a breakdown of positions by funding source.

26. In a document prepared by the District on February 17, 2005, entitled "PKS A19" (Respondent's Exhibit E), the District identified 38.60 FTE counselors characterized as

³ Revised Exhibit A-1, Certificated, dated April 13, 2005, attached to the District's April 12, 2005 Motion to Dismiss Accusation as to Certain Respondents (Exhibit A-1).

A-19⁴, 1.50 FTE counselors as A-20, and 1.00 FTE counselor as B-7. In a document prepared by the District on April 14, 2005, entitled, "Distribution of Counselors," (District's Exhibit 24), the District identified 30.20 FTE A-19 (K-12) counselors entirely funded with general/unrestricted funds; 1.50 FTE A-20 independent study counselors; 1.30 FTE B-7 counselors in special programs funded by grants and categorical funding; and 8.10 FTE counselors working as K-12 counselors, whose funding came in whole or in part from categorical funding⁵, for a total of 41.10 FTE counselor positions.

27. Respondents contend that the District may only lay off at most 31.50 FTE A-19 counselors⁶ (the maximum number of general fund/unrestricted fund counselor positions), 1.50 FTE A-20 counselors (the maximum number of independent study counselors), and 5.70 FTE B-7 counselors (the maximum number of grant and categorically funded counselor positions authorized for reduction by Exhibit A-1), for a total of 38.70 FTE positions. Thus, by respondents' calculation, the District "over-noticed" 2.40 FTE counselors, the most senior of whom should be retained. On the other hand, the District contends that the categorization of the funding sources for counselor positions on Exhibit A-1 was part of the District's attempt to identify all of the counselors rendering services to be eliminated, and was not itself a "particular kind of service." The District further argues that, at most, the identification of positions by funding source was a "non-substantive procedural error" that did not prejudice the respondents, since the total number of positions identified in Exhibit A-1, 41.20 FTE, was greater than the positions of individuals affected by the layoff, 41.10 FTE. Thus, the District contends it should not be prevented from discontinuing counseling services in the District.

Under all the facts and circumstances herein, the District's argument is persuasive. The District identified 41.2 FTE counselor positions to be eliminated as a result of a reduction or discontinuation of PKS. The fact that, as the evidence developed at hearing, the funding sources for these positions was not as was reflected in Exhibit A-1 does not deprive the District of the right to make those reductions. As was noted in *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, at 841 (emphasis supplied):

The March 15 notice is only the first step in the termination process. *Karbach* [*Karbach v. Board of Education* (1974) 39 Cal.App.3d 355] does not require that this preliminary notice specify the precise number of teachers to be terminated **or the specific positions to be eliminated**; those details emerge as the administrative hearing process progresses. It is enough that the Board specify in the March 15 notice the statutory grounds set forth in section 13447 [now Education Code section 44955] for staff reductions.

⁴ This number includes Kent Liebermann, 1.00 FTE K-12 counselor.

⁵ Of this 8.10 FTE, 1.30 FTE positions were funded from general/unrestricted funds, and 6.80 FTE positions were funded from categorical funds.

⁶ 30.20 FTE plus 1.30 FTE positions.

Kenyan Epps and 6th Grade Middle School Social Science

28. Kenyan Epps (seniority date 08/21/02) is currently employed as a 1.0 FTE sixth grade middle school teacher who is teaching Social Science for .80 FTE and Tutorial for .20 FTE. Mr. Epps received a March 15 Notice because he is being "bumped" for .20 FTE from his Tutorial class by Michael Gebhardt (seniority date 04/26/76); the remaining .80 FTE reduction of Mr. Epps' position is due to the PKS reduction in category "A09." Mr. Graser testified at hearing that category "A09" is the PKS reduction for "7-12 Social Science Teacher." Because Mr. Epps does not teach Social Science in grades 7-12, he was not properly identified as an "affected" employee as part of that PKS reduction in Social Science teaching. While Mr. Graser testified that a more senior Social Science teacher would have been affected by the PKS reduction in 7-12 Social Science and would have then "bumped" Mr. Epps out of his .80 FTE Social Science position, the District did not present evidence at hearing regarding who would have "bumped" Mr. Epps from his position. Mr. Epps is the most senior teacher credentialed to teach departmentalized classes in Social Science who is being laid off, and there is no one with more seniority who can "bump" him. Therefore, Mr. Epps must be retained for .80 FTE.

David Nobis and Driver's Education

29. David Nobis (seniority date 08/29/03) is currently employed as a 1.00 FTE high school teacher, assigned to teach Drivers' Education for .67 FTE, and as Athletic Director for .33 FTE. In Respondents' Closing Brief, respondents raised the issue of whether the District's proposal to "bump" Mr. Nobis from his position as a .67 FTE Drivers' Education teacher was proper. Mr. Nobis did not file a request for hearing in this matter, and he is not a respondent in this proceeding. Consequently, no ruling is made concerning this issue.

Zachary Lovell and Health

30. Zachary Lovell⁷ (seniority date 01/17/03) is currently employed as a 1.0 FTE high school teacher, assigned to teach Physical Education for .67 FTE and Health for .33 FTE. Mr. Lovell received a March 15 Notice because he is being "bumped" from his position by two administrators, Kathleen Tack (seniority date 08/30/74) for .95 FTE and Michael Gebhardt (seniority date 04/26/76) for .05 FTE. Both Ms. Tack and Mr. Gebhardt are credentialed to teach Physical Education. However, neither is credentialed to teach Health. Pursuant to Appendix-13 of *The Administrator's Assignment Manual* published by the California Commission on Teacher Credentialing, "The holder of a Standard Secondary Teaching Credential in PE may obtain a supplementary authorization [in health] by completing the same requirements [i.e., completion of 20 semester units, or 10 upper division semester units, in Health Science], or by verifying three years of experience teaching health prior to 9-1-87 plus subject matter competence as specified in Education Code Section §

⁷ As a result of his filing a late request for hearing, Mr. Lovell waived his right to participate in these proceedings. See Finding 15 above.

44258.7(a).” The District presented no evidence that either Ms. Tack or Mr. Gebhardt has met either of these requirements, and no Supplemental authorization for Health is listed for them in the District’s records. Since Ms. Tack and Mr. Gebhardt lack the appropriate credential to teach Health, they cannot bump Mr. Lovell from the .33 FTE of his position in which he teaches Health. Neither Ms. Tack nor Mr. Gebhardt received the March 15 Notice.

There are two probationary teachers with more seniority than Mr. Lovell who are subject to layoff and who do possess an appropriate credential to teach Health pursuant to Appendix-13 of *The Administrator’s Assignment Manual*. These teachers are Laura Pierson and Tobias Spencer, both having a seniority date of 08/20/01, and both possessing a Single Subject credential in Life Science, which is one of the appropriate credentials to teach Health. The evidence did not establish that the District ever applied the tiebreaker criteria to these individuals. However, based upon the criteria set forth in Resolution 2330, it appears that Mr. Spencer has greater seniority than Ms. Pierson because District records indicate he possesses a “CLAD”⁸ authorization, and Ms. Pierson does not. Resolution 2330 states, “Employees with such [CLAD] certification will be retained prior to employees without such certification regardless of points calculated below.” Thus, Mr. Spencer shall be retained to teach the .33 FTE Health class(es) currently being taught by Mr. Lovell.⁹

Employment Status of Molly McFarland-Silva

31. Molly McFarland-Silva has been employed in previous school years as a temporary teacher with the District. She believes she began work as a temporary teacher on August 19, 2002, as a CORE English and History teacher in the International Baccalaureate (IB) Program at Churchill Middle School. At the start of the 2003-04 school year, she worked as a substitute teacher until she signed a temporary contract on September 24, 2003. During the 2003-04 school year, she was employed with an emergency credential in her same assignment as a CORE English and History teacher in the IB Program at Churchill Middle School. In March of 2004, Ms. Silva received a temporary release letter from the District, dated March 12, 2004, indicating that her employment was being terminated at the end of the school year. The letter stated as follows:

Thank you for your service in the San Juan Unified School District. At this time, we are not able to offer you a position for the 2004-2005 school year. Therefore, pursuant to Education Code section 44954, you will be released from service with the District at the end of this school year. Should you receive a letter offering you summer employment, please be aware that this does not obligate the District to hire you beyond the 2004 summer school session.

⁸ Cross-cultural, Language, and Academic Development.

⁹ Ms. Pierson did not file a request for hearing in this matter, and she is not a respondent in this proceeding; she waived her right to contest her layoff, and would not be retained in any event.

If you would like to be considered for vacancies for which you are qualified, please email Human Resources at employment@sanjuan.edu.

32. During the summer of 2004, Ms. Silva was in contact with the District concerning employment for the 2004-05 school year. Ms. Silva had exhausted all emergency credential renewals, and District records indicate that her emergency credential was due to expire on September 1, 2004. District records indicate that on July 23, 2004, Denise Moore, Personnel Technician, spoke with Ms. Silva, who stated that she was waiting to receive a C-19 "Letter of Issuance" from National University verifying that she had completed all requirements to obtain a Professional Clear Multiple Subject credential with CLAD emphasis. Ms. Silva was again offered a position as a CORE English and History teacher in the IB Program at Churchill Middle School for the 2004-05 school year, with the understanding that she would provide the Letter of Issuance to the District.

National University sent Ms. Silva the Letter of Issuance, dated August 13, 2004; she testified that she received it "a few days" after that date.

33. Prior to August 18, 2004, Ms. Silva was contacted by the principal of Churchill Middle School, Gloria Baker, who informed her about staff development days scheduled for August 18-19, 2004. The scheduling of staff development days was at the discretion of each school site, pursuant to the collective bargaining agreement between the District and the Union. Ms. Silva attended both staff development days at the invitation of Ms. Baker. Pursuant to an agreement between the District and the Union, dated December 9, 2004, employees who worked staff development days were to be fully reimbursed, at the employee's daily rate of pay, no later than August 31, 2005.

34. Ms. Silva went to the District office on the morning of August 19, 2004 to sign paperwork for the new school year, and to bring in the Letter of Issuance. She was told the contract was not ready and was asked to come back that afternoon. She was also told that the District was "waiting for the Letter of Issuance" before preparing the employment contract. Ms. Silva returned to the District office after attending the staff development day on August 19, 2004. At that time, she signed a temporary contract, as well as an Application for Issuance of a Temporary County Certificate. The contract stated that Ms. Silva's services in the temporary position "will begin 8/20/2004 and end 6/10/2005 unless terminated by either party with a 10 day written notice."

35. In October 2004, Ms. Silva received a computer print-out from the District, entitled, "2004-05 Notice of Employment – Current Earnings." The document stated that Ms. Silva's employment status was "temporary," and that her seniority date was "9-24-2003."¹⁰

¹⁰ The seniority date reflects the fact that Ms. Silva signed her temporary contract for the 2004-05 school year on or before the "official" start of the school year on August 20, 2004; thus, she was not considered to have had a break in service from her prior temporary employment with the District during the 2003-04 school year, pursuant to the

36. In November 2004, Ms. Silva received a notification from the District, dated November 16, 2004, concerning information about her employment status and credentials as contained in the District's computer system. The notification informed Ms. Silva that the District considered her to be a temporary employee, with a seniority date of September 24, 2003. The notification further stated as follows:

...The seniority date is your date of hire or your return date if you resigned and were later rehired. It reflects continual contractual employment with San Juan, without a break in continuous service.

Please review the information ABOVE and BELOW for any incorrect data. This data will be used to determine rights in the event of Board reductions or layoffs. Correct any data errors and return the document to the Human Resources Department (Attn: Employee Verification) by January 7, 2005. If the form is not returned with corrections by this date, Human Resources will assume that the information provided herein is correct.

Ms. Silva signed the form on December 12, 2004. She made the following corrections on the form: she changed her seniority date from "9/24/2003" to "8/02," and she circled "STATUS - TEMPORARY-10 PAY" and wrote, "was temp past year. I have full CLAD clear credential. Why am I not probationary?" Ms. Silva turned the corrected form in to the District in January 2005, after returning from winter break. When she did not hear back from the District, she contacted her Union representative, Sandra Galindo, to obtain assistance in clarifying her employment status. Ms. Galindo sent Ms. Silva an e-mail on February 10, 2005, stating as follows:

Molly,

I called Human Resources to find out your status, and they had you down as "Temporary" but they agreed it was a mistake. I let them know you corrected the mistake when you sent in your form, so they said the district is just falling behind in making corrections. Call again next week to see if Jan Gertz or whomever you corresponded with has corrected your status. If they have not let me know.

Sandra

In a follow-up e-mail to Ms. Silva dated February 11, 2005, Ms. Galindo stated as follows:

District's practice of calculating seniority.

Molly,

I spoke to Vivian, but she is just my contact. She did her checking on the computer and then made a call to Jan Gertz or whomever you were working with. Check with the person that sent you the form that you corrected. If you need my help, of course, call or email me.

Sandra

37. The District contends that until Ms. Silva appeared in the Human Resources Department with her paperwork demonstrating completion of her coursework her credential, she was not authorized by the District to render services. The District further contends that Ms. Silva lacked the appropriate credentials to teach, prior to submitting the C-19 Letter of Issuance to the District on August 19, 2004. This contention is not supported by the District's records, which indicate that Ms. Silva's emergency credential was still in effect through September 1, 2004.

38. The District further argued that August 20, 2004 was the first official teacher work day of the 2004-05 school year, as negotiated between the District and the Union, and Ms. Silva has not yet been paid for the staff development days she worked on August 18-19, 2004. This argument is not persuasive; the District is obligated to pay Ms. Silva for the two staff development days pursuant to the December 9, 2004 agreement between the District and the Union.

39. Respondents contend that, consistent with the holding in *Kavanaugh v. West Sonoma County High School District* (2003) 29 Cal.4th 911, Ms. Silva must be deemed a probationary employee of the District because she commenced paid service to the District for the 2004-05 school year prior to receiving notice of her salary and temporary employment status. This argument is persuasive. As the Supreme Court stated in *Kavanaugh*:

Section 44916 [of the Education Code] thus mandates that a school district comply with three requirements if it desires to hire a "new certificated employee" (such as plaintiff Kavanaugh) as a temporary employee: it must (a) notify the employee of his or her salary and status as a temporary employee; (b) do so in a written notice; and (c) give such notice "at the time of initial employment." (*Id.*, at p. 919)

The *Kavanaugh* court concluded, "Reading section 44916 to mean that certificated teachers must be informed in writing, on or before their first day of paid service to their employing districts, of their salary and employment status is thus consistent with the apparent purpose of the statute." (*Id.*, at p. 921) In this case, Ms. Silva rendered two days of paid service to the District before she was presented with written notification of her salary and employment status; thus, she must be deemed a probationary employee of the District, with a seniority date of 09/24/03.

40. Ms Silva did not receive a March 15 Notice, and therefore must be retained by the District for the ensuing school year, pursuant to Education Code section 44949. Moreover, there are permanent teachers who hold Multiple Subject credentials (the appropriate credential to teach in Ms. Silva's middle school position) that are identified for layoff. Therefore, one full-time (1.0 FTE) position should be saved from layoff. The most senior permanent employee with a Multiple Subject teaching credential who is being laid off is Karen Rinde, (seniority date 11/15/01). However, Ms. Rinde is only being laid off as to 30 percent of her position (.30 FTE), because the District has her "bumping" a junior employee for the remaining .70 FTE. Therefore, Ms. Rinde should be retained for an additional .30 FTE, and she should not be laid off for the ensuing school year. The next most senior teacher with a Multiple Subject credential is Carla Elkins, also with a seniority date of 11/15/01.¹¹ Ms. Elkins is being laid off for 1.0 FTE. Therefore, she should only be laid off for .30 FTE of her position, and retained for .70 FTE.

Correction of Seniority Dates/Status

41. Barbara Harris. The parties stipulated that Barbara Harris' date of hire is January 15, 2003, and her status is probationary, rather than permanent.

42. Mirna Joje. Mirna Joje is a permanent employee of the District. The parties stipulated that her seniority date is 03/23/96.¹²

43. Marcy Alexander. Marcy Alexander is a probationary employee of the District. According to the District's records, Ms. Alexander's seniority date is 08/20/01. She has not attained permanent status with the District because she is a district intern. Ms. Alexander attended "Success for All," an intervention reading program, for two or three days, beginning on August 13, 2001. This was a required training course before she could begin her regular teaching assignment for the 2001-02 school year. She worked under a temporary contract for the 2001-02 school year, beginning on August 20, 2001. She believed when she began the course that she was being compensated for attending the course as part of her regular salary; she was surprised when she received payment for the hours worked as an "additional assignment." At the time Ms. Alexander commenced work for the District during the 2001-02 school year, she had not received written notification from the District concerning her salary and employment status. Consequently, under the rationale of *Kavanaugh, supra*, her seniority date shall be corrected to 08/13/01, the date on which she first rendered paid service to the District in a probationary position.

44. Sonia Takanikos. Sonia Takanikos is a permanent employee of the District. According to the District's records, Ms. Takanikos' seniority date is 08/20/04. Like Molly McFarland-Silva, Ms. Takanikos attended the two-day staff development training at

¹¹ Ms. Rinde has more seniority than Ms. Elkins because she possesses a Supplemental Authorization to teach Home Economics.

¹² The Accusation against Ms. Joje was dismissed by the District in its April 12, 2005 Motion to Dismiss Accusation as to Certain Respondents.

Churchill Middle School on August 18-19, 2004. She signed her employment contract with the District in July of 2004; the contract stated that she was being employed as a temporary employee, commencing August 20, 2004. Ms. Takanikos is entitled to payment for attending the staff development days on August 18-19, 2004, prior to the start of her temporary contract. However, unlike Ms. Silva, at the time Ms. Takanikos commenced work for the District during the 2004-05 school year, she had received written notification from the District concerning her salary and employment status. Thus, the rationale of *Kavanaugh* does not apply; under the District's definition of seniority as the first date in paid service under contract without a break in service, her seniority date shall remain 08/20/04, the date on which her contract with the District went into effect.

45. Annette Bell. Annette Bell is a probationary employee of the District. According to the District's records, Ms. Bell's seniority date is 10/15/03. Ms. Bell commenced her employment with the District for the 2003-04 school year as a substitute, or "guest" teacher. She clearly understood that she was being employed as a "guest" teacher, which she believed was an "independent contractor" and not an "employee" of the District. The District's handbook for substitute teachers states in part as follows:

2. As a Guest Teacher properly certified, you may be recommended for a full time contracted position. You must sign an Offer of Employment Contract before the contract takes affect [sic]. Services prior to the signing of the contract will be at the Guest Teacher rate of pay. There are no retroactive appointments.

Ms. Bell worked as a day-to-day substitute teacher through September 8, 2003. In September 2003, Ms. Bell interviewed for an English Language Learner (ELL) math position at Jonas Salk Elementary School. Because Ms. Bell was not credentialed to teach mathematics, she was told to go to the District's Human Resources office and complete the paperwork to obtain a Limited Assignment Teaching Permit (LATP). One of the requirements for obtaining the LATP is that, "Applicant must be currently employed by the employing agency requesting such assignment." Based on this language, Ms. Bell assumed she was no longer a "guest" teacher, but rather was an "employee" of the District, at the time she applied for the LATP. Ms. Bell underwent training on September 11, 2003, and she began teaching in the position at Jonas Salk on September 12, 2003. Ms. Bell asked a substitute school secretary at Jonas Salk when she would be given a contract or if the LATP application "was it." She was told that her status would be clarified through paperwork at a later time. Ms. Bell filled out a timesheet for K-12 Guest Teachers on September 25, 2003, for her work from August 26, 2003, to September 25, 2003. On or about Friday, October 3, 2003, Ms. Bell was informed that the math position at Jonas Salk was being given to another teacher, and that she was being placed at a different school site. On Monday, October 6, 2003, she was assigned to teach at Carnegie Middle School. In mid-October 2003, Ms. Bell was contacted by Jan Gertz, Personnel Technician, to come to the District office to sign a contract. She was given a temporary contract for the remainder of the 2003-04 school year,

with a contract date of October 15, 2003. She filled out a timesheet for K-12 Guest Teachers on October 15, 2003, for her work from September 26, 2003 to October 14, 2003.

Ms. Bell testified that she felt like she was "kicked in the gut" when she saw the October 15, 2003 date on her temporary employment contract with the District. However, the evidence did not establish that Ms. Bell contested the contract date at any time prior to this layoff hearing in 2005. She did not dispute her seniority date in December of 2004, when the District sent out the notices to employees to correct errors in status or credentials as reflected in District records. She was not told by any employee in the Human Resources office that her contract would be back-dated to the date she applied for the LATP. District records reflect that she was a long-term substitute teacher from September 12, 2003 to October 14, 2003. The LATP application did not alter her status as a substitute teacher. Under all of the facts and circumstances herein, the District's computation of Ms. Bell's seniority date is proper, and does not require correction.

Other Matters

46. Except as noted above, 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.

47. 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.

48. The reduction of the particular kinds of services, and the resultant reduction in 173.43 FTE certificated positions is for the welfare of the District and the pupils. The decision was made because of a variety of factors affecting the 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 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

Prior Rulings

1. The administrative law judge ruled on the following issues, either at the April 12, 2005 PHC, or during the hearing:

"Precedential" Decisions

2. On January 27, 2004, in Resolution No. 2297, the Governing Board adopted as a "Precedential Decision," pursuant to Government Code section 11425.60, the proposed decision of Presiding Administrative Law Judge Jaime René Román, adopted by the Governing Board on May 13, 2003. At a PHC on April 16, 2004, Administrative Law Judge M. Amanda Behe ruled that the Governing Board lacked the authority under Government Code section 11425.60 to enact a precedential decision, in that the California Board of Education, rather than the Governing Board of the District (or any other individual school district or county office of education) is the "agency" authorized to interpret the Education Code, and thereby make law and policy from adjudication as well as rulemaking. Judge Behe's ruling was affirmed by Administrative Law Judge Leonard L. Scott during the layoff hearing on April 21-22, 2004. Effective May 12, 2004, the Governing Board adopted the proposed decision of Judge Scott, as amended; the amended decision rejected the rulings of Judge Behe and Judge Scott, and adopted the May 2004 layoff decision as "Precedential." The Governing Board's decision was not appealed.

3. At hearing, the District asserted that the 2003 and 2004 "Precedential Decisions" were binding on the parties and on the administrative law judge with respect to issues previously addressed in said decisions, such as the District's method of assigning seniority dates. The District's argument was rejected as a matter of law. Although not binding on the administrative law judge in this proceeding, the rationale of Judge Behe's ruling at the April 16, 2004 PHC is persuasive. The Governing Board does not have the authority under Government Code section 11425.60 to adopt layoff decisions as "Precedential," for the reasons set forth in Judge Behe's April 16, 2004 ruling; thus, the ability of the administrative law judge to make rulings in this proceeding is not limited by the Governing Board's 2003 and 2004 layoff decisions. However, the administrative law judge is not precluded from considering the rulings made in prior layoff decisions, as well as the fact that those decisions were not appealed, in determining the issues in this proceeding.

Status of Temporary Employees

4. When counsel for respondents filed the Notice of Defense on March 30, 2005, it listed the following certificated employees, who were classified as "temporary" by the District: Jeffrey Allen, Elizabeth Austin, Gerell Elliott, Marcia Garrett, Tamaryn Goin, Richard Hale, Tania Love, Rocco Marrongelli, Molly McFarland-Silva, Robert Meng, Luke Mullinsen, Tamela Navarro, Melissa Oates, Larry Patterson, Jr., Brian Quale, Phetsavane Sayasy, William Wade Smith, Robyn Soliman, and Gina Williams. These employees had not been served with the March 15 Notice or the Accusation. At the April 12, 2005 PHC, the District brought a motion in limine to prevent respondents from asserting that these employees were misidentified as temporary employees, and should have been classified as probationary. The administrative law judge ruled that these employees were notified of their temporary status in September 2004, and again in November 2004. The District relied on the known probationary and permanent status of employees as reflected in the District's records in identifying employees to be given layoff notices. The District would be prejudiced if the

individuals were now allowed to assert their status as probationary employees, in that the time fore issuing March 15 Notice of intended layoff has passed. To the extent that these employees did not give prior notice to the District that they were challenging their status as temporary employees, they were barred by the equitable doctrine of laches from raising the issue of their alleged probationary status after the March 15 Notice was issued. One employee, Molly McFarland-Silva, did raise the question of her temporary status in January 2005, well before the issuance of the March 15 Notice (see Finding 36). The District was therefore on notice that her status was in dispute, and could have issued a precautionary layoff notice to her. Consequently, Ms. Silva was permitted to participate in the hearing, in order to challenge her temporary status. Except as to Ms Silva, the motion in limine was granted.

District's Calculation of Seniority Dates

5. Respondents challenged the District's calculation of seniority date as "first date in paid service under contract without a break in service." The administrative law judge ruled at hearing that this is a long-standing practice of the District, which has been upheld in prior layoff decisions. It was specifically raised as an issue in the 2004 layoff hearings. It is not clearly erroneous. It is the District's practice to inform employees at the start of the school year of their seniority date and status as a substitute, temporary, probationary, or permanent employee, and to again notify employees of their status each November or December. Under the circumstances, the failure to challenge the District's method of determining seniority prior to the layoff hearing, after notices have been issued to affected certificated employees, is prejudicial to the District, and respondents are barred by laches from raising the issue at the hearing. Respondents were permitted to submit a written offer of proof concerning this issue.

District's Employment of Substitute/"Guest" Teachers

6. Respondents challenged the District's practice of initially hiring employees to fill vacant positions as "substitute" or "guest" teachers, instead of as temporary teachers, with the result that their service for the District prior to signing a temporary contract constitutes a "break in service" for purposes of calculating seniority. Respondents contended that Education Code section 44916, and the case of *Kavanaugh v. West Sonoma County Union High School District*, *supra*, require that employees in this situation should be deemed probationary, and that their seniority date should be calculated as the date they first rendered paid service to the District as a "substitute" teacher. The administrative law judge ruled that the use of substitute teachers at the start of the school year is a long-standing practice of the District, and the general issue of employment of substitute teachers in vacant positions is beyond the scope of this layoff proceeding. Furthermore, the status of teachers hired as substitute or guest teachers is known to those teachers; thus the underlying rationale of *Kavanaugh* does not apply, in that the teachers were not misled about their status as either substitute or temporary employees. Respondents were permitted to submit a written offer of proof concerning this issue.

7. 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.

8. 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.

9. Education Code section 44956, subdivision (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.

10. 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* (1996) 41 Cal.App.4th 1571, and *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.

11. 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 Association v. Kruse* (1980) 109 Cal.App.3d 648, and *Levin v. Board of Trustees* (1976) 62 Cal.App.3d 977.

12. 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.

13. 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. Tilapias 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, supra*, 116 Cal.App.3d 831.

Hearing Issues

14. As set forth in Findings 13 and 14, Colleen Kelly and Richard Myers are excused from the late submission of their requests for hearing, and they are entitled to participate as respondents in these proceedings.

15. As set forth in Findings 12 and 15, Kristin Edington and Zachary Lovell waived their rights to a hearing by their unexcused failure to submit a timely request for hearing, and they are not respondents in this matter.

16. As set forth in Finding 24, respondent Stephanie Floyd-Smith is not entitled to be retained by the District to teach special education, and the District is not obligated to seek an emergency credential on her behalf to allow her to do so.

17. As set forth in Findings 25-27, the District properly identified all counselor positions in the District as being subject to layoff.

18. By reason of the facts set forth in Finding 28, respondent Kenyan Epps shall be retained for .80 FTE of his position as a sixth grade middle school science teacher, in that his position was improperly identified as being affected by the PKS reduction in 7-12 Social Science, and the District did not establish which, if any, teacher with more seniority would have the right to "bump" Mr. Epps. Mr. Epps shall be laid off .20 FTE.

19. By reason of the facts set forth in Finding 30, respondent Tobias Spencer shall be retained in .33 FTE position, in that he is the most senior respondent with the credentials and qualifications to "bump" Zachary Lovell from his .33 FTE position teaching Health. Neither of the teachers identified by the District as "bumping" Mr. Lovell had the credentials and qualifications to teach Health.

20. By reason of the facts set forth in Findings 31-40, Molly McFarland-Silva shall be designated as a probationary employee of the District, with a seniority date of 09/24/03, She shall be retained for the 2005-06 school year, because she did not receive a March 15 Notice. In addition, Karen Rinde (who is currently slated to be laid off for .30 FTE) shall be retained for an additional .30 FTE (resulting in her being retained for the 2005-06 school year), and Carla Elkins (who is currently slated to be laid off for 1.0 FTE) shall be retained for .70 FTE (resulting in her being laid off for .30 FTE), in that they are the most senior respondents with the same credentials and qualifications as Ms. Silva who would have been eligible to "bump" Ms. Silva from her teaching position.

21. As set forth in Finding 41, Barbara Harris' seniority date is 01/15/03, and she is classified as probationary.

22. As set forth in Finding 42, Mirna Jape's seniority date is 03/23/96.

23. As set forth in Finding 43, Marcy Alexander's seniority date shall be changed to 08/13/01.

24. All other arguments of the parties not specifically addressed herein were considered and are rejected.

Conclusion

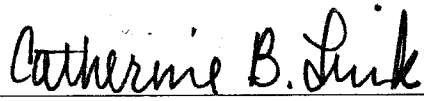
25. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

26. Cause exists for the reduction or discontinuation of the particular kinds of services and of 173.43 certificated positions at the end of the 2004-2005 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, 2005-2006.

ORDER

1. Pursuant to Legal Conclusion 20, the accusation against Karen Rinde is dismissed, and both Karen Rinde and Molly McFarland-Silva shall be retained for the 2005-06 school year.
2. The District shall comply with Legal Conclusions 14, 18, 19, 20, 21, 22, and 23.
3. Except as noted above, notices shall be given to respondents that their services will not be required for the 2005-06 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

Dated: 5-6-05



CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

RESPONDENTS REPRESENTED BY COUNSEL

1. Alexander, Marcy
2. Alpay, Rosemarie
3. Anderson, Marie
4. Avila, Michele
5. Baucom, Timothy
6. Bell, Annette
7. Bennett, Ann
8. Bittinger, Judith
9. Borris, Michaela
10. Brandow, Trisha
11. Brown, Ellen
12. Bruins Scarbrough, Yvonne
13. Cacciotti, Anna
14. Campa, Rosa
15. Coburn, Steve
16. Cox, Robyn
17. Cunningham, Timothy
18. Darrow, Jeffrey
19. Darrow, Joann
20. Donahoo, Peter
21. Driver, David
22. Edington, Kristen
23. Elkins, Carla
24. Epps, Kenyan
25. Ezzell, Amy
26. Farnworth, Dana
27. Ferrari, Sabrina
28. Ferris, Sara
29. Finney, Julie
30. Fischer, Andrea
31. Floyd-Smith, Stephanie
32. Fowler, Nancy
33. Freire, Suzanne
34. Gilley, Shannon
35. Gordon, Toryanno
36. Gutierrez, Martha
37. Haleva, Andrea
38. Harris, Barbara
39. Heredia, Erika
40. Holleman, Dana

41. Hostetter, Andrea
42. House, Deborah
43. Jacinto, Abigail
44. Jacks, Rochelle
45. Johnson, Julie
46. Kelly, Colleen
47. Kiley, Diane
48. Kincer, Tiffany
49. Kitz, Barbara
50. Klaes, Geraldine
51. Lang, Wayne
52. Larson, Tara
53. Lawson, Betina
54. Liby, Vanessa
55. Link, Kimberly
56. Lofgren, John
57. Loggins-Morgan, Leslie
58. Loper, Rebecca
59. Lorenzo, Joel
60. Lovell, Zachary
61. Mackey, Nelda
62. Madison-Knipp, Carol
63. Manak, Colleen
64. Manchester, Kristen
65. Mathany, Kate
66. Matthews-Harris, Susan
67. McAdam, Jennifer
68. Meeler, Judith
69. Minton, Terence
70. Misner, Jennifer
71. Murphey, Karen
72. Myers, Richard
73. Narvaez-Rasmussen, Kathryn
74. Nelson, Darryl
75. Norman, Sara
76. O'Connor, Nicole
77. Patterson, Karen
78. Riedel, Elisa
79. Rinde, Karen
80. Royal, Jill
81. Silva, Molly (T)
82. Singley, Danielle
83. Sloan, Susan
84. Smith, Damon

85. Spencer, Nancy
86. Spencer, Tobias
87. Springer, Karin
88. Stevens, Maria
89. Stokes, Linda
90. Takanikos, Sonia
91. Thompson-Kemp, Christie
92. Vogeli, Sarah
93. Walter, Margot
94. Weitzel, Brian
95. Werly, Scott
96. Werner, Kelley
97. White, Suzanne