

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

In the Matter of the Accusations  
Against:

JOYCE M. COLBERT, KAREN LEE  
DORING SHURTLEFF, NINA NIXON,  
FRANCES G. POLLOCK, PAMELA P.  
REARDON, ERLITA G. RIVERA, PAULA  
VLASICH, and ADA YUK FUNG YIP,

Respondents.

OAH No. L-2004030479

**PROPOSED DECISION**

This matter was heard by Vincent Nafarrete, Administrative Law Judge, on April 21 and 30, 2004, in Pomona. Complainant Pomona Unified School District was represented by Margaret A. Chidester, Attorney at Law. Respondents were represented by Michael R. Feinberg, Attorney at Law.

At the outset of the hearing, complainant withdrew the Accusation and preliminary layoff notice against respondent Erlita G. Rivera. At the conclusion of the hearing, the parties waived statutory time requirements under Education Code Sections 44944 and 44955, in order to file written argument. On May 10, 2004, complainant and respondents timely filed written arguments which were marked as Exhibit 13 and Exhibit L respectively. The Administrative Law Judge also marks the parties' hearing briefs as Exhibit 14 and M, respectively.

Oral and documentary evidence having been received, the Administrative Law Judge submits this matter for decision on May 10, 2004, and finds as follows:

**FACTUAL FINDINGS**

1. The Administrative Law Judge takes official notice that, on March 26, 2004, the Accusations were made and filed by Emmett L. Terrell solely in his official capacity as Deputy Superintendent, Personnel Services, of the Pomona Unified School District (hereinafter District).

2. Respondents Joyce M. Colbert, Karen Lee Doring Shurtleff, Nina Nixon, Frances G. Pollock, Pamela P. Reardon, Erlita G. Rivera, Paula Vlasich, and Ada Yuk Fung Yip, and each of them, are certificated employees of the District.

3. (A) On February 24, 2004, pursuant to the recommendation of the Superintendent, the Governing Board of the Pomona Unified School District adopted Resolution No. 13 (2003-04) in which it determined that particular kinds of services may be reduced or discontinued at the close of the 2003-2004 school year. The Governing Board resolved to reduce or eliminate 241.00 full-time equivalent positions in certain services or programs performed by probationary or permanent certificated employees, including 12.0 full-time equivalent positions performed by school nurse practitioners and 24.00 full-time equivalent positions performed by school nurses. The Governing Board resolved that, because of the reduction or elimination of particular kinds of services, the Superintendent or his designee be directed to serve notices of termination in accordance with and in the manner prescribed by Education Code Sections 44949 and 44955.

(B) On February 24, 2004, the Governing Board resolved that, in selecting those probationary and permanent certificated employees who shall receive notice of termination, certain certificated employees, who have special training, experience, or credentials that others with more seniority do not possess, would be exempt from the order of certificated layoff. The Governing Board determined that certificated personnel who possess credentials and are presently and will be assigned to services or positions in administration; special education; language, speech, and hearing; and English, math, or science; as well as certificated personnel who possess an emergency permit authorizing service in and are currently assigned to special education would be exempt from the order of layoff.

(C) On February 24, 2004, pursuant to Education Code Section 44955, the Governing Board also adopted criteria to be used in determining the order of termination of certificated employees who first rendered paid service to the District in a probationary position on the same date. The Governing Board resolved that the order of termination of said employees shall be determined by reference to certain tiebreaker criteria and to points assigned to each category of tiebreaker criteria. The Governing Board further resolved that such criteria are determined to best serve the needs of the District and its students and would be applied in the layoff hearing in which the issue may arise.

4. On or about March 1, 2004, pursuant to the resolution of the Governing Board and the provisions of Education Code Sections 44949 and 44955, Deputy Superintendent Terrell, as designee of the Superintendent of the District, gave written notice to certificated employees, including respondents, that the Superintendent had recommended and the Governing Board had determined that notice be given that their services may not be required for the ensuing 2004 - 2005 school year. Said "Preliminary Notice Not to Re-Employ" informed certificated employees, including respondents, that the reason for the notice was that the Governing Board had determined that it was necessary to lay off certain certificated permanent and probationary employees due to the decision of the Governing Board to discontinue particular kinds of services. The written notice indicated that it may be

necessary to decrease the number of certificated employees of the District by 241 full-time equivalent certificated employees and that the District was "compelled by the fiscal realities of the shortfall of State funding" to reduce particular kinds of services. Respondents were properly served with the written notice by either personal service or certified mail.

5. The District's notice dated March 1<sup>st</sup> was sufficient in providing notice to respondents under Education Code Sections 44949 and 44955. Respondents were not prejudiced by errors or omissions in the notice, if any, with respect to the description of their current positions, assignments, or any other matters.

6. On or about March 15, 2004, respondents, and each of them, timely requested a hearing to determine if there is cause for not employing them for the ensuing school year. On or about March 26, 2004, complainant District filed and timely served Accusations, Resolution No. 13, Statement to Respondent, blank Notice of Defense, Request for Discovery, pertinent sections of the Government and Education Codes, and Notice of Hearing upon each of the respondents.

7. On or about April 6, 2004, respondents and by their counsel filed timely notices of defense, requesting a hearing and objecting to the Accusations. All pre-hearing jurisdictional requirements have been met by the parties to this matter.

8. On February 24, 2004, the Governing Board of the District resolved and took action to reduce or discontinue certain services or programs offered by the District for the 2003 - 2004 school year in the following full-time equivalent positions (hereinafter FTE):

<u>SERVICES</u>	<u>FULL-TIME EQUIVALENT POSITIONS</u>
Classroom Teacher/Teacher Specialist	26.00
Counselors	22.00
Resource Teachers	2.00
Resource Teachers—Bilingual	28.00
School Nurse Practitioners	12.00
School Nurses	24.00
School Psychologists	32.00
School Site Specialists	6.00
Speech & Language Specialists	21.00
Teacher Specialists	10.00
Teacher Specialist-on-Assignment	1.00
Teacher Specialist—Content Expert	1.00
Teacher Specialist—Curriculum/Instruction	1.00
Teacher Specialists—Educational Media	3.00

Teacher Specialists—Reading Coach	14.00
Teacher Specialists—Special Education	3.00
Teacher Specialists—Technology	4.00
Teachers—K-6 Drama	7.00
Teachers—K-6 Music	8.00
Teachers—K-6 Visual Arts	8.00
Teachers-on-Assignment	8.00

The reduction or discontinuance of the services or programs set forth hereinabove constitute a total of 241.00 full-time equivalent positions. The District believes that the reduction or discontinuance of services or programs is necessary for the economic solvency of the District and due to projected declining enrollment of approximately 1,000 students for the ensuing school year.

9. (A) The services or programs set forth in Findings 3 and 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 Governing Board of the District to reduce or discontinue these services or programs is within the sound discretion of the District and is not arbitrary or capricious. The reduction or discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

(B) Further, the District has obviated the need to reduce or discontinue all of the particular kinds of services described in Findings 3 and 10 above by taking into account the -personnel changes due to attrition, retirements, and the releases of temporary employees. Nonetheless, the District has determined that services in school nurses and school nurse practitioners must still be reduced or discontinued by 6.0 FTEs to maintain a balanced budget and provide essential services.

10. On March 26, 2004, the District withdrew the Preliminary Notice Not to Re-Employ or preliminary notice of layoff previously served upon an undetermined number of certificated employees including teachers. On April 16, 2004, the District withdrew the preliminary notice of layoff previously served upon school counselors. At the hearing on April 21, 2004, the District withdrew the preliminary notice of layoff and Accusation previously served upon respondent and school nurse Erlita G. Rivera. Consequently, in this matter, the issue presented for decision is whether or not the District may not re-employ or layoff two school nurse practitioners and four school nurses for the ensuing school year due to the reduction or discontinuance of particular kinds of services performed by the school nursing staff.

11. Respondent Frances Pollock is a school nurse for the District and possesses a professional clear credential as a school nurse. Ms. Pollock's date of first paid service with the District was May 28, 2002. For the past two years, respondent Pollock has been working

half-time as a school nurse pursuant to a contract with the District and is considered a first year probationary certificated employee. Under the District's seniority list, Ms. Pollock is the most junior of the school nurses subject to layoff.

12. (A) Respondent Karen Doring Shurtleff is a school nurse and possesses a professional clear credential in school nurse services. Her date of first paid service with the District is September 30, 2002, and she is a second year probationary certificated employee.

(B) Respondent Doring Shurtleff has a bachelor's degree in nursing and master's degrees in psychology and in biology and nutrition. Before joining the District two years ago, she worked as a school nurse with the Los Angeles Unified School District for eleven years. She now receives greater job satisfaction from her job with the District because she is able to provide continuity of care to students and to conduct follow-up calls after health screenings. She works two days per week at Decker Elementary School and two days at Ranch Hills Elementary School. One day each week, she performs screening examinations of students for scoliosis and hearing and vision tests as a member of school cluster nursing team.

(C) As a school nurse at two elementary schools, respondent Doring Shurtleff administers medications to students and assists students with their medical needs including catheters and diaper changes. She also trains and advises the health clerks and administrative staff how to administer medications and assist students in her absence. She provides nursing services to students who become ill or suffer injuries. Respondent also performs health assessments of special education students for purposes of their individual education plans. She instructs students on hygiene.

13. Respondent Ada Yuk-Fung Yip is a full-time school counselor for the District and possesses a preliminary school nurse's credential. Ms. Yip has a date of first paid service with the District of September 7, 1999. She is considered a second year probationary certificated employee because, while she worked full-time in her first year with the District, Ms. Yip worked only half-time and did not work 75 percent of the school days in the three subsequent school years. Respondent Yip did not appear or testify at the hearing but was represented by counsel. She is credentialed only to provide nursing services for the District and may not be reassigned to any other certificated employee position.

14. (A) Respondent Paula Vlasich is employed as a tenured, full-time school nurse practitioner by the District and possesses a life health services credential as a school nurse. Ms. Vlasich has a date of first paid service with the District of October 4, 2001, and is in her third year of employment with the District.

(B) Respondent Vlasich is a registered nurse and has been a nurse practitioner for over 25 years. She attained her credential and a bachelor of science degree in nursing from Loma Linda University. She received further education to be a nurse practitioner from the University of Southern California. She has taken continuing education classes in pediatric nursing. Ms. Vlasich appreciates the professional nursing environment of the District in

which she is able to consult with nursing colleagues in her cluster of schools and provide first-time health care for many low-income students who have not seen a nurse or doctor before enrolling in school.

(C) Three and one-half days each week, Ms. Vlasich works as a nurse practitioner at Madison Elementary School. On the other one and one-half day each week, she performs duties as a team leader and member of her cluster team of nurses, including conducting vision, hearing, and scoliosis screenings of students. At her school site, respondent Vlasich sees children who may have come to school sick and often refers such students to the District health services clinic or outside physicians by completing referral forms. She assists students with special needs and conditions such as medical use of a tracheal tube and attention deficit hyperactivity disorder. She trains health aides to help such students and the students themselves in the administration of their own medical services. She reviews students' immunization records.

(D) In accordance with District policy, respondent Vlasich regularly attends "Student Success" team meetings at her school site. With the student, parents, and student's teacher, she discusses what can be done to improve a student's academic performance in the classroom. Frequently, respondent as a school nurse is able to attribute the student's poor academic record to health problems that are not readily apparent to the teacher or parents. With respect to special education students, Ms. Vlasich regularly participates in triennial review meetings of the students' progress and initial assessment conferences with the school psychologist, resource specialist, day teacher, speech and language specialist, and administer to discuss students' eligibility for the special education program. In addition, in cases where a special education student has a health issue, respondent will participate in meetings to develop and revise the student's individual education plan. This school year, respondent Vlasich has taken part in 17 IEP meetings.

15. (A) Respondent Nina Nixon is a tenured certificated employee and school nurse for the District. She possesses a preliminary school nurse services credential and has a date of first paid service to the District of September 4, 2001. While her date of first paid service is the same as respondent Pamela Reardon, Ms. Nixon is considered junior to Ms. Reardon after application of the tiebreaker criteria and point system by the District.

(B) Ms. Nixon has a bachelor of science degree in nursing from Azusa Pacific University. She is in her third year as the sole school nurse at Pomona High School, which has approximately 1,700 students, many of whom come from low-income and/or undocumented families. She provides health and nursing services to students who are ill when they come to school, who have special health needs, and who are disabled by medical conditions. She performs blood sugar tests for diabetic students, administers medications, and assists students who use a gastric tube, oxygen tank, or inhaler. Ms. Nixon also cares for and counsels students who use illegal drugs and suffer from conditions such as eating disorders, pregnancy, anxiety, depression, and abuse. She provides health resource information and refers students to counselors and other health professionals. She is very busy seeing students who come by on office visits. For example, in March 2004, Ms. Nixon

and her health aide had 916 office visits at the high school nurse's office. In addition, she performs health screenings of students with her cluster team of nurses. Ms. Nixon has trained her health aide or clerk and office staff to administer medications and assist students when she is unavailable.

(C) Moreover, respondent Nixon performs school nursing duties for students with special needs. She is the case carrier for four special education students who have medical conditions requiring seizure medications. She provides medications to those students and has trained the health aide to administer the medications as well. She performs health history and development assessments of students with health disabilities and needs. She participates in individual education plan meetings for special education students with health concerns and individual health services plan meetings for students with special health needs. Ms. Nixon also frequently sees the approximately 60 severely handicapped students at the high school who come to school with illnesses and need follow-up care.

16. (A) Respondent Pamela Reardon is a tenured certificated employee and school nurse for the District. She holds a professional health services credential in school nursing and has a first date of paid service with the District of September 4, 2001. Under the District's tiebreaker criteria, Ms. Reardon has more tiebreaker points and is considered senior to respondent Nixon even though they both share the same hire date.

(B) Respondent Reardon obtained a bachelor of science degree in nursing from Point Loma Nazarene University in San Diego and a master's degree in health services from California State University Los Angeles. Prior to joining the District, she worked for the Bonita school district for 12 years. She has also worked at hospitals in Pasadena. Ms. Reardon has now been working as a District school nurse for three years. In her current District position, she provides nursing and health services to 165 moderately to severely handicapped pre-school children and to 45 moderately to severely handicapped adults. Both of said student populations have mental and/or physical disabilities requiring special education programming. Ms. Reardon services the students at six elementary school sites and an adult transition program. In connection with the special education program, Ms. Reardon conducts health assessments and participates in individual education planning meetings

17. Respondent Joyce Colbert is a tenured certificated employee and school nurse for the District. She possesses a professional clear credential in school nursing services and has a date of first paid service with the District of September 5, 2000. Based on her date of first paid service, she is the most senior of the school nurses and nurse practitioners subject to layoff from the District in this matter. Ms. Colbert did not testify but was represented by counsel at the hearing.

18. (A) Certificated employee Gloria J. McCrea is a school nurse and has first date of paid service to the District of September 28, 1999. She holds a Ryan health services credential as a school nurse and a Ryan multiple subjects credential. Based on the latter teaching credential, the District has reassigned Ms. McCrea to the classroom.

(B) Respondent Erlita G. Rivera is a school nurse and has a date of first paid service with the District of September 7, 1999. She possesses a preliminary health services credential to act as a school nurse. The District withdrew the Accusation and preliminary notice of layoff previously issued to her and she is being retained as an employee of the District.

19. In this proceeding, the District proposes to not re-employ two school nurse practitioners and four school nurses, or 6.0 FTE positions in school nursing, due to the reduction or discontinuance of particular kinds of services in school nursing. Currently, the District employs 33.8 FTE positions of school nurses and school nurse practitioners. For the ensuing school year, after reducing positions in school nursing by 6.0 FTE, the District plans to retain 10.0 FTE positions for school nurse practitioners and 17.8 FTE positions for school nurses or a total of 27.8 FTE positions in school nursing. The District's school nurses are employees within the health services department and provide health and nursing services to students who receive educational services at school sites and with the special education program.

20. The school nurses provide mandated health services to the District students including vision and hearing testing, scoliosis screening, immunization checks, and health assessments for special education eligibility and programming. In addition, the nurses prepare designated instructional services plan for certain disabled and special needs students who require additional supports and services to fully utilize the educational opportunities offered by the schools. Non-mandated services provided by school nurses may include classroom health presentations, caring for sick students, and attendance at meetings to discuss the academic performance of students or development of individual education plans for special education students who do not have a health-related concern or issue.

21. (A) With the nurses of its health services department, the District provides health and nursing services to its special education students. The District educates and serves about 3,900 special education students who comprise about 11 percent of its total student body. Each school year, the school nurses participate in the preparation and meetings for individual education plans (IEPs) for special education students who have health or medical issues. As part of the IEP process, the school nurses also prepare individual health services plans for those special education students with health-related issues or problems. In addition, the school nurses perform about 900 triennial health and development evaluations for enrolled special education students and 300 health and development evaluations for new or prospective students for the special education program.

(B) The school nurses perform these mandated services for special education students in addition to their other mandated and non-mandated duties requiring them to see the special education students when they undergo health screenings, require immunization records checks, and are ill or need assistance at school.

(C) In meeting the requirements to provide mandated services to special education students, the District also plans to employ 27.8 FTE positions for school psychologists, 33.0



FTE positions for speech and language therapists, and 7.0 FTE positions for adaptive physical education specialists. The District plans to contract with an outside vendor to provide occupational therapy for special education students. The District also employs about 200 instructional aides to help special education students with their classroom work and health care needs.

22. With the proposed reduction or discontinuance of nursing services, the District still plans to meet its obligations to provide mandated and non-mandated services to the students by additional training of existing nursing staff and health clerks, prioritizing which health assessments and service plan meetings require actual participation by school nurses, decreasing the presence of a school nurse at each school site by one-half day each week, transferring some non-mandated services such as office consults of students to school site health clerks, and increasing the efficiencies and work of the nursing staff. The District represents that it will be able to provide daily nursing and health services coverage at each of its school sites by assigning nurses and health clerks a total of at least 5.5 days each week at each school. The District employs about 24.5 FTE positions for health clerks whose job is to assist students with their health concerns and to help the school nurse at each school site. For next year, the District has allocated or received funding for 11.3 FTE positions for school nurses for special education and 2.7 FTE positions for school nurses to the child development center. By its assignment of school nurses to school sites and allocation or funding for FTE positions for school nurses, the District will provide mandated and non-mandated nursing and health services to students in a reduced manner that is not arbitrary or capricious and meets the welfare and interest of the District and its students.

23. It was not established that, if the District does not re-employ the subject certificated nursing employees for the ensuing school year, the District will be unable to provide services, including mandated services, to its students due to the recent transfer and acceptance of approximately 195 moderately to severely handicapped or disabled students from the Los Angeles County Office of Education. Said disabled students have been always been attending school in District facilities and receiving educational and health services from District personnel. The transfer of said disabled students has not adversely affected the District to provide services to its student population. The District allocated an additional 2.0 FTE positions in school nursing to provide health and nursing services to these disabled students.

24. Based on Findings 19 – 23 above, it was not established that, with the non re-employment of subject school nurse practitioners and school nurses for the next school year due to the reduction or discontinuance of the particular kind of service in school nursing, the District will reduce mandated nursing services below the level required by law or will be unable to render nursing services at the level required by law.

25. (A) Based on Findings 9 – 24 above, respondents Pollock, Doring Shurtleff, Yip, Vlasich, Nixon, Reardon, and Colbert may be terminated pursuant to the reduction or discontinuance of services of 6.0 full-time equivalent positions for school nurses and school nurse practitioners.

(B) There are no certificated employees with less than seniority than said respondents who are being retained by the District to render services that any one of said respondents is certificated and competent to provide.

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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 Section 44949 and 44955; and all notices, accusations, and other related papers and reports required by said sections have been provided in timely manner and, as such, complainant District has complied with the requirements of said sections.

2. Cause exists pursuant to Education Code Sections 44949 and 44955 to reduce by 6.0 full-time equivalent positions the concomitant number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services, to wit: school nurses and school nurse practitioners, as set forth in Findings 3 – 5 and 8 – 9 above. Said cause relates solely to the welfare of the schools of the District and the pupils thereof within the meaning of Education Code Section 44949.

3. Cause exists, due to the reduction or discontinuation of particular kinds of services pursuant to Education Code Section 44955, to give notice to respondents who presently hold 6.0 FTE positions in school nursing that their services will not be required for the ensuing school year, based on Findings 3 – 9 and 25 above. There are no certificated probationary or permanent certificated employees with less seniority than respondents who are being retained by the District for the 2004 - 2005 school year to render services which respondents are certificated and competent to provide.

4. Discussion--Respondents argue that the Accusations seeking their layoff as school nurses should be dismissed because the employing District has not shown that it will be able to provide mandated nursing services after the proposed reduction of the particular kind of service in school nursing. In support of their argument, respondents have cited the case of Degener v. Governing Board, 67 Cal.App.3d 689, 136 Cal.Rptr. 801 (1977), and the administrative decision of the governing board of the Huntington Beach high school district in a layoff proceeding from last year. Respondents' argument, while certainly compelling, is not persuasive in the circumstances of this matter.

A school district is required to give diligent care to the health and physical development of its pupils and may employ certificated persons to perform the work. (Education Code Section 49400.) Under the Education Code, a school district is required to provide certain health-related services such as the administration of prescribed medications for pupils, specialized physical health care services, and vision and hearing tests. (Education Code Sections 49423, 49423.5, 49452, and 49455.) Nursing is a particular kind of service that a school district may reduce in the teacher layoff proceeding. (See Rutherford v. Board of Trustees, 64 Cal.App.3d 167, 134 Cal.Rptr. 290 (1976); Murray v. Sonoma County Office of Education, 208 Cal.App.3d 456, 256 Cal.Rptr. 353 (1989).)

In Degener v. Governing Board, *supra*, 67 Cal.App.3d 689, 695 – 696, the Court held that, where a school district does not reduce its offerings in code-mandated course or service below the level required by law, said reduction should be considered a reduction of a particular kind of service and proper under the Education Code. Further, it is within the school district's discretion, subject to the minimum level required by law, to determine the extent to which it deemed a reduction of services is necessary and proper under the circumstances. (San Jose Teachers Assn. v. Allen, 144 Cal.App.3d 627, 192 Cal.Rptr. 710 (1983).) Discretion also lies with the governing board of a school district to determine how and in what manner mandated services are to be provided. (Gallup v. Board of Trustees, 41 Cal.App.4<sup>th</sup> 1571, 49 Cal.Rptr.2d 289 (1996).) Of course, a school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary, or capricious. (Campbell Elementary Teachers Assn., Inc. v. Abbott, 76 Cal.App.3d 796, 807-808, 143 Cal.Rptr. 281 (1978).)

In the instant matter, the Governing Board of the Pomona Unified School District resolved to reduce or discontinue particular kinds of services, including school nursing, for the ensuing school year due to fiscal concerns and declining enrollment. The District has determined to reduce school nursing by six full-time equivalent positions and has demonstrated that, after such service reduction, it has sufficient nursing staff along with health aides to provide daily nursing services and coverage at its school sites. In recognition perhaps of the greater prospective workload for the nurses, the District also plans to increase work efficiency with training and elimination of certain non-mandated tasks that do not require the participation of school nurses in the process or in meetings. With respect to special education, the pupils receive instruction and other services in many or all of the school sites staffed by school nurses and the District will be retaining, in addition to school nurses, school psychologists, resource specialists, and speech and language therapists who will continue to provide mandated services to the students. Based on the evidence, the District will meet its legal obligations to provide services to all of its pupils although services by nurses will be reduced. The reduction or discontinuance of nursing services is related to the welfare of the pupils within the meaning of Education Code Sections 44949 and 44955. The decision to reduce or discontinue the services is not arbitrary or capricious but a proper exercise of the discretion of the District and Governing Board.

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WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusations with respect to respondents Joyce M. Colbert, Karen Lee Doring Shurtleff, Nina Nixon, Frances G. Pollock, Pamela P. Reardon, Paula Vlasich, and Ada Yuk Fung Yip, and each of them, is sustained and notice may be given to all of them as well as those certificated employees, if any, who received written notices but did not request a hearing that their services will not be required for the ensuing 2004 - 2005 school year because of the reduction or discontinuance of particular kinds of services, based on Conclusions of Law nos. 1 - 4 above.

2. Before giving notices to respondents and other certificated employees, if any, who did not request a hearing, the District shall determine and take into account further positively assured attrition among certificated employees in deciding how many and when certificated employees should be terminated before the ensuing 2004 - 2005 school year.

3. The District shall give notice to respondents and those certificated employees, if any, who did not request a hearing, in the inverse order of seniority with the District pursuant to the provisions of Education Code Section 44955.

4. The Accusation filed and issued against respondent Erlita G. Rivera shall be withdrawn and/or dismissed pursuant to the request of the District, as set forth in Findings 10 and 18(A) above.

Dated:

Vincent Nafarrete  
Administrative Law Judge  
Office of Administrative Hearings

stipulation (s) are set forth in Exhibit C, attached hereto and incorporated herein by this reference.

### Reduction of Psychologists

11. District currently employs 35 school psychologists (some of whom work part-time) in 26.7 F.T.E. positions. As part of its action in reducing services for the 2004-2005 school year the Governing Board of District determined to reduce 12.50 F.T.E. school psychologist positions.<sup>2</sup> At hearing, District indicated that only 10.2 F.T.E. psychologist positions will actually be reduced and that 16.5 F.T.E. psychologist will be retained for the 2004-2005 school year.

Certain services provided by psychologist are mandated by state law. Mandated services which require participation of a school psychologist include special education assessments, triennial re-evaluations of special education students, manifestation determinations, positive behavior intervention plans, designated instruction and service (DIS) counseling and 504 reports for special education students. District has developed a contingency plan designed to cover all mandated service areas. The contingency plan, which is based on a reduction of 12.50 psychologist positions, will provide a minimum level of service in each mandated service area with more F.T.E. assigned to the areas of greatest need in District. In addition, in order to ensure that each school site will have equal access to psychological services psychologists retained by District will be site based, i.e., assigned particular school sites. District has also implemented a Learning Center Model to reduce the need for formal special education assessments of students. The Learning Center Model is a new program of pre-assessment and early intervention that is designed to identify and address a student's educational problems early in order to avoid the need for special education services.

12. Respondents contend District has failed to establish that it will be able to provide all mandated psychological services if the proposed reductions are implemented. They note that in 1998 the State found District was out of compliance in providing mandated psychological services (i.e., special education assessments) at one school site even though it had 17 psychologists on staff. They also note that District has a current backlog of special education assessment requests. Lastly, respondents argue that the sheer volume of mandated psychological services District must provide to students demonstrates that District will not be able to meet its statutory obligations if the proposed reductions are implemented.<sup>3</sup>

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<sup>2</sup> Although the board resolution indicates a reduction of 14.50 F.T.E. school psychologist positions this was a typographical error. At hearing District indicated that 12.50 F.T.E. was actually the correct number.

<sup>3</sup> Respondent presented evidence that there are approximately 4,900 special education students currently enrolled in District and that each year psychologists participate in approximately 1,600 triennial evaluations, 450 manifest determinations and 1000 positive behavior intervention plans, in addition to performing crisis intervention, writing 504 reports and providing DIS counseling.

13. District acknowledges that it has a backlog of triennial re-evaluations and that there is a strong possibility of a larger backlog with the reduction in psychologist services. It nevertheless maintains that it will be able to meet its obligation to provide mandated services. It notes that in 1998 it had only recently hired 17 psychologists after operating for years with only 6 due to budget constraints. As a result in 1998 it had an assessment backlog of approximately 2000 students and there were complaints at one school site that psychological services were not being equitably provided to all schools. In or about 1998, pursuant to a corrective action plan, District revamped its assessment process and also made its psychologists site based. District points out that nothing in the plan required District to have a specific number of psychologists or required a psychologist to spend a certain percentage of time on site. District also believes it will be able to provide the mandated psychological services because it is working diligently to reduce its backlog, some school sites no longer have a triennial re-evaluation backlog and District's current overall backlog is only about 500 cases. District notes that every school district in the state has a backlog. In addition, District expects the need for special education assessments, triennial reevaluations, etc. to gradually decrease with implementation of the Learning Center Model, which will also reduce the demand for mandated services. Lastly, District notes that it is actually reducing only 10.2 F.T.E. psychologist positions rather than the 12.50 F.T.E. anticipated under its contingency plan, which means it will have an additional 2.3 F.T.E. psychologist positions to provide necessary services.

14. The evidence established that District's determination that it can comply with all statutory mandates with a reduced psychologist staff was not arbitrary, but rather was based upon reasonable considerations. While it is clear that the psychologists who remain in District will be working harder due to the reduction of psychologist positions, it was not established that the reduction will prevent the District from providing mandated services. Moreover, it must be presumed that District will perform its official duties and comply with legislative mandates. If District finds it difficult to provide mandatory services next year, it has the option of changing the manner or method of offering the service. (*Campbell v. Abbot* (1978) 76 Cal.App.3<sup>rd</sup> 796; *Gallup v. Loma School Dist.* (1996) 41 Cal.App.4<sup>th</sup> 1571.)

#### Retention of Behaviorist

15. As part of its action in reducing services for the 2004-2005 school year the Governing Board of District determined to skip Rebecca J. Valero. Valero holds a Professional Clear Pupil Personnel Services (PPS) credential in school counseling and has a seniority date of August 8, 2002. District currently employs Valero as a 1.0 F.T.E. behaviorist. The primary responsibility of a behaviorist is to work with teachers to develop comprehensive behavioral plans for students who are in crisis or whose behavior is out of control.<sup>4</sup> The behaviorist at District primarily works with autistic children who have severe behavioral problems.

The behaviorist position was developed by District because it was paying \$100,000.00 to \$150,000.00 to outside contractors (who had no incentive to limit costs) to perform the services currently provided by Valero. When District developed the behaviorist position the only educational requirement was a Pupil Personnel Services (PPS) credential. All psychologists employed by District hold PPS credentials and were therefore eligible to apply. Valero, who had previously served as a psychology intern at District, was the only applicant for the position. The behaviorist position was her first regular psychology position. Following her hire Valero took numerous courses directly related to the duties of a behaviorist, accumulating 42 hours of behaviorist training that no psychologist who is subject to layoff possesses. As part of her duties as a behaviorist Valero is also responsible for performing certain duties that school psychologists do not typically perform, including developing comprehensive behavior plans, providing training regarding behavioral assessments, techniques and intervention plans and providing discrete trial training.

16. Respondent Stephen Cederborg holds Standard Life Pupil Personnel Services (PPS) credentials in psychology, counseling, psychometry, child welfare and attendance, and social work, as well as a Life Administrative Services Credential. He has a Ph.D. in educational psychology. District currently employs Cederborg as a .5 F.T.E. school psychologist.<sup>5</sup> District has assigned Cederborg a seniority date of February 1, 2001. Cederborg holds .5 of the psychologist positions that are being eliminated.

Respondent Linda Byrns holds a Professional Clear Pupil Personnel Services Credential in school psychology. District currently employs Byrns as a 1.0 F.T.E. school psychologist. District has assigned Byrns a seniority date of June 10, 2000. Byrns holds one of the psychologist positions that is being eliminated.

Valero is less senior than psychologists Stephen Cederborg and Linda Byrns, as well as several other psychologists noticed for layoff.

17. Respondents contend that all psychologists employed by District are certificated and competent to perform the duties of the behaviorist position because all school psychologists possess a PPS credential. School psychologist Sherry Burke, who is not subject to layoff, testified that all school psychologist at District either perform the functions of a behaviorist or received training in those functions in order to obtain their PPS credential. Burke has taught several courses at Chapman College and oversees their psychology intern program. Both Cederborg and Byrns testified that they are qualified to

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<sup>4</sup> In order to develop a plan to redirect behaviors the behaviorist must do a behavioral assessment, which requires the behaviorist to observe the child over a period of time to determine what occurs right before the problem behavior takes place. Such plans are often up to 10 pages long.

<sup>5</sup> Cederborg was noticed for layoff of 1.0 F.T.E. At hearing District stipulated that he should only have been noticed for layoff of the 0.5 F.T.E. psychologist portion of his position. Although Cederborg is a 1.0 F.T.E. employee, 0.5 F.T.E. of his position consists of other, non-psychologist duties and is funded from a grant.

perform the duties of a behaviorist and that no one at District ever asked if they could perform the duties. Byrns also testified that she has experience preparing behavioral plans (school psychologists typically use a 1 page behavioral plan), that she works with teachers to implement those plans and that she performs many of the same duties as a behaviorist as part of her job as a school psychologist, including working with severely maladjusted children and providing crisis intervention.

18. District does not contend that school psychologists are incompetent to perform the duties of a behaviorist. Rather it maintains that it is entitled to skip Valero because she has special training and experience as a behaviorist that no school psychologist subject to layoff possesses by virtue of having attended numerous trainings specific to behaviorists that school psychologist have not attended. District asserts that any additional training by Valero, including that obtained after she was hired as a behaviorist, qualifies her to be skipped.

19. Generally speaking, a senior employee whose position is eliminated has the right to "bump" into a position held by a junior employee if the senior employee is credentialed and competent to perform the duties of the junior employee's position. However, the seniority rule is not absolute. Education Code section 44955, subdivision (d) permits a school district to deviate from terminating a certificated employee in order of seniority if it demonstrates a specific need for personnel to teach a specific course or course of study, and that the certificated employee has special training and experience necessary to teach the course or course of study, which others with more seniority do not possess.

20. District has demonstrated a specific need for someone to perform the duties of a behaviorist. However, it has failed to establish that the coursework taken by Valero constitutes the type of special training that would justify skipping Valero in favor of a more senior school psychologist. A primary purpose of Education Code 44955, subdivision (b) is to protect the seniority rights of certificated employees. Skipping based on a very narrow definition of special skills is inappropriate where it serves to undermine that purpose. (*Alexander v. Board of Trustees of the Delano Joint Unified School Dist.* (1983) 139 Cal.App.3<sup>rd</sup> 567, 574, fn. 2.) Moreover, Education Code section 44955, subdivision (d) expressly provides that in order to skip a junior employee based on special skills and experience, the skills and experience must be "necessary to teach the course or course of study" and must not be possessed by the senior employee. Education Code section 44955, subdivision (d) does not authorize a comparative evaluation of who is better qualified where both the senior and junior employee possess the skills necessary to do the job. In this case, virtually all of Valero's "special skills and experience" as a behaviorist were obtained after she obtained the job. The coursework taken by Valero was not required as a condition of obtaining or continuing employment. In fact District was not aware of all the coursework undertaken by Valero until it began preparing for the subject layoff hearings. Nor did Valero's coursework lead to any type of special certification. While Valero's coursework and actual performance of behaviorist duties may suggest she has better skills than a school psychologist to perform the duties of a behaviorist, it does not indicate she possesses special skills that psychologists do not possess. District has therefore failed to demonstrate that Valero's "special skills and experience" are necessary for performance of the behaviorist



position. When laying off an employee who is certificated to perform services provided by a junior employee, the burden of proof is on the district to establish that the senior employee is not competent to perform those services. (*Davis v. Gray* (1938) 29 Cal.App.2d 403, 408; *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 566-567.) District has failed to sustain that burden. Accordingly, the most senior psychologist noticed for lay off must be retained.

#### Reduction of Counselors

21. The proposed reduction in the counseling program will result in the elimination of all counselors. Some of the duties now performed by counselors will be handled by administrators, teachers and other District staff. Many of the counseling services now offered will not be provided at all. While some of the tasks undertaken by counselors are mandated, counselors themselves are not a mandated service.

22. Respondents contend District has failed to establish that it will be able to provide all mandated counseling services if the proposed reductions are implemented. District maintains it will be able to provide all mandated services by utilizing administrators and other district staff to provide student support. District also contends the ALJ decision in the 2003 layoff hearing regarding elimination of counseling services is *res judicata* on that issue.

23. The doctrine of *res judicata* is equally applicable to civil actions and administrative proceedings provided the agency is acting in its judicial capacity to resolve a disputed issue of fact that is properly before the agency. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315; *Shor v. Department of Social Services* (1990) 223 Cal.App.3d 70.) It appears that the issue of whether District can provide mandated services if it eliminates all counselors was litigated and conclusively decided at the previous layoff proceeding. The ALJ found that District was not mandated to provide middle and high school counselors, that critical counselor duties, including providing mandated services, could be performed by administrators, and that it was within the discretion of District to eliminate all middle and high school counselors. The Governing Board of District adopted the ALJ's proposed decision and that decision is now final. Respondents are therefore barred from asserting the same claim in the present layoff proceeding. (See *Worton v. Worton* (1991) 234 Cal.App.3d 1638; *Tensor v. City of Glendale* (1993) 14 Cal.App.4th 154.)

#### Reduction of 504 Intervention Specialist

24. Respondent Beverly Guyton holds a Standard Designated Credential (the predecessor to the Pupil Personnel Services Credential) in school psychology and an Administrative Services Credential. District currently employs Guyton as a 1.0 F.T.E. 504 Intervention Specialist. Guyton holds the 504 Intervention Specialist position that is being eliminated.

Guyton is responsible for ensuring that services are provided to 125 to 130 students who have an impairment that significantly impacts a major life activity. Her duties include determining eligibility for services, coordinating psychological services, supervising 504 psychologists, working with parents, administrators and teachers, and collecting data for mandated reports. Guyton contends that District has an obligation under the American with Disabilities Act to provide the services she offers as the 504 Intervention Specialist and that it has failed to demonstrate that it has any plan to meet this mandate.

25. District acknowledges that it does not currently have a plan regarding provision of 504 services next year. However, it notes that there is no specific staffing requirement imposed by statute. Patricia McWilliams, Assistant Superintendent of Human Resources, testified that staff is currently discussing how to provide mandated services and that a plan will be developed to ensure provision of 504 services during the 2004-2005 school year. District has established that it does not propose to reduce 504 services below state mandated levels.

#### Reduction of Secondary Services

26. As part of its action in reducing services for the 2004-2005 school year the Governing Board of District determined to reduce secondary teachers. Respondents contend District has not demonstrated that it will be able to provide students the necessary coursework required for high school graduation pursuant to Education Code section 51225.3 (which lists the minimum coursework requirements for high school graduation) if it reduces 160 secondary teachers as planned. Respondents also note District offered no evidence that it will offer courses that will enable students to meet the minimum coursework requirements for enrollment in the California State University and/or University of California systems.

27. Howard Cohen, Regional Superintendent for Secondary Schools, testified that he carefully analyzed what cut backs in curriculum were necessary at the middle school and high school levels. Then on a school by school basis he determined which classes in each subject area were under enrolled and what reductions in F.T.E. could be made if each under enrolled class had maximum enrollment. At the middle school level Cohen matched the reductions in F.T.E. against the state guidelines to ensure District would be able to meet state mandates. At the high school level Cohen checked the F.T.E. cutbacks against District and state requirements. Cohen testified that it was clear after comparing course offerings for the 2004-2005 school year against District and state requirements that District would still be able to offer a full secondary program. Respondents have not presented any contrary evidence that establishes District will not be able to meet all state mandates.

#### Reduction of Librarians

28. As part of its action in reducing services for the 2004-2005 school year the Governing Board of District determined to eliminate all librarians. Howard Cohen, Regional Superintendent for Secondary Schools, testified that at a minimum District will continue to

distribute and keep track of textbooks, but it may have to discontinue all other library services.

29. Respondents contend District will be in violation of Education Code section 18100 if it proceeds with its plan. That section states that the "governing board of each school district shall provide library services for pupils and teachers" by maintaining a school library or by contractual arrangement with another public agency. Respondents further contend District has failed to demonstrate that it will meet the state's mandate for library services for the upcoming school year and therefore all librarians must be retained. Respondents also note that District will receive funds to operate school libraries under the California Public School Library Act (Library Act) through the end of 2003-2004 school year, and that there is no evidence that District will not receive similar funding during the 2004-2005 school year.

30. Although there is no evidence that District will not receive funding under the Library Act during the next school year, neither is there any evidence that such funding will continue to be available during the 2004-2005 school year. Therefore District's action in not relying on such funding is reasonable. Moreover, if funding under the Library Act were to be available during the upcoming school year such funding could not be used to fund personnel. Also, librarians are not a mandated service. (See Ed. Code, § 18120 [governing board may appoint librarians].) In *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3<sup>rd</sup> 627, 639, the court held that there is no statutory requirement that a school district employ librarians and that a school district's decision not to retain any librarians did not violate Education Code section 18100. It also noted that a school district may employ non-certified individuals as librarians. Clearly reduction of librarians is properly within the Governing Board's discretion and District is entitled to reduce or eliminate it librarians.

#### Reduction of Administrator

31. Respondent Jocelyn Hendrix holds Clear Standard Secondary Teaching Credentials in English and Speech and a Professional Clear Administrative Services Credential. District currently employs Hendrix as a 1.0 F.T.E. Special Education Administrator for its Adult Transition Program. Hendrix supervises multiple sites. District has assigned Hendrix a seniority date of August 8, 2000. Hendrix holds the Special Education Principal position that is being eliminated.

32. Hendrix contends that she is not a Special Education Principal and that she was therefore improperly noticed for layoff. Hendrix was promoted to her current position on January 21, 2003. The Notice of Personnel Action she received from District listed her title as "Administrator-Special Education." A payroll worksheet received by Hendrix in March 2003 indicates she was transferred from the position of Assistant Principal to her current position of "Administrator-Special Education." In March 2004 Stephen Collins, the Associate Director of Special Education, orally advised Hendrix that she was being laid off from her position of "Special Education Principal." This was Hendrix first notice that she was considered a Special Education Principal. Later in March 2004 Hendrix also received a

formal layoff notice and an accusation packet that contained a copy of the resolution reducing particular kinds of services.

33. District argues that even if Hendrix's job title was improperly listed in the Board resolution authorizing reduction of particular kinds of services it was non-substantive procedural error. District notes that Hendrix received both an oral and a formal written notice that she was subject to layoff. In addition, Ana Souza, the Director of Personnel Services for Elementary Education, testified that a Special Education Principal is the same as a Special Education Administrator.

34. The purpose of the initial notice is to notify the employee of the probability that her services will not be required for the ensuing school year so that she may consider looking elsewhere for employment. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 653.) Hendrix clearly received such notice and there was no evidence she experienced any prejudice as a result of the improper listing of her job title. It must also be noted that a notice of non-reemployment because of a reduction in particular kinds of services is sufficiently specific if it designates the categories of services to be reduced or discontinued, even though it does not specify the specific positions to be eliminated. (See *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 639.) Respondent was clearly on notice that special education services were going to be reduced. It is therefore determined that the improper listing of Hendrix's job title was a non-substantive procedural error that does not warrant dismissal of the charges. (See Ed. Code, § 44949, subd. (b)(3) [nonsubstantive procedural errors by school district or governing board shall not constitute cause for dismissing the charges unless the errors are prejudicial errors].)

#### Inconsistencies between the Budget and the PKS Resolution

35. Respondents argue that the budget adopted by the Governing Board of District is inconsistent with the PKS resolution the Board adopted because it does not reflect reduction of 48 elementary positions, 5 elementary APL positions, 23 elementary Prep positions, 80 middle school positions and 80 secondary positions. Respondents then reason that this inconsistency reflects a conflicting intent because there is no clear indication that the positions omitted from the budget will actually be discontinued next year.

36. Respondent's contention is not persuasive. The PKS resolution is the document that governs reductions in force. As a general rule the budget is irrelevant to the reduction process. The mere fact that the budget does not parallel the PKS resolution does not indicate no reductions will occur. To the contrary, District has presented evidence that due to financial constraints faced by District the reductions will in fact occur.

37. The evidence established that the District will be reducing services for the ensuing school year.

38. No certificated employee junior to any respondent is being retained to perform services which any respondent is certificated and competent to render.

39. The reduction or discontinuance of services is related to the welfare of the District and its pupils.

### LEGAL CONCLUSIONS

1. Each of the services set forth in Finding 4 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

2. Cause exists to reduce the number of certificated employees at West Contra Costa Unified School District due to the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

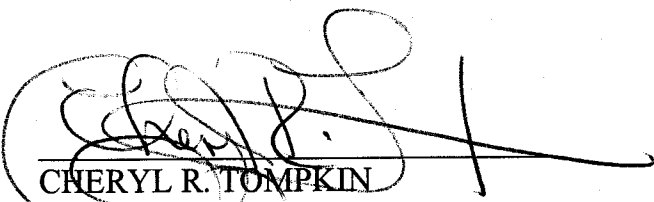
3. By reason of the matters set forth in Finding 20 notice may not be given to the most senior psychologist noticed for layoff.

4. District shall take action to reduce or terminate the employment of respondents in accordance with the stipulations set forth in Findings 9 and 10.

### ORDER

Notice may be given to respondents occupying up to 377.52 F.T.E. positions that their services will not be required for the 2004-2005 school year because of the reduction or discontinuation of particular kinds of services, except that notice shall not be given to the most senior psychologist noticed for layoff and any reduction or discontinuation of particular kinds of services shall be subject to the stipulations set forth in Findings 9 and 10.

DATED: 5/7/04

  
CHERYL R. TOMPKIN  
Administrative Law Judge  
Office of Administrative Hearings