

**BEFORE THE GOVERNING BOARD OF  
THE IRVINE UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Belinda Averill, and Other  
Certificated Employees of the  
Irvine Unified School District,

Respondents.

OAH Case No. L2008030557

**PROPOSED DECISION**

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard the above-captioned matter on April 30, 2008, in Irvine, California.

Anthony P. De Marco, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented Gwen Gross, Ph.D., Superintendent of the Irvine Unified School District (District). Terry Walker, Assistant Superintendent, also appeared on behalf of District.

Carlos R. Perez and Lori Atkinson, Attorneys at Law, Reich, Adell & Cvitan, represented Belinda Averill, Lynette Bain, Kelli Bourne, Roberta Chewning, Maria Conferti, Vincent Fabella, Dominic Fratantero, Jill George, Edward Johnson, Sheri Kulungian-Mendoza, Donna Lamanno-Linzey, Eileen Levy, Linda Mirshafiee, Estella Salter, Joyce Stenberg, Jan Stewart, Tonia Stewart, Elizabeth Taylor, Michelle Tseng, Rebecca Venlet, Andrea Vyn, Elizabeth Wieske, and Cheryl Yoon (Respondents).

Respondents Julie Bautista, Jamie Di Francisco, Shelley Edgar, Kimberly Fenton, Kristiana Jahn, Jeanette Kumamoto, and Kerri Nishimori did not appear at hearing and were not represented by counsel.

The District has decided to reduce or eliminate particular kinds of services and has chosen to eliminate of all its employees it deemed "temporary certificated employees" to achieve this reduction. The district provided "precautionary" notices to Respondents of its intent not to reemploy them for the 2008-2009 school year. Respondents requested a hearing for a hearing for a determination of whether cause exists for not reemploying them for the 2008-2009 school year.

Oral and documentary evidence, and evidence by way of stipulation, was presented and received, and the matter was submitted for decision on April 30, 2008.<sup>1</sup> The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follows.

## FACTUAL FINDINGS

### Jurisdictional Facts

1. Gwen Gross, Ph.D., Superintendent of the Irvine Unified School District, filed the Accusation in her official capacity.
2. On or before March 15, 2008, the District served written notice pursuant to the direction of the Governing Board of the Irvine Unified School District (Governing Board) that the services of “temporary certificated employees” would not be required in the upcoming 2008-2009 school year (notice). Each notice set forth the reasons for the recommendation and noted that the Governing Board had passed a resolution not to reemploy “temporary certificated employees.” This notice was served on 251 “temporary certificated employees.”
3. The notice informed the certificated employees that the Governing Board may release temporary employees pursuant to Education Code section 44954<sup>2</sup>, without providing layoff hearings pursuant to sections 44949 and 44955. However, to the extent that any of the certificated employees believed or claimed that they were entitled to probationary or permanent status, the Governing Board advised that the notices served as notice that they were entitled to a hearing under sections 44949 and 44955, e.g., a “precautionary notice” to the “temporary certificated employees.” The certificated employees were advised that they must complete an enclosed “request for hearing” form by March 14, 2008, to preserve their right to hearing, and that failure to do so would constitute a waiver of that right to a hearing.
4. Prior to the date specified in the District’s notice, 30 certificated employees each timely returned a request for hearing form. On March 24, 2008, the District filed and timely served the 30 certificated employees who submitted requests for hearing with a “Notice of Accusation and Acknowledgement of Request for Hearing” and related materials which

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<sup>1</sup> On March 17, 2008, District requested that OAH set the hearing in this matter on April 7, 2008, and the hearing was set on that date. On March 25, 2008, District and Respondents filed a motion to continue the hearing to April 30, 2008, which was granted by OAH. Pursuant to section 44949, subdivision (e), a continuance of the original hearing date shall extend the dates prescribed in sections 44949, subdivision (c) and 44955, subdivision (c) for a period of time equal to the continuance. Here, the applicable dates are extended for a period of 23 days. Subsequently, the May 7, 2008 issuance date for the proposed decision in this case is extended by 23 days, or until May 30, 2008.

<sup>2</sup> All further references are to the Education Code unless specified.

included a "notice of defense" form. At hearing, the parties stipulated that the District provided proper notice and service to the certificated employees.

5. Twenty-four certificated employees who filed requests for hearing filed Notices of Defense. Three of these certificated employees, Jamie Di Francisco, Jeanette Kumamoto and Andrea Vyn, later withdrew their requests for hearing and are not included in this proceeding. Five certificated employees, Julie Bautista, Shelly Edgar, Kimberly Fenton, Kristiana Jahn, and Kerri Nishimori, requested a hearing but did not submit a notice of defense or appear at the hearing. These five employees have waived their rights to a hearing, pursuant to section 44949, subdivision (b). One certificated employee, Dominic Fratantaro, submitted a request for hearing, but failed to file a timely notice of defense. Mr. Fratantaro, however, was represented by counsel at hearing, who made a motion to include him in this proceeding even though no notice of defense had been submitted. The District opposed this motion because he did not file a notice of defense. Respondent Fratantaro will be included in the hearing because he filed a timely request for hearing and was represented by counsel at hearing.<sup>3</sup>

6. On April 30, 2008, at hearing, the District dismissed its Accusation against two certificated employees, Lynette Bain and Cheryl Yoon. The District determined that these two employees were improperly issued notices as temporary certificated employees, because in fact, they should have been classified as probationary employees.

7. Accordingly, the District's Accusation and this hearing proceeded as to the following certificated employees: Belinda Averill, Kelli Bourne, Roberta Chewning, Maria Conferti, Vincent Fabella, Dominic Fratantero, Jill George, Edward Johnson, Sheri Kulungian-Mendoza, Donna Lamanno-Linzey, Eileen Levy, Linda Mirshafiee, Estella Salter, Joyce Stenberg, Jan Stewart, Tonia Stewart, Elizabeth Taylor, Michelle Tseng, Rebecca Venlet, and Elizabeth Wieske.

8. All prehearing jurisdictional requirements have been met.

#### Reduction in Services

9. Respondents are certificated employees of the District.

10. On March 4, 2008, upon the recommendation of the Superintendent, the Governing Board adopted Resolution No. 07-08-25 (Resolution), to reduce or eliminate

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<sup>3</sup> Section 44949, subdivision (b) provides that an employee shall file a request for hearing prior to the date specified in the Governing Board's written notice, here March 14, 2008. Failure to do so results in the employee's waiver of the right hearing. Respondent Fratantaro timely requested his hearing. Section 44949, subdivision (c)(1) provides that respondent shall provide a notice of defense, *if any*, five (5) days after the accusation has been served upon respondent. This provision does not specify that respondent waives a right to hearing if a notice of defense is not timely filed. Respondent Fratantaro was represented at hearing by counsel, who filed a notice of representation on April 28, 2008. Although Respondent failed to timely file a notice of defense, the District will not be unfairly prejudiced if Respondent Fratantaro participates in this hearing.

certain certificated services by releasing its temporary certificated employees. The following reduction in particular kinds of services (PKS) were included in the Resolution to apply 2008-2009 school year:

<u>Particular Kinds of Services</u>	<u>Full-Time Equivalent Positions</u>
Class Size Reduction (Grade 9)	17.90
Class Size Reduction (Grades K, 1, 2, 3)	57.96
Counseling	9.00
District Programs (TOSA)	6.60
Elementary Art	7.42
Elementary Intervention (TOSA)	7.77
Elementary Music	15.33
Elementary Teaching (K-6)	52.00
English Language Arts	1.80
Foreign Language (Including Spanish)	0.20
Humanities	0.10
Independent Study / Home Education	1.40
Math	0.80
Nursing	1.20
Physical Education	0.71
Resource Specialist Program	0.40
Science	0.40
Science Resource	20.10
Secondary Supplemental Services (TOSA)	3.17
Social Sciences	0.60
Special Day Classes	0.20
Special Education (TOSA)	<u>5.10</u>
Total FTE	210.16

11. These services are “particular kinds of services” that may be reduced or eliminated within the meaning of Education Code section 44955. The Governing Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

12. The Governing Board resolved to reduce the particular kinds of services in factual finding number 10 primarily due to expected revenue reduction as a result of the State’s budgetary crisis. The reduction in the particular kinds of services is related to the potential for loss of funding of certain categorical or specially-funded programs and the possibility of probationary and permanent employees returning from leaves of absence, factors that relate directly to the number of temporary certificated employees that can be retained by the District. The District expects a deficit of approximately \$12,500,000 for its 2008-2009 school year budget.

13. The District intends to achieve the reduction or elimination of the entire 210.16 FTE positions in factual finding number 10 through the release of employees that the District has deemed “temporary certificated employees,” and “no probationary or permanent certificated employee” will be affected by the reduction in particular kinds of services specified in factual finding number 10. The District did not issue notice to any probationary or permanent certificated employees.

14. The reduction or elimination of services set forth in factual finding number 10 is related to the welfare of the District and its pupils, and the reduction or elimination of the 210.16 FTE positions will not reduce services below the State mandated levels of instruction and services. Further, Respondents do not contend that the District’s proposed reduction in services reduces services below the State mandated levels of instruction and services.

Categorically Funded Programs

15. Eleven of the Respondents remaining in this proceeding were classified by the District as temporary certificated employees who occupied categorically funded positions during the 2007-2008 school year: Respondents Chewning, Conferti, Kulungian-Mendoza, Levy, Lamanno-Linzey, Mirshafiee, Stenberg, J. Stewart, T. Stewart, Taylor, and Venlet. At least seven of these Respondents have been employed two or more consecutive years by the District in categorically funded positions in which they worked 75 percent of the calendar school year but were retained in temporary employee classifications. Respondents dispute the appropriateness of the District’s temporary employee classification, but they did not offer any evidence regarding the Respondents’ service time or seniority as compared to other District certificated employees. The District did not provide a seniority list that included these certificated employees because they were deemed by the District to be temporary employees.

16. The District has several programs it describes as “categorically funded programs” (CFP), including but not limited to, “Title One” funded programs (including some special education programs), Class Size Reduction (CSR) programs (which primarily include teachers in kindergarten through grade 3), School Library Improvement program (SLP), AB 1802 Supplemental Counseling program, and the Economic Impact Aide (EIA) program. Categorically funded programs are programs financed outside of the District’s base revenue stream and are intended to provide educational services that are not mandated by state and federal statutory provisions. The District typically employs “temporary certified employees” to fill these categorically funded positions because of the indefinite duration of the funding for the particular kinds of services.

17. During the 2007-2008 school year, the District had 267.31 FTE positions in categorically funded programs, excluding certificated employees employed in CSR programs. The District participates in “option 1” of the CSR program which is funded to the extent the District is able to show that it meets a 20 to 1 student to teacher ratio to qualify the District for receipt of CSR funds. The evidence established that the District met its requirements for funding for the CSR program for the 2007-2008 school year, but was

inconclusive as to whether the District would be able to continue to meet the 20-to-1 CSR level to receive funding for the 2008-2009 school year.

18. The evidence did not definitively establish that the District's funding for all or any of its categorically and specially-funded programs would be eliminated or expire at the end of the 2007-2008 school year. Typically, categorically funded programs are funded on an annual basis by the state, federal, or local governments, and the funding is said to "sunset" at the end of each school or fiscal year. These programs, in normal budget environments are routinely refunded and the positions filled in the next school year.<sup>4</sup> Thus, it can not be concluded that the categorically funded positions would not be available for the 2008-2009 school year. There was credible evidence, however, that the District's budget would be cut based upon the projected State budget crisis, and that some of the categorically funded programs would be affected for the 2008-2009 school year, but exactly which programs or projects would be cut was not established by the District.

#### Employees Replacing Teachers on Leave of Absence

19. Nine Respondents remaining in this proceeding were classified by the District as temporary certificated employees who replaced regular employees on leave of absence from the District during the 2007-2008 school year: Respondents Averill, Bourne, Fabella, Fratantero, George, Johnson, Salter, Tseng, and Wieske. Respondents dispute the appropriateness of the District's temporary employee classification, but they did not offer any evidence regarding the Respondents' service time or seniority as compared to other District certificated employees. The District did not provide a seniority list that included these certificated employees because they were deemed by the District to be temporary employees.

20. The District had 49.803 FTE certificated employee positions on leave of absence during the 2007-2008 school year.

#### Temporary Employment Status

21. The District initially hires all of its certificated employees as temporary employees. The District prefers to use temporary certificated employees when filling categorically funded positions and to replace teachers on leave of absence because it considers these positions to be tenuous in nature due to the uncertainty surrounding the funding of the categorically funded positions, and the assumed return of teachers on leave of absence.

22. The actual temporary employment agreement of each Respondent was not offered into evidence. Rather the District offered into evidence a copy of the temporary employment notification form, the temporary employment agreement, and the continuing employment letter/agreement used by the District when employing temporary certificated

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<sup>4</sup> For example, the special education program funding is typically not subject to draconian budget cuts.

employees.<sup>5</sup> The parties stipulated that each Respondent received and signed a notification of temporary employment and signed a temporary employment agreement prior to beginning employment with the District. The parties further stipulated that the District utilized these forms and procedures when employing temporary certificated employees.

23. Prior to hiring a certificated employee, the District provides a "Notification of Temporary Employment Status." (See Exhibit 7.) The notification provides in relevant part that the offer of employment is as a "temporary employee" and that the District "reserves the right to remove you summarily, without cause, at any time." The certificated employee must sign an acknowledgement of receipt of this notification which provides that they have read the notification and understands that "this offer is for temporary employment and that I have only the rights afforded me by my status as a temporary employee."

24. If the temporary certificated employee accepts a position with the District, they sign an "Offer of Temporary Certificated Employment" agreement. (See Exhibit 8.) The agreement specifies in relevant part, the position offered, e.g., counselor, school nurse, elementary teacher, reading specialist, etc., the date on which the employment will commence and terminate, the salary to be paid, the percentage of (full-time) salary to be earned, and the number of days to be worked. The temporary employment agreements terminate at the end of the school year, typically in June, unless the agreement was for a shorter period. The agreement further provides in relevant part that the:

....[D]istrict.... offers you employment as a temporary employee. Your employment with this District will be subject to the statutory provisions dealing with temporary employees and will award you no rights which are not required by statute including but not limited to the right of the District to remove you summarily, without cause, at any time the District determines that would be in its best interest. The District may revise your status to that of a probationary employee and utilize the provisions of Education Code § 44929.21 to nonreselect you for the following school year. In either of the above actions, or any other taken by the District, you have no right to a hearing challenging the action of the District.

If you serve more than seventy-five percent (75%) of the days of required service, you may have a hiring preference over new applicants for the following school year. That hiring preference does not prohibit the District from determining which temporary employee shall be reemployed when two or more temporaries have

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<sup>5</sup> Respondents' counsel offered into evidence the actual notifications and employment agreements of five Respondents deemed to be temporary certificated employees in categorically funded positions, Elizabeth Taylor, Jan Stewart, Sheri Kulungian-Mendoza, Jill George, and Donna Lamanno-Linzey. These notifications and agreements were consistent with the copies of the agreements provided at hearing by the District.

similar rights. In the event that the District revises your status to probationary during the year, your seniority date for purposes of the Education Code § 44949 or 44955 will be the first day of probationary employment.

The certificated employee signs an acceptance provision that states the employee understands he/she only has rights afforded by statute as a temporary employee.

25. If a temporary certificated employee is retained for a subsequent school year, the District sends a letter to the employee, typically in May or June of the current school year, notifying the employee of their “continuing employment” with the District for the upcoming school year. (See Exhibit 9.) The letter informs the employee that the “position offered you is temporary” and identifies the applicable school year for which the position is offered. The District acknowledges in its letter that written notice of contract status is required under section 44916, and informs the employee that the letter constitutes the employee’s continuing contract, and that no new contract would be issued. The employee is required to sign the letter acknowledging acceptance of the new contract, and return it to the District before a specified date.

26. If temporary certificated employees are not retained by the District, a letter is forwarded to the employee, usually in May or June of the current school year, indicating that the employee is being “released” and notifying the employee of the effective date their employment will terminate with the District, usually the end of the current school year. (See Exhibits A.)

27. At the time the certificated employee is initially hired by the District, he or she is informed of the temporary classification of the position offered. The employee is advised of the position offered, duration of employment, and the salary to be paid. They are not informed whether the position is a categorically funded position or whether they are replacing a permanent or probationary teacher out on a leave of absence.

28. As a policy and practice, the District releases or terminates all of its temporary certificated employees near the end of the school year, in May or June, and then simultaneously offer continued employment agreements (Exhibit 9) to the certificated employees if positions are available for the upcoming school year. The District consults the principals at each school to determine their needs at each school cite before offering the continued employment agreements to “temporary certificated employees.” Employees who have worked as temporary employees are given priority when filling categorically funded positions in the upcoming school year.

29. In November of each school year, the District meets with the principals from each of the 32 school cites and discusses how many “temporary certificated employees” can be “turned” into probationary employees. The District balances the needs of each principal with the number of categorically funded positions available, the number of teachers on leave of absence, and the number of temporary certificated employees it is employing in the

current school year. In determining whether a temporary certificated employee is made probationary, the District considers the employee's performance, principal evaluations, and the number of years the employee has served as a temporary employee. Following this process, the principals are advised of how many probationary employee slots it may fill for the upcoming school year.

30. On November 7, 2007, the District identified 111.64 FTE of temporary certificated employee positions (Exhibit 11) that it designated would be "turned" into probationary employees as a result of the balancing process outlined in factual finding number 49. The classifications of these employees, whether they were temporary employees in categorically funded programs or replacing teachers on leave of absence, were not established by the evidence.

### **LEGAL CONCLUSIONS**

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of factual findings 1 through 8.<sup>6</sup>
2. The services listed in factual finding number 10 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual findings number 10 and 11.
3. Cause exists under sections 44949 and 44955 for the District to reduce or eliminate the particular kinds of services set forth in factual finding number 10, because the reduction or elimination of services is related to the welfare of the District and its pupils, by reason of factual finding numbers 1 through 14.

#### *District's Temporary Agreements and Notification*

4. Respondents contend that the District's temporary employee agreements used in hiring temporary certificated employees do not comply with the statutory requirements for sections 44924 or 44909. Respondents' essentially argue that the agreements lack mutuality and fail to fully state the nature of the employment for which they are being hired.

At the time a certificated employee is initially hired, the District must specify the classification of the certificated employee, provide a written statement indicating his or her employment status and the salary to be paid, and if hired as a temporary employee, clearly

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<sup>6</sup> The District issued precautionary notice to 251 employees it deemed to be temporary certificated employees subject to the notification provisions under section 44954. This section provides the District may release temporary employees at any time prior to the employee serving 75 percent of the number of days for the regular schools year. Thereafter, the employee must be notified before the end of the school year of the District's decision not to reelect the employee for the next succeeding year. (Ed. Code, § 44954.) The District also satisfied the jurisdictional requirements under section 44954 for dismissing or terminating temporary employees.

indicate the “temporary nature of the employment and the length of time for which the person is being employed.” (Ed. Code, § 44916.) The District may employ persons with appropriate credentials as certificated employees to perform services conducted under contract if the terms and conditions under which such persons are employed are mutually agreed upon and such agreement is reduced to writing. (Ed. Code, § 44909.)

The District provides notification of temporary employment status to each certificated employee it hires at the time the employee is initially hired. The notice specifically advises the certificated employee that the employment offered by the District is temporary and that their services may be terminated at any time by the District. The employee signs an acknowledgement in the notification attesting that they understand the employment offered is for a temporary position.

The District’s temporary employment agreement specifies the position filled, salary paid, the duration of the agreement, and clearly states the temporary nature of the employment offered. Further, the certificated employees signs an acceptance provision that also advises that the employment is temporary and that the rights afforded by statute are those relating to a temporary employee.

If the employee is retained by the District at the end of the school year, a letter offering continuing employment is forwarded to the certificated employee in May or June of the school year. The letter confirms the employees’ continuing employment for the upcoming school year and advises that the position offered is temporary. The letter does not specify the position offered or the salary paid, but indicates that the agreement constitutes a “continuing contract” and that no new contract will be issued.

Although Respondents argue that the agreement and notification fail to specifically state the classification of the position offered, all documents used by the District clearly state that the positions offered are temporary positions. It is not required as, Respondents contend, that the District indicate the funding source of the position offered position, i.e. categorically funded position or replacement for teacher on leave of absence, etc. The statutes merely require that the contract clearly indicate the temporary nature of the employment, and that the parties mutually agree in writing to the terms and conditions of the employment. (See Ed. Code, §§ 44916 and 44909.) These requirements have been met by the District in this case, by reason of factual finding numbers 21 through 27.

#### Certificated Employees Replacing Employees on Leave of Absence

5. Cause exists to dismiss Respondents Averill, Bourne, Fabella, Fratantero, George, Johnson, Salter, Tseng, and Wieske without the protections afforded in sections 44949 and 44955, as these Respondents were properly classified as section 44920 temporary employees, by reason of factual findings 19 through 27.

6. Respondents contend that the District improperly classified certificated employees hired to replace regular teachers on leave of absence as temporary employees, when in fact

they were probationary employees, and entitled to the protections provided by sections 44949 and 44955. Respondents failed to establish that the District's classification was in error.

The District may employ a certificated teacher, for a complete school year, but not less than one semester during a school year, with limited exceptions, as a temporary employee. (Ed. Code, § 44920.) "The employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board." (Ed. Code, § 44920.) "Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a vacant position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status." (*Id.*) "For purposes of this section 'vacant position' means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. It shall not include a position which would be filled by a permanent or probationary employee except for the fact that such employee is on leave." (*Id.*)

"A district may employ no more long-term replacement teachers than it has permanent or probationary teachers absent on leave at any one time." (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1283; *see also Welch v. Oakland Unified School Dist.* (2001) 91 Cal.App.4th 1421, 1431-1432.) Moreover, the District need not place the temporary certificated employee in a specific position replacing a *particular* regular teacher on leave of absence. (*Bakersfield Elementary Teachers Association, supra*, 145 Cal.App.4th at p. 1283; *Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.* (1977) 76 Cal.App.3d 223, 232-233; *Paulus v. Board of Trustees* (1976) 64 Cal.App.3d 59, 62-63.)

Here, the District had 49.803 FTE certificated employee positions designated as being on leave of absence for the 2007-2008 school year. There are only nine certificated employees in this action classified as replacing teachers on leave of absence for the 2007-2008 school year. Thus the District had sufficient FTEs of leave of absence to so classify these nine employees as temporary for the 2007-2008 school year. The nine employees classified as section 44920 temporary employees produced no evidence at hearing to suggest that they were hired into a vacant position that was not filled by a permanent or probationary employee on a leave of absence from the school district. Absent such evidence, these Respondents can not establish that they were improperly classified as temporary employees for the 2007-2008 school year.

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Certificated Employees in Section 44909 Categorically Funded Programs

7. Cause does not exist to terminate the eleven certificated employees who remain in this action that were classified by the District as “temporary certificated employees” working in categorically funded positions under section 44909, by reason of factual findings 15 through 18 and 28 through 30. These employees are Respondents Chewning, Conferti, Kulungian-Mendoza, Levy, Lamanno-Linzey, Mirshafiee, Stenberg, J. Stewart, T. Stewart, Taylor, and Venlet.

8. Respondents contend that certificated employees in categorically funded positions under section 44909 were improperly classified as temporary employees, when in fact these employees are probationary employees who are entitled to protections under sections 44949 and 44955. The District argues that certificated employees hired into categorically funded positions are temporary employees because these positions are temporary in nature and subject to unsettled funding sources. Thus, according to the District, they are properly classified as temporary employees and may be dismissed at the will of the District.

Categorically funded programs are typically funded outside the base revenue limit of the school district and address needs that cannot be, or are not being, addressed with base revenue limit funds. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 847.) Section 44909 relates to credentialed certificated employees who are employed by the school districts in “programs and projects to perform services conducted under contracts with public or private agencies, or categorically funded projects which are not required by federal and state statutes.”<sup>7</sup> (Ed. Code, § 44909.)

Section 44909 Certificated Employees are Probationary Employees

Here, the District correctly argues that employees hired under section 44909 are treated like temporary employees and perform services that are temporary in nature because of the uncertain duration of the funding sources. Employees under this provision are “treated in much the same way” as temporary employees in that they do not accrue service toward attainment of permanent status, unless reemployed the following year as a probationary employee. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.*, *supra* 98 Cal.App.4th

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<sup>7</sup> Education Code section 44909 provides in relevant part that: “The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.”

838, at pp. 843-844; *Bakersfield Elementary Teachers Association*, *supra* 145 Cal.App.4th at p. 1286.) Employees hired under section 44909 work in programs and projects that are anticipated to be temporary in nature and the school districts are afforded the flexibility to terminate these employees without the formalities of regular teachers. (*Bakersfield Elementary Teachers Association*, *supra* 145 Cal.App.4th at p. 1287.)

District's ability, however, to terminate certificated employees without notice under this provision requires that the specially funded projects or programs be expired or terminated. This is a very important distinction under section 44909. The employee may be terminated under section 44909 without regard to rights and notice afforded probationary and permanent employees only when the contract or specially funded project expires. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.*, *supra*, 98 Cal.App.4th 838, at pp. 843-844; *Bakersfield Elementary Teachers Association*, *supra* 145 Cal.App.4th at p. 1286.) "Certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired." (*Id.* at p. 1287; *see also Hart Federation of Teachers v. William S. Hart Union High Sch. Dist.* (1977) 73 Cal.App.3d 211, 215-216.)

The evidence at hearing did not establish that categorically funded programs in which Respondents worked had been terminated or expired, or would expire before the 2008-2009 school year. Both Terry Walker, Assistant Superintendent, and Lisa Howell, Director of Fiscal Services, could not definitively state with any level of certainty that the categorically funded programs would be terminated for the 2008-2009 school year. Although the funding for categorical programs such as CSR, EID, and the federal Title I program, and other state and local programs are funded on a year-to-year basis, and the District must apply and certify compliance with program requirements to receive funding, in the past these programs have been consistently refunded.

To be sure, the evidence established that the District's budget would be likely reduced by 12.5 million dollars, and categorically funded programs would be impacted or affected. However, mere reduction of the funding or the indeterminate duration of funding for these programs is not determinative. (*See Zalac v. Governing Bd. of Ferndale Unified School Dist.*, *supra* 98 Cal.App.4th 838, at pp. 846 ("under section 44909 the uncertainty of future funding is no longer explicitly controlling—perhaps because there is an element of such uncertainty for all programs, even those authorized indefinitely.")) Rather under section 44909, the programs or contracts supporting the categorically funded positions must terminate or expire for the District to avoid providing notice afforded to permanent and probationary employees. The evidence did not establish that the funding for District's categorical funded programs and projects had expired or would terminate for the 2008-2009 school year. Those Respondents in hired into categorically funded programs are entitled to notice and protections afforded probationary and permanent employees by section 44949 and 44955.

This conclusion is not adverse to the legislative intent expressed in the Code that certificated employees should be afforded certain rights to protect against arbitrary dismissal.

"Teachers, certificated employees, are given rights through a rather complex system designed to give a degree of academic tenure in direct relation to years of employment. Additional service by a teacher imposes a limitation on the power of the institution's governing body to terminate employment. The Legislature prevents the arbitrary dismissal of certificated employees who have obtained positions of a settled and continuing nature ... by requiring notice and hearing before termination .... To fill its short range needs, however, a district may employ a certificated person as a temporary employee ... who may as a general rule be dismissed at the pleasure of the district ....[¶] The Legislature, however, has restricted the flexibility of a school district in the continued use of temporary employee..., for otherwise the benefits resulting from employment security for teachers could be subordinated to the administrative needs of the district.... Temporary classification, narrowly defined by the Legislature, must be strictly construed." (*Zalac v. Governing Bd. of Ferndale Unified School Dist.*, *supra*, 98 Cal.App.4th 838, at pp. 843-844; *Haase v. San Diego Community College Dist.* (1980) 113 Cal.App.3d 913, 917-918.)

This point is further illustrated by the Education Code provisions addressing temporary employment of certificated employees. Except for certain specific provisions authorizing substitute, temporary, or permanent classification, the Legislature does not provide for the expansive use of the "temporary employee" classification. Unlike other statutory provisions within the Education Code that specifically address temporary employees and the classification of temporary or substitute employees (sections 44917, 44919, 44920, 44921 and 44986), section 44909 does not indicate that certificated employees may be classified as temporary employees. Section 44909 does not specifically use the term "temporary" or identify certificated employees working in categorically funded programs as "temporary employees." However, section 44915 provides that "[g]overning boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees." (Ed. Code, § 44915.) Thus, where the statutory provision does not specifically provide for a permanent, substitute, or temporary classification, the default classification is probationary.

The Legislature has made clear its intent to narrowly construe the application of temporary classifications to certificated employees. Although section 44909 allows some flexibility for the District to terminate certificated employees hired in categorically funded positions, this flexibility does not include classifying teachers hired under this provision as temporary. Such an interpretation of section 44909 would establish a huge loophole in the Education Code which would allow Districts to retain certificated employees in temporary classifications indefinitely who have worked 75 percent of the calendar school year for multiple years. At least seven of the Respondents in this case have been employed two or more consecutive years by the District in categorically funded positions in which they worked 75 percent of the calendar school year but were retained in temporary employee classifications. These employees' elevation to probationary status would be dependent solely upon the discretion of the District. Without clear intent from the Legislature, the District may not interpret section 44909 to authorize this type of temporary classification.

Accordingly, employees hired into categorically funded positions under section 44909 are presumptively probationary employees. ( Ed. Code, § 44915; *Hart Federation of Teachers v. William S. Hart Union High Sch. Dist.*, *supra*, 73 Cal.App.3d at pp. 215-216; *Bakersfield Elementary Teachers Association*, *supra*, 145 Cal.App.4th at pp. 1285-1287.)

Employees in Categorically Funded Programs Are Not Temporary as a Matter Of Contract

9. Finally, the District argues that because Respondents mutually agreed to the terms and conditions of the temporary employment agreements, they may not now dispute their classification a temporary employee in this proceeding. Although the District's temporary agreements and notification procedures satisfy statutory requirements under section 44916, these agreements may not be used to nullify protections afforded employees under the Education Code. "Any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void." (Ed. Code, § 44924.) Respondents in section 44909 categorically funded positions may not be relegated to temporary status by operation of contract, when in fact, their classifications are presumptively probationary under the section 44915 and the rulings in *Hart Federation of Teachers* and *Bakersfield Elementary Teachers Association*.

Effect of "Precautionary Notices"

10. Notwithstanding the determination that Respondents in categorically funded positions are deemed probationary employees, the District contends that these employees were afforded the notice protections of probationary and permanent employees by reason of the "precautionary notice" given in this case and their participation in the lay-off hearing. Although Respondents Chewning, Conferti, Kulungian-Mendoza, Levy, Lamanno-Linzey, Mirshafiee, Stenberg, J. Stewart, T. Stewart, Taylor, and Venlet were all properly noticed pursuant to sections 44949 and 44955, it can not be determined on the evidence whether Respondents would be subjected to the reduction in the particular kinds of services included in the Governing Board's Resolution No. 07-08-25, listed in factual finding number 10.

Once the Respondents were determined to be probationary employees, they must be considered in light of other probationary employee employed by the District when considering lay-off reductions. The District failed to include Respondents in the seniority list provided at hearing, thus, it can not be determined where Respondents would rank with other probationary employees within the District. (*Bakersfield Elementary Teachers Association*, *supra*, 145 Cal.App.4th at p. 1301.) Moreover, the District's Resolution No. 07-08-25 resolved that only temporary employees would be released in order to effectuate the proposed reductions in particular kinds of services in factual finding number 10, and that probationary and permanent employees would not be affected.

Neither the District nor Respondents produced any evidence regarding Respondents' seniority, credentials, service time, tie-breaking criteria, or any other data that would be relevant to determining whether Respondents should be subject to the reduction in particular kinds of services listed in the Governing Board's resolution. Absent this evidence,

Respondents, who are deemed probationary employees, in categorically funded programs and positions can not be dismissed subject to Resolution No. 07-08-25, in factual finding number 10.

WHEREFORE, the Administrative Law Judge makes the following ORDER:

**ORDER**

1. The Accusation against Respondents Belinda Averill, Kelli Bourne, Vincent Fabella, Dominic Fratantero, Jill George, Edward Johnson, Estella Salter, Michelle Tseng, and Elizabeth Wieske is sustained in as much as these are temporary certificated employees who have been released but nevertheless provided timely and proper notice of their termination due to the reduction or elimination of particular kinds of services in the Governing Board's Resolution No. 07-08-25.
2. The Accusation is dismissed against Respondents Roberta Chewning, Maria Conferti, Sheri Kulungian-Mendoza, Eileen Levy, Donna Lamanno-Linzey, Linda Mirshafiee, Joyce Stenberg, Jan Stewart, Tonia Stewart, Elizabeth Taylor, and Rebecca Venlet, and the District may not notify Respondents that their services will not be needed for the 2008-2009 school year due to the reduction of particular kinds of services.

DATED: May 16, 2008

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MICHAEL A. SCARLETT  
Administrative Law Judge  
Office of Administrative Hearings