

BEFORE THE  
GOVERNING BOARD OF THE  
ANTIOCH UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against  
The Certificated Employees Identified in  
Exhibit A,

OAH No. 2008030579

Respondents.

**PROPOSED DECISION**

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings heard this matter on April 16, 2008, in Antioch, California.

Joshua A. Stevens and Roy Combs, Attorneys at Law, represented the Antioch Unified School District.

Dale Brodsky, Attorney at Law, represented respondents.

The matter was submitted on April 16, 2008.

**FACTUAL FINDINGS**

1. Deborah Sims, Ed.D., made and filed the Accusation against respondents, those individuals listed on Exhibit A hereto, in her official capacity as the Superintendent of Schools (Superintendent) of the Antioch Unified School District (District).
2. Respondents are all certificated employees of the District.
3. On March 12, 2008, the Governing Board of District adopted Amended Resolution No. 2007-2008-03 finding it was necessary to terminate certain employees due to a reduction or discontinuance of the following particular kinds of services for the 2008-2009 school year:

**Administrative Positions:**

Administrator – Extended Learning	1.0 F.T.E.
Assistant Director – Special Education	2.0 F.T.E.
Assistant Superintendent, Elementary Education	1.0 F.T.E.

Assistant Superintendent, Secondary Education	1.0 F.T.E.
Chief Academic Officer	1.0 F.T.E.
Coordinator - Educational Technology	1.0 F.T.E.
Coordinator - EL	1.0 F.T.E.
Coordinator - Student Support Services	1.0 F.T.E.
Director - Assessment	1.0 F.T.E.
Director - Curriculum	1.0 F.T.E.
Director - Federal and State Programs	1.0 F.T.E.
Director - Human Resources	1.0 F.T.E.
Director - Special Education	1.0 F.T.E.
Director - Student Support Service	1.0 F.T.E.
District Program Specialist	1.0 F.T.E.
Elementary Vice Principals	3.0 F.T.E.
High School Reform Coordinator	1.0 F.T.E.
High School Vice Principal	1.0 F.T.E.
Middle School Vice Principal	1.0 F.T.E.

#### **High School Teaching Positions:**

Bilingual Teachers	2.5 F.T.E.
English	3.0 F.T.E.
ROP: Auto	0.2 F.T.E.
ROP: Healthcare Support Services	0.2 F.T.E.

#### **Opportunity School:**

Guidance Specialist	0.2 F.T.E.
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#### **Bridges:**

Guidance Specialist	0.8 F.T.E.
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#### **Prospects:**

Teacher	1.0 F.T.E.
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#### **Middle School Teaching Positions:**

Bilingual Teacher	1.4 F.T.E.
Opportunity Teacher	1.0 F.T.E.

#### **Elementary School Teaching Positions:**

Prep Teachers: PE 6.8 F.T.E., Computers 5.8 F.T.E. Music 0.6 F.T.E.	13.2 F.T.E.
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**Categorical Arts and Music Teacher:** 5.0 F.T.E.

**Special Education Teaching Positions:**

Psychologists 8.0 F.T.E.  
Resource Teachers 4.0 F.T.E.

**Reform Facilitator Coaches** 13.0 F.T.E.

**Project Teachers – Central Office:**

EIA 0.25 F.T.E.  
General Fund 0.30 F.T.E.  
PAR 0.20 F.T.E.  
SLIP 0.20 F.T.E.  
Teacher Credentialing Block Grant 0.40 F.T.E.  
Title II 2.10 F.T.E.  
Title III 0.75 F.T.E.

**Project Teachers – Site:**

Title I 3.0 F.T.E.

**Total Certificated F.T.E. to be Reduced or Eliminated:** 82.70 F.T.E.

The resolution also authorized the Superintendent of District to send appropriate notices to all employees affected by the reduction.

4. On February 27, 2008, the Governing Board of District had previously adopted a resolution approving criteria for determining the relative order of seniority of certificated employees with the same first date of paid service in a probationary position (tiebreak criteria).

5. On March 13, 2008, the Superintendent gave written notice to respondents, pursuant to Education Code sections 44949 and 44955, of her recommendation that notice be given them that their services would not be required for the ensuing school year. The written notice set forth the reasons for the recommendation.<sup>1</sup>

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<sup>1</sup> District also gave notice to all 118 of its temporary employees.



6. Respondents each made a timely request in writing for a hearing to determine if cause existed for not reemploying them for the 2008-2009 school year.

7. All prehearing jurisdictional requirements have been met.

8. District currently employs 20 special education psychologists (some of whom work part-time) in 17.85 F.T.E. positions. As part of its action in reducing services for the 2008-2009 school year the Governing Board of District determined to reduce 8.0 F.T.E. special education psychologist positions. At hearing District indicated that only five special education psychologists will actually be laid off. Two special education psychologists have been reassigned<sup>2</sup> and one was non-reelected. District will retain 9.85 F.T.E. special education psychologists for the 2008-2009 school year.

9. Certain services provided by a 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 and designated instruction and service (DIS) counseling. District determined, after hundreds of hours of data collection from the community, staff, the director and assistant director of the Special Education Department and others, that special education psychologists were performing duties that were not appropriate for their positions. In addition to providing mandated services, the psychologists were providing non-mandated services (e.g., counseling to the general student population), and mandated services that were not required to be performed by psychologists (e.g., preparation of 504 reports and plan management.)

During the 2008-2009 school year District plans to reorganize the Special Education Department to streamline the job responsibilities of special education psychologists. The reorganization will provide a minimum level of service in each mandated service area. Some of the duties now performed by psychologists will be handled by counselors, teachers and other District staff. For example, 504 services, which previously were an essential part of the duties of special education psychologists, will be moved out of the Special Education Department into Student Support Services. The 9.85 F.T.E. psychologists who remain after the proposed reductions will have significantly fewer job duties and will be expected to give priority to providing mandated services to special education students.

In deciding how many F.T.E. to reduce, District tried to anticipate special education enrollment in relation to the streamlined job responsibilities of the special education psychologists. It relied upon data collected over the course of many months from the community and other sources, including the Assistant Director of Special Education, who advised that two fewer special education classes will be required during the upcoming 2008-

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<sup>2</sup> The two special education psychologists also had counseling credentials and were moved into vacant counseling positions.



2009 school year. District also relied upon an anticipated increased usage of behavioral plans. District currently hires a behaviorist as a consultant. Over the past two years District required all of its special education psychologists to receive behaviorist training and certification. District anticipates that behavior plans can now be prepared and implemented much more quickly, which should result in a decreased need for the services of special education psychologists. The probable decrease in special education enrollment and probable decrease in need for the services of special education psychologists were factors in District's decision regarding how many F.T.E. to reduce. District believes that its reorganized Special Education Department will be able to cover all mandated service areas which require participation of a special education psychologist. District represents that if it is not able to provide the required services, it will rehire special education psychologists.

10. Respondents contend District has failed to establish that it will be able to provide all mandated psychological services if the proposed reductions are implemented. Respondents presented evidence that over 2000 special education students are currently enrolled in District and that up to 95 percent of a special education psychologist's time is spent performing mandated services. Janice Yankura, Director of Special Education for District, testified that District is able to maintain compliance with the state requirements for evaluation and support of special education students at the current staffing level, but she expressed doubt that District would continue to be able to do so if the proposed reductions are implemented.

Respondents also presented evidence that the current special education student/psychologist ratio is already higher than the SELPA average, and higher than the ratio in a similar school district. Respondents argue that the ratio will be "even more lopsided" and mandated services to special education students will be further negatively impacted if the proposed reductions are implemented. However, respondents conceded that not every special education student's IEP requires implementation by a psychologist (many do not), that students do migrate out of special education and that there is no legally mandated student to psychologist ratio.

Respondents also complained that District failed to consult with individual special education psychologists or the Special Education Director regarding what services should be cut prior to reorganizing the Special Education Department, and that District ignored the Special Education Director's recommendation that no psychologist positions be reduced. In response, District correctly noted that the particular kinds of services to be reduced is a management decision and that it did not have a legal obligation to consult with individual psychologists or adopt the recommendation of the Special Education Director.

11. 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 have an increased case load and may have to work 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 Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796; *Gallup v. Bd. Of Trustees*. (1996) 41 Cal.App.4th 1571.) This can include rehiring special education psychologists, which District has indicated it will do if it is unable to provide those mandated services which require participation of a special education psychologist.

12. Respondent Blair Wilkins holds a Single Subject Provisional Intern Permit Renewal - English: History. He is currently employed by District as a 1.0 F.T.E. high school history teacher. District has assigned Wilkins a seniority date of August 28, 2007. On March 13, 2008, District applied the tiebreak criteria to six individuals who were currently in a history or social science assignment and who had a seniority date of August 28, 2007. After applying the tiebreak criteria, Blair Wilkins was determined to be the least senior District employee currently teaching in a position requiring a social service credential.

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

14. No certificated employee junior to respondents is being retained to perform services which respondents are certificated and competent to render.

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

### LEGAL CONCLUSIONS

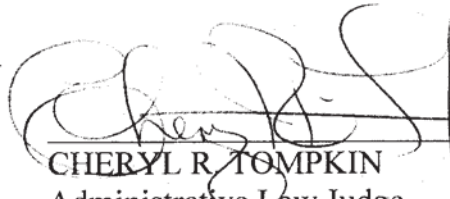
1. Each of the services set forth in Finding 3 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell Elementary Teachers Assn. v. Abbot, supra*, 76 Cal.App.3d 796; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689.) The 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 Antioch 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.

ORDER

Notice may be given to respondents that their services will not be required for the 2008-2009 school year because of the reduction or discontinuation of particular kinds of services.

DATED: 9/2/08

  
CHERYL R. TOMPKIN  
Administrative Law Judge  
Office of Administrative Hearings



**EXHIBIT A**  
(List of Respondents)

- 1 BOER, ERIN
- 2 BRANDT-AGUILERA, KRISTIN
- 3 CONIGLIO, GIANNA
- 4 EBERTS, MEGAN
- 5 ESTEPA, MELISSA
- 6 HARTWIG, REGINA
- 7 OCHOA, RAYMOND
- 8 PENEYRA, JUDITH
- 9 WILKINS, BLAIR