

BEFORE THE
BOARD OF TRUSTEES
ANAHEIM UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

Certain Probationary and Permanent
Certificated Employees and Temporary
Contract and Categorical Certificated
Employees of the Anaheim Union High
School District,

Respondents.

OAH Case No. 2012030990

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 23, 2012, in Anaheim.

The Anaheim Union High School District was represented by Jack M. Sleeth, Jr., and Jeanne Blumenfeld, Attorneys at Law, of the law firm of Stutz, Artiano, Shinoff and Holtz.

Respondents Anita Buers, Justin Buz'Zard, Melanie Evans, Kerri Fenton, Yolanda Flores-Smith, Michael Franks, Toni Godfrey, Laura Gonzalez, Heather Gruenthal, Jack Gupton, Linda Hodgin, Phillip Hohensee, Marilyn Konowal, Kathie Maier, Richard Martin, Erin McCowan, Kathryn Pavel, Suzanne Rahn, Joey Russell, and Lisa Tomeo were represented by Kent Morizawa, Attorney at Law, of the law firm of Reich, Adell, and Cvitan. Mónica Mora, Teacher Advocate, West Orange County United Teachers, was also present.

Respondents Camille Albrecht and Debra Seufert were present during the hearing and represented themselves. Respondents Janae Nafziger and Terri Vu were not present or represented at the hearing.

Oral and documentary evidence having been received and arguments heard, the Administrative Law Judge submitted this matter for decision on April 23, 2012, and finds as follows:

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FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on April 9, 2012, the Accusation was made and filed by Russell Lee-Sung in his official capacity as the Assistant Superintendent for Human Resources (Assistant Superintendent) of the Anaheim Union High School District, State of California (District).

2. Respondents, and each of them, are probationary or permanent certificated employees or temporary certificated employees of the District who are employed as teachers, counselors, and librarians.

3. The District is a high school district in Orange County comprised of eight comprehensive high schools, eight junior highs schools, adult and continuation schools, and a special education program. The District serves and educates over 30,000 pupils from the sixth through twelfth grade.

4. Because of the continuing downturn in economic conditions at the state and national levels, the anticipated reduction in State and categorical funding due, in part, to the possible shortfall in State revenues and the Governor's Tax Initiative, and concomitant effects thereof upon the revenues and finances of the District, the Assistant Superintendent has determined that the District must reduce expenditures to maintain a balanced budget and its reserve and to pay expenses. The Assistant Superintendent further determined that the District's budget must be curtailed by \$24 million for the 2012-2013 school year. On March 13, 2012, the Assistant Superintendent recommended to the Board of Trustees of the District (Governing Board) that particular kinds of services be reduced or discontinued no later than the beginning of the 2012-2013 school year.

5. (A) On March 13, 2012, in Resolution No. 2011/12-HR-07, and pursuant to Education Code sections 44949 and 44955 and upon the recommendation of the Assistant Superintendent, the Governing Board resolved that it was in the best interests of the District and its students to reduce or discontinue certain particular kinds of services no later than the beginning of the 2012-2013 school year and to decrease the number of certificated employees equal in number to the positions affected in the reduction or discontinuance of particular kinds of services. The Governing Board determined that it was necessary to reduce or discontinue particular kinds of services even after having considered all positively assured attrition due to resignations, retirements, and other permanent vacancies in reducing services.

(B) On March 13, 2012, in adopting Resolution Number 2011/12-HR-07, the Governing Board resolved to reduce or discontinue particular kinds of services in management, counseling, library services, supplemental instructional support, and staffing in particular subject areas and programs to achieve more appropriate staffing ratios, by 51.00 full-time equivalent (FTE) positions. In addition, the Governing Board resolved that, due to a recent court decision regarding temporary certificated employees paid with categorical funds, it is necessary to provide preliminary notices to 61 temporary certificated employees,

“who may be affected by the reductions as stated in this resolution,” that their services will not be needed for the ensuing school year. The decrease in probationary and permanent certificated employees is in addition to the release of the 61 temporary certificated employees.

(C) On March 13, 2012, the Governing Board directed the Superintendent or her designated representative to send appropriate notices to all certificated employees whose positions will be affected by this reduction or elimination of particular kinds of services that their services will not be required for the next school year.

6. On or about March 14, 2012, pursuant to Resolution Number 2011/12-HR-07 and the provisions of Education Code sections 44949 and 44955, the Assistant Superintendent, as the designee of the Superintendent, gave written preliminary notices to probationary and permanent certificated employees that their services may not be required for the ensuing 2012-2013 school year because the Governing Board had determined to reduce or discontinue certain particular kinds of services due to “fiscal realities of the shortfall of state funding” and had resolved that it was necessary to layoff certificated employees under Education Code section 44955. The notices informed probationary and permanent certificated employees of their right to request a hearing to determine whether there is cause for not reemploying them for the ensuing school year and included copies of the Governing Board’s resolution and Education Code sections 44955 and 44949, and a Request for Hearing Form.

7. On or about March 14, 2012, pursuant to Resolution Number 2011/12-HR-07 and the provisions of Education Code sections 44949 and 44955, the Assistant Superintendent also gave written preliminary notices to temporary contract and categorical certificated employees that the Governing Board had determined that their services may not be required for the ensuing 2012-2013 school year. The notices informed the temporary contract and categorical certificated employees that some temporary positions will be eliminated due to the projected elimination or reduction of categorical or temporary funding or due to teachers returning from leaves. The notices also stated that the Governing Board had determined to reduce or discontinue certain particular kinds of services for the ensuing school year and that a recent court case had caused uncertainty about the continued employment of temporary certificated employees who are paid by categorical funds. The notices informed temporary contract and categorical certificated employees of their right to request a hearing to determine whether is cause for not reemploying them for the ensuing school year and included copies of the Governing Board’s resolution and Education Code sections 44949, 44951, and 44955, and a Request for Hearing Form.

8. The District obtained the signatures of probationary and permanent certificated employees and temporary contract and categorical certificated employees on Acknowledgements of Receipt to demonstrate that they received the preliminary notices by March 15, 2012. The District gave preliminary notices to 25 probationary and permanent certificated employees and 61 temporary contract and categorical certificated employees.

9. The District's preliminary notice of layoff dated March 14, 2012, was sufficient under Education Code sections 44949 and 44955 in providing written notice to probationary and permanent certificated employees and temporary contract and categorical certificated employees that their services will not be required for the ensuing school year. No claims or complaints were raised at the hearing by any certificated employee or respondent that the preliminary notice was deficient in any respect.

10. On or about April 9, 2012, the Assistant Superintendent timely served those permanent and probationary certificated employees and temporary contract and categorical certificated employees who had requested a hearing, with an Accusation, Statement to Respondent, copies of pertinent sections of the Government Code and Education Code, a blank Notice of Defense form, and Notice of Hearing. Respondents are those certificated employees who filed Notices of Defenses, acknowledging their receipt of the Accusation, requesting a hearing to determine if there is cause not to employ them for the ensuing school year, and objecting to the Accusation. All prehearing and jurisdictional requirements have been met by the parties.

11. On March 13, 2012, in Resolution Number 2011/12-HR-07, and pursuant to Education Code section 44955, the Governing Board of the District adopted a tie-breaking resolution that stated, "as between employees who first rendered paid service on the same date, the order of termination shall be based solely on the basis of the need of the District and the students thereof." In fact, the tie-breaking criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date are set forth in the collective bargaining agreement between the District and its teachers.

12. On March 13, 2012, pursuant to Resolution Number 2011/12-HR-07, the Governing Board resolved and took action to reduce or discontinue certain particular kinds of services or programs offered by the District for the 2012-2013 school years in the following FTE positions:

<u>Services</u>	<u>FTE</u>
Management Positions	4.00
Counselors	1.00
Librarians	8.00
Supplemental Instructional Support	24.00
Classroom Teachers	14.00

The reduction or discontinuance of the particular kinds of services set forth hereinabove constitute a total of 51.00 FTE.

13. The services set forth in Finding 12 above are particular kinds of services performed by certificated employees of the District which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Governing Board to reduce or discontinue these services is within its sound discretion and not arbitrary or capricious. The reduction or discontinuance of these particular kinds of services is related

to the welfare of the District and its pupils and is necessary in order for the District to maintain a balanced budget. Following the reduction or discontinuance of these particular kinds of services, the District will still be able to provide mandated and essential services.

14. (A) Citing the case of *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, counsel for certain respondents argued that the District's reduction of classroom teachers by 14 FTE and supplemental instructional support by 24 FTE did not constitute reductions in particular kinds of services within the meaning of Education Code section 44955, subdivision (b). The District considers supplemental instructional support to be temporary teachers in categorically funded positions or programs. Counsel's argument is not persuasive.

(B) A school district facing an anticipated unbalanced budget and financial problems may reduce the number of probationary and permanent employees for such economic reasons but only as authorized by Education Code section 44955. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-854; *Gassman v. Governing Board* (1976) 18 Cal.3d 137, 147) A school district may reduce services within the meaning of Education Code section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) As long as there is a change in the method of teaching or in the particular kind of service in teaching a subject, a particular kind of service provided in excess of any statutorily mandated minimum can be reduced or eliminated pursuant to section 44955. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 811-812.) 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, supra*, 76 Cal.App.3d at 807-808.)

(C) In the *San Jose Teachers* case, the court considered the issue whether classroom teaching in elementary schools was a particular kind of service that can be reduced. Unlike in secondary schools where specific, identifiable subjects such as math or science are taught by designated credentialed teachers at particular hours or periods, the court found that instruction in elementary school is given in several subjects by the same teacher in the same classroom throughout the school day. Because elementary schools are limited to identifying a service simply as classroom teaching, the court found that classroom teaching at the elementary level must be recognized as a particular kind of service subject to reduction as long as statutory minimum levels are maintained. The *San Jose Teachers* court, however, did not hold that classroom teaching in secondary schools is not a particular kind of service subject to reduction or discontinuance, or that a school district is precluded from designating classroom teaching in secondary schools as a particular kind of service, under Education Code section 44955, subdivision (b). Accordingly, classroom teaching and supplemental instructional support in the circumstances of this matter are considered particular kinds of services that may be subjected to reduction or discontinuance under section 44955.

15. (A) The District prepared and/or updated a certificated seniority list, which identifies in inverse order certificated employees by their names, seniority rankings by first dates of first paid service, job information (status, school site, department, and FTE position), and credentials and authorizations. In addition, the certificated seniority list includes a separate list of temporary contract and categorically employees in order of the dates of their temporary contracts. The District also prepared a certificated seniority list by departments.

(B) The Assistant Superintendent calculated and prepared, but not necessarily in this order, charts of necessary staffing ratio changes at two alternative education sites (Exh. 7) and for physical education sections at two high schools (Exh. 8); projections of necessary reductions in certificated staff due to reduced categorical funding for the next school year (Exh. 4); a list of Temporary Teachers for the current school year with the reasons, funding source, and dates of their temporary employment (Exh. 6); a chart of the categorical funded and job share positions for the current school year (Exh. 5); and projections of necessary certificated positions for core classes at the three sites that will receive categorical funding from the Quality Education Investment Act (QEIA) for 2012-2013 (Exh. 9).

(C) Before and after the Governing Board adopted Resolution Number 2011/12-HR-07 ordering the reduction of particular kinds of services, the Assistant Superintendent determined how positions had to be reduced or eliminated due to staffing ratio changes and reductions in categorical funding, the subject matter assignment of the District's 62 temporary certificated employees in categorically funded positions or programs, and the number of probationary or permanent employees who are planning to share jobs, retire, and take or return from leaves (Exh. 2 and 3). The Assistant Superintendent then determined it was necessary to serve preliminary notices upon all of the 62 temporary certificated employees in categorical programs and to 15 probationary and permanent certificated employees, including those probationary and permanent certificated employees who were determined to be eligible to be reassigned to different positions in accordance with their certifications.

(D) The Assistant Superintendent reviewed the subject areas or departments which are subject to reduction, including English, math, science, social science, music, art, business, industrial foreign language, physical education, health, and special education, and determined how many of the least senior temporary certificated employees in each subject area must be laid off or released from their contracts. After taking into account the release of temporary contract and categorically certificated employees, the Assistant Superintendent identified the least senior probationary or permanent certificated employees assigned to the subject areas being reduced. The Assistant Superintendent reviewed the seniority, credentials, and subject areas of service of these probationary and certificated employees, including librarians, and then determined whether they hold credentials and authorizations in other areas of service or teaching and were entitled to bump other less senior probationary and permanent certificated employees and should be reassigned to other subject areas. The Assistant Superintendent determined and prepared a Displacement Chart (Exh. 15), showing the bumping, reassignments, and layoffs of certificated employees according to subject areas.

The District demonstrated that it properly identified for layoff the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued and its determinations were not arbitrary or capricious.

16. Further, the District has obviated the need to reduce or discontinue all of the particular kinds of services described in Finding 12 above and to terminate the employment of all respondents given preliminary notice and Accusations by taking into account the personnel changes and attrition due to retirements and resignations of individual certificated employees within the District. The District will continue to reasonably determine and account for what will be positively assured attrition among its certificated staff for the ensuing 2012-20123 school year and reduce by corresponding number the number of certificated employees whose employment must be terminated due to the present reduction or discontinuance of particular kinds of services.

Withdrawals of Accusations

17. (A) During the hearing, the District withdrew the Accusations and, in effect, rescinded the preliminary notices issued to the following respondents who are probationary or permanent certificated employees: Keri Fenton (982), Yolanda Flores-Smith (1243), and Laura Gonzalez (1226).¹ In addition, the District withdrew the Accusations and, in effect, rescinded the preliminary notices, issued to the follow respondents who are temporary certificated employees: Camille Albrecht, Beverly Berekian, Toni Godfrey, Jack Gupton, Janae Nafziger, and Lisa Tomeo. These respondents cannot be given a final layoff notice and will be employed with the District in the next school year.

(B) According to the Displacement Chart (Exh. 15), the District was planning to reassign Mirko Lopez (1246), Spanish teacher, to a position in math due to the possible bumping of a Spanish teacher by a librarian with the seniority and credentials to move back into the classroom and teach Spanish. However, while he has authorizations to teach biology, geosciences, and social science, Lopez does not have a credential or authorization to teach math. It was not established whether the District still plans to reassign Lopez but it is assumed with the withdrawal of the Accusation against Flores-Smith, a fellow Spanish teacher with the same seniority date, that Lopez is likewise not subject to being laid off.

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¹ The number in parentheses following the name of each respondent or certificated probationary or permanent employee corresponds to his or her rank or place on the Seniority List relative to other certificated employees. There is no number following the name of a temporary certificated employee.

Music

18. Respondent Debra Seufert is a temporary certificated employee who teaches music and/or vocal music at Walker Junior High School. She holds a life single subject credential in music and a clear single subject credential in English. Seufert was given a preliminary notice and remains subject to layoff pursuant to the reduction of the particular kind of service in music. One position in music must be reduced or eliminated due to the expiration of categorical funding under the American Recovery and Reinvestment Act. Respondent Seufert may be given a final notice and laid off from her temporary employment.

Librarians

19. Respondents Anita Buers (84), Justin Buz'Zard (259), Heather Gruenthal (163), Linda Hodgin (18), Marilyn Konowal (378), Kathie Maier (99), and Suzanne Rahn (956) are librarians who received preliminary notices that their services will not be required for the ensuing school year due to the reduction of the particular kind of service of librarians by 8.0 FTE. In addition, permanent certificated employee Deanna Guzman (485) received a preliminary notice but apparently did not file a request for hearing or Notice of Defense.

20. (A) In addition to a teacher librarian services credential, Guzman holds a clear single subject credential in Spanish. The Assistant Superintendent has determined that Guzman is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in Spanish.

(B) In addition to a library media teacher services credential, respondent Maier holds a clear single subject credential in physical education. The Assistant Superintendent has determined that Maier is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in physical education.

(C) In addition to a library media services credential, respondent Hodgin holds a credential or authorizations in special education to act as a resource specialist and to teach pupils who are severely handicapped, learning handicapped, and mentally retarded. The Assistant Superintendent has determined that Hodgin is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in special education.

(D) In addition to a standard librarian credential, respondent Konowal holds a life secondary credential in history. The Assistant Superintendent has determined that Konowal is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in social science.

(E) In addition to a library media teacher services credential, respondent Rahn holds a clear single subject credential in English. The Assistant Superintendent has

determined that Rahn is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in English.

(F) In addition to a clear library media credential, respondent Gruenthal holds a clear single subject credential in English. The Assistant Superintendent has determined that Gruenthal is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in English.

(G) In addition to a clear library media teacher credential, respondent Buz'Zard holds a clear single subject credential in English. The Assistant Superintendent has determined that Buz'Zard is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in English.

(H) In addition to a library media services credential, respondent Buers holds a clear single subject credential in English. The Assistant Superintendent has determined that Buers is certificated and competent and has the seniority to bump or displace a less senior certificated classroom teacher in English.

21. Based on their credentials, competencies, and seniority dates, the District thus plans to reassign certificated employee Guzman and respondents Maier, Hodgin, Konowal, Rahn, Gruenthal, Buz'Zard, and Buers from their librarian positions to the classroom for the ensuing school year and does not plan to lay them off. The District gave what may be viewed as precautionary preliminary notices to these librarians because each of them will lose a librarian's stipend once he or she is reassigned to the classroom. The District may reassign these respondents to the classroom, allow them to bump less senior certificated employees, and terminate their librarian stipends. The District may reassign them back to their librarian positions in the order of seniority in the event that funding is received so that it is not necessary to reduce the particular kind of service of librarians by 8.0 FTE. Respondents Maier, Hodgin, Konowal, Rahn, Gruenthal, Buz'Zard, and Buers may not receive a final layoff notice.

22. Respondent Buers decries the reduction of teacher librarians within the District, emphasizing that librarians play an important role in improving the academic performance of schools and pupils by promoting literacy, providing curriculum support, and integrating information and technology literacy. Buers points out that the reduction of librarians will leave the District with only one librarian for its 18 schools and 33,000 pupils and that this ratio is far below the state recommended librarian-student ratio. The District does not disagree and will return the librarians to the librarian positions if it receives sufficient funding to do so. Education Code section 18120 does permit a school district to appoint or employ librarians to staff its librarians but does not require a school district to employ certificated librarians to provide required library services. (*Campbell Elementary Teachers Assn. Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 811.)

English

23. Respondent Phillip Hohensee (1220) is a permanent certificated employee and English teacher at Cypress High School. He holds a clear single subject credential in English. Hohensee was served with a preliminary notice and remains subject to layoff due to the reduction of particular kinds of services. The Assistant Superintendent has determined that 17.5 FTE positions in English must be reduced. Eight temporary certificated employees and two permanent employees, Hohensee and Roberta Dieter (1237), who both teach English, remain subject to layoff. Hohensee has more seniority with the District than Dieter or any other permanent employee. Here, an undetermined English teacher has retired or given notice of his or her retirement at the end of the current school year. Due to what appears to be positively assured attrition, the District would need then to layoff only one permanent certificated employee in English and should be able to retain Hohensee. The District, however, has thus far declined to withdraw the preliminary notice and Accusation issued to respondent Hohensee. A school district need not consider positively assured attrition occurring between the date of the preliminary notice and the final notice in determining the number of certificated employees to be terminated by reason of a reduction or discontinuance of a particular kind of service. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at 634-636.) It is within a school district's discretion to determine the extent to which it deems a reduction of services necessary and proper and such decision is made at the time of the final notice. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at 636.)

Science

24. (A) Respondent Richard Martin is a temporary certificated employee who teaches science at Loara High School. He holds preliminary single subject credentials in biological science, geosciences, social science, and English.

(B) Respondent Martin started teaching for the District as a long-term substitute in the spring semester of the 2010-2011 school year. On August 5, 2011, the Assistant Superintendent approved the personnel request or requisition to employ Martin as a long-term substitute teacher of earth science at Loara High School beginning on August 25, 2011, and ending on a date to be determined. The reason for the personnel request and approval thereof was that the District needed a long-term substitute to replace certificated teacher John Jawor who was on leave. As such, Martin began teaching at Loara High School as a long-term substitute at the beginning of the fall semester of the 2011-2012 school year.

(C) On or about November 4, 2011, the Human Resources office asked Martin to come into the office to sign an Offer of Temporary Certificated Employment. On November 7, 2011, Martin signed the temporary contract, which stated that his services as a temporary teacher were to begin on October 31, 2011. Martin has continued teaching

biology or earth science at Loara High School. On March 14, 2012, he was given a preliminary notice that his services were not needed for the next school year.

(D) Under these circumstances, the evidence supports the conclusion that respondent Martin is a probationary employee for the current 2011-2012 school year under Education Code section 44916 because he was not notified of his employment status or salary on his first date of paid service with the District under *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911. Nevertheless, even as a probationary employee, Martin is the least senior probationary certificated teacher in science or English in the District. Since he was given a preliminary notice, respondent Martin may be terminated pursuant to the current reduction of particular kinds of services.

Special Education

25. The Assistant Superintendent determined that the District must reduce services in special education by 6.0 FTE or positions since the change of staffing ratio requires a reduction of 4.0 FTE and two more senior permanent certificated employees, librarian Linda Hodgins (18) and an administrator, have the appropriate credentials and seniority to bump into special education and displace less senior certificated employees. The District gave preliminary notices to respondent Kathryn Pavel, respondent Joey Russell (1253), respondent Erin McCowan (1247), and permanent employee Jennifer Mele (1236), and continues to seek their layoff.

26. (A) Respondent Kathryn Pavel is a temporary certificated employee and special education teacher in the mild and moderate program at Magnolia High School. She holds a Level II special education credential in mild and moderate disabilities and autism. On March 14, 2012, Pavel was served with a preliminary notice that her services were not needed for the ensuing school year and she is subject to release from her temporary contract pursuant to the reduction of the particular kind of services in special education.

(B) On August 10, 2011, respondent Pavel signed her Offer of Temporary Certificated Employment. She was hired as a leave replacement under Education Code section 44920 for permanent certificated employee Robert Frasco (665), a physical education teacher, and began teaching as a temporary certificated employee. Frasco was teaching in the special education program but then had an undetermined problem in obtaining his special education credential or authorization. He was placed in a position at the District office that has not required him to use his physical education credential or to teach special education.

(C) In this proceeding, counsel for certain respondents argued that respondent Pavel should be classified as a probationary employee under Education Code section 44916 because she was not hired as a temporary certificated employee for a teacher on leave under Education Code section 44920. Counsel's argument has merit. In the recent case of *Stockton Teachers Ass'n CTA/NEA v. Stockton Unified School Dist.* (2012) 204 Cal.App.4th 446, the Court of Appeal, Third District, stated that the Education Code specifically

authorizes a temporary classification for certificated employees in only a few instances, including Education Code section 44920. The classification of a certificated employee as a temporary employee is narrowly defined by the Legislature and must be strictly construed. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 843.) A person who has been determined to be qualified to teach may be classified as a temporary employee only if the person occupies a position defined by law as temporary. (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1277.) Even if an employee agrees in writing to be hired as a temporary employee, such writing or contract is not determinative of his or her classification as a temporary employee unless the classification is authorized by statute. (*Stockton Teachers Ass'n CTA/NEA v. Stockton Unified School Dist.*, *Ibid.* As a general rule, probationary status is the default classification when the Education Code does not specify another classification. (*California Teachers Ass'n v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146; Ed. Code, § 44915.)

(D) Under Education Code section 44920, a school district may employ any person holding the appropriate certification documentation as a teacher for a full year, but not less than one semester, to replace a certificated employee who has been granted leave for the semester or year or is experiencing a long-term illness. The school district may then classify such replacement leave teacher as a temporary employee. Here, respondent Pavel was hired to replace certificated employee Frasch who was purportedly on a leave of absence. However, the evidence showed that Frasch is not, in fact, on a leave of absence. Accordingly, Pavel cannot be classified as a temporary employee under section 44920 and must be classified as a probationary employee.

(E) Even as a probationary employee, however, respondent Pavel remains along with respondents Russell (1253) and McCowan (1247), and permanent employee Mele (1236) among the least senior probationary or permanent certificated teachers in special education. Respondents Pavel, Russell, and McCowan and permanent employee Mele were all served with preliminary notices and may be terminated pursuant to the current reduction of particular kinds of services.²

Temporary Categorical Employees

27. (A) Respondents Melanie Evans, Toni Godfrey, Lisa Tomeo, Richard Martin, and Beverly Berekian are temporary certificated employees whose teaching positions are funded by the Quality Education Investment Act (QEIA), a state categorical funding program administered by the California Department of Education (CDE) which is not necessarily required by federal or statute statutes. QEIA provides funding to school districts for allocation to specific low performing schools as established by the schools' low rankings in

² No claim or evidence was presented regarding probationary certificated employee Lauren Klatzker (1245), who is a special education teacher and holds a preliminary special education credential in the area of mild and moderate disabilities.

the Academic Performance Index. Funding under QEIA supports activities to improve academic instruction and pupils' academic performance. QEIA is not a categorical funding program that is set to expire at the end of the current 2012-2013 school year and, in fact, will continue to operate and provide funds to eligible school districts through the 2014-2015 school year.

(B) For the 2011-2012 school year, the District received \$9.8 million in QEIA funds, which included carryover funds from the prior school year. For the 2012-2013 school year, the District anticipates receiving approximately \$6.1 million in QEIA funds, which together with the carryover of funds will amount to \$8.1 million, or \$1.7 million less than the current school year. The QEIA funds are allocated to three District schools: Anaheim High School, South Junior High School, and Sycamore Junior High School. The District is required to use the QEIA funding to help these schools exceed growth in test scores, reduce teacher to pupil ratios, and increase the number of highly qualified teachers through activities including professional development. For these three schools, the District is required to file reports with the CDE to show compliance with these goals.

(C) Respondents Evans and Berekian teach math and science, respectively, at Magnolia High School and funding for their positions comes from QEIA funds allocated to Anaheim High School. Respondents Martin and Tomeo teach science at Loara High School and funding for their positions comes from QEIA funds allocated to Anaheim High School. Respondent Godfrey teaches social science at Lexington Junior High School and funding for her position comes from QEIA funds allocated to Sycamore Junior High School.

28. (A) In this proceeding, respondents Evans, Berekian, Martin, Tomeo, and Godfrey, and each of them, received preliminary notices that their temporary contract services will not be needed for the next school year. Their counsel argued that, because they are being terminated from their QEIA categorically funded positions before the expiration of said categorical program, these respondents should be treated as probationary employees, rather than temporary employees, and receive seniority accruals, pursuant to the recent case of *Stockton Teachers Ass'n CTA/NEA v. Stockton Unified School Dist.* (2012) 204 Cal.App.4th 446. In the *Stockton* case, the Court of Appeal held that, before a school district can terminate an employee hired to perform services for a contract or categorically funded project as a temporary employee under Education Code section 44909, the school district must (1) show the employee was hired to perform services under a contract with public or private agencies or categorically funded projects which are not required by federal or state statutes; (2) identify the particular contract or project for which services were performed; (3) show that the particular contract or project expired; and (4) show that the employee was hired for the term of the contract or project. If the school district does not prove these four elements under Education Code section 44909, the employee must be treated as a probationary employee.

(B) Here, respondents Berekian, Godfrey, and Tomeo are not being terminated from their temporary teaching positions, for the District has offered to re-employ them for the next school year and withdrawn the Accusations against them, as set forth in Finding

17(A) above. As such, it is not necessary to determine if respondents Berekian, Godfrey, and Tomeo are temporary or probationary certificated employees under the *Stockton* case. Respondent Martin has already been found to be a probationary employee due to the late signing of his contract under the *Kavanaugh* case but he is still subject to layoff, as set forth in Finding 24(A) – (D) above.

(C) The District also plans to terminate respondent Evans pursuant to the reduction of particular kinds of services in classroom teaching in math. On July 25, 2011, Evans signed an Offer of Temporary Employment which states that she was “elected to serve as a temporary teacher pursuant to Education Code Sections 44919, 44920 or 44921.” However, it was not established that Evans was hired as a temporary teacher to teach temporary classes not to last more than three months or to supervise athletic activities under section 44919, to be a replacement for a teacher on a leave of absence under section 44920, or as a temporary teacher for the first semester of this school year due to expected decrease in student enrollment under section 44921. As stated in the *Stockton* case, a written agreement to be hired as a temporary employee is not determinative unless the classification is authorized by statute. (*Stockton Teachers Ass’n CTA/NEA v. Stockton Unified School Dist.*, *supra*, 204 Cal.App.4th 446.) Based on the Reasons for Temporary Contracts (Exh. 6), the evidence shows that Evans was hired as a categorical employee for the QEIA program presumably under Education Code section 44909. However, because she is being terminated before the expiration of the QEIA project, which does not expire until the 2014-2015 school year, Evans cannot be found to be a temporary employee of a categorically funded project under section 44909 and must be treated as a probationary employee under the *Stockton* case. As a probationary employee who is certificated and competent to teach math, Evans is nevertheless the most junior of math teachers in the District and remains subject to layoff due to the reduction of particular kinds of services. Respondent Evans may receive a final layoff notice.

29. Any claims and contentions made by the parties at the hearing or in written argument for which there are no specific findings in this Proposed Decision were deemed unproven or were considered irrelevant or surplussage.

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

LEGAL CONCLUSIONS

1. Jurisdiction exists for the subject proceedings pursuant to Education Code sections 44949 and 44955, based on Findings 1 – 29 above. All notices, accusations, and

other related papers and reports required by these Education Code sections have been provided in timely manner and, as such, the parties have complied with the statutory requirements.

2. Cause exists pursuant to Education Code sections 44949 and 44955 to reduce or discontinue by 51.00 full-time equivalent positions the concomitant number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services, based on Findings 1 – 29 above. With respect to those respondents whose employment has been found to be terminable by the District and any other certificated employees who received notices but did not request a hearing, if any, the causes set forth in the Accusations relate solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. Cause does not exist pursuant to Education Code sections 44949 and 44955 to terminate the employment of the following respondents and/or certificated employees: Keri Fenton (982), Yolanda Flores-Smith (1243), Laura Gonzalez (1226), Camille Albrecht, Beverly Berekian, Toni Godfrey, Jack Gupton, Janae Nafziger, Lisa Tomeo, Anita Buers (84), Justin Buz'Zard (259), Heather Gruenthal (163), Linda Hodgins (18), Marilyn Konowal (378), Kathie Maier (99), and Suzanne Rahn (956), based on Findings 17(A) and 19 – 21 above.

4. Cause exists under Education Code sections 44949 and 44955 for the District to serve upon the remaining respondents, notices that their services will not be required for the ensuing 2012-2013 school year because of the reduction or discontinuance of particular kinds of services, as long as those respondents to be served were identified in the Displacement Chart or other exhibits, documents, testimonial evidence presented during the hearing as being the subjects of a final layoff notice.

5. Based on Findings 1 – 29 above, except as provided in this Proposed Decision and/or due to determinations by the District in reasonable exercise of its discretion, there is no certificated probationary or permanent employee or temporary contract or categorical certificated employee with less seniority than any one of respondents who is being retained by the District for the 2012-2013 school year to render services which any one of respondents is certificated and competent to render.

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WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusation issued against respondents or certificated employees named or identified in Findings 17(A) and 19 – 21 above must be dismissed, based on Conclusion of Law 3 above. These respondents or certificated employees may not be given final layoff notices that their services will not be required for the 2012-2013 school year.

2. The Accusation issued against all of the remaining respondents is sustained, based on Conclusions of Law 1, 2, 4, and 5 above. The District may give notice to these respondents, and each of them, in inverse order of seniority that their services will not be required for the ensuing 2012-2013 school year because of the present reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

3. Before giving notice to respondents, the District shall further determine and take into account any additional positively assured attrition among certificated employees in deciding how many respondents should be terminated before the ensuing 2012-2013 school year.

4. The District may give notice to any respondents that their services will not be required for the ensuing 2012-2013 school year because of the reduction or discontinuance of particular kinds of services as long as those respondents were previously identified as being subject to service of a final layoff notice, based on Conclusions of Law 4 above.

Dated: May 4, 2012

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings