

1 MARIANNE REINHOLD (CSB 106568),
2 CARLOS R. PEREZ (CSB 181647) and
3 KENT MORIZAWA (CSB 260453), Members of
4 REICH, ADELL & CVITAN
5 A Professional Law Corporation
6 2670 North Main Street, Suite 300
7 Santa Ana, California 92705
8 Telephone: (800) 386-3860
9 Facsimile: (714) 834-0762

10 Attorneys for Certain Respondents

11 **BEFORE THE GOVERNING BOARD OF THE**
12 **LONG BEACH UNIFIED SCHOOL DISTRICT**

13 In the Matter of the Accusation Against:] OAH No. 2010020244

14 Certified Employees,]
15 Respondents.] **REPLY BRIEF OF CERTAIN**
16 **RESPONDENTS**

17 **I. INTRODUCTION**

18 Before proceeding to their arguments, certain respondents would like to note that the
19 District's Opening Post-Hearing Brief is short on substance, especially with regard to addressing
20 many of the arguments that certain respondents made during the hearing. In light of all the
21 testimonial and documentary evidence that certain respondents produced over seven days, it is
22 surprising to see that the District does not address a majority of their evidence. Instead, the District
23 only makes brief and cursory reference to two issues that certain respondents raised: (1) seniority
24 dates; and (2) skipping criteria. The District's failure to address most of the issues certain
25 respondents raised leads them to believe that either: (1) the District concedes all arguments it did
26 not address; or (2) it intentionally did not address those issues in order to preclude certain
27 respondents from responding to them here in their reply brief. Given that the latter is the more
28 likely scenario, certain respondents would like to take this opportunity to comment on the bad-faith
nature of this tactic.

The District, in agreeing to the current briefing schedule, knew that this reply brief would be

1 the final opportunity for certain respondents to address the issues before the Administrative Law
2 Judge. In fact, certain respondents agreed to the simultaneous submission of opening and reply
3 briefs based on the impression (now false) that the District would make a good-faith effort to
4 address certain respondents' arguments in its opening brief.

5 The practical result of the District's flimsy opening brief is to deny certain respondents the
6 ability to construct a meaningful reply brief because there is painfully little to reply to. Perhaps
7 realizing this, courts of appeal have held that, "Points raised for the first time in a reply brief will
8 ordinarily not be considered, because such consideration would deprive the respondent of an
9 opportunity to counter the argument." *American Drug Stores, Inc. v. Stroh* (Cal. App. 4th Dist.
10 1993) 10 Cal. App. 4th 1446, 1453. Here, certain respondents are only left to wonder what the
11 District's arguments will be in its first and second reply briefs. Not only that, but they are left
12 without a vehicle to respond and challenge those arguments. Thus, certain respondents would ask
13 that the Administrative Law Judge not consider any arguments the District raises in its two reply
14 briefs that certain respondents did not have the opportunity to "counter," to use the term of the court
15 of appeal.¹

16 **II. THE DISTRICT MISCONSTRUES THE STANDARD USED TO DETERMINE AN**
17 **EMPLOYEE'S FIRST DATE OF PAID SERVICE.**

18 Education Code section 44845² establishes that an employee's seniority date with a school
19 district is the date upon which he "first rendered paid service in a probationary position." Cal.
20 Educ. Code § 44845. At issue here is whether certain respondents' attendance at trainings before
21 their first day in the classroom (hereinafter "pre-service trainings") constitutes their first day of paid
22 service in a probationary position. The District asserts that the proper standard for this analysis is:
23 "(1) whether the training occurred during the contractual work year; (2) whether the training was
24 paid as part of the teacher's contractual salary or in some separate manner; and (3) whether

25
26
27 ¹ Certain respondents recognize that this reply brief contains points not raised in its initial closing
28 brief. However, by virtue of the briefing schedule, the District has an opportunity to respond to
these arguments in its second reply brief.

² All further statutory references are to the Education Code unless otherwise noted.

1 attendance at the training was mandatory." See District's Opening Post-Hearing Brief, at p. 2.
2 However, the District's standard misconstrues the proper analysis because whether the training
3 occurred during the contractual work year is irrelevant, especially since the District does not clearly
4 define what constitutes the "contractual work year." Rather, the proper standard is: (1) whether
5 attendance at any pre-service training was mandatory; and (2) whether the teacher was paid for
6 attending. Within this standard, the critical factor is whether attendance at this training was
7 mandatory because in almost all cases teachers are paid some compensation for attendance at these
8 trainings.³ Administrative Law Judge Roy Hewitt's analysis of the issue in the Riverside Unified
9 School District reduction in force hearing is informative and highly persuasive. There, he states

10 The pivotal question boils down to whether the paid service is "mandatory." If it is
11 mandatory and the teachers are paid, it is then the first day of paid service for purposes
12 of establishing a seniority date. [¶] The district and the school site principals control
13 the flow of information to the teachers. It is up to the district and its agents (the school
14 principals and administrators) to make it clear to new teachers when training is
15 mandatory. Consequently, for purposes of determining which training is "mandatory,"
16 the analysis, which is factually based, must focus on what an ordinary, reasonably
17 prudent, person (ORPP) in the same or similar position would have reasonably
18 believed.

19 *In the Matter of the Reduction of Force of the Riverside Unified School District* (2010) OAH No.
20 2010030980, pp. 10-11.

21 Here, by its actions thus far, the District appears to concede that the critical factor in the
22 analysis is whether any pre-service training was mandatory. At the hearing and confirmed in its
23 brief, the District stipulated that it would change the seniority dates of all teachers (roughly 4,600
24 individuals) to reflect their attendance at New Teacher Institute (hereinafter "NTI"). Although

25
26 ³ The District argues in its brief that it is unclear whether respondents who attended some pre-
27 service trainings were compensated as part of their contractual salary or in some other manner.
28 See District's Opening Post-Hearing Brief, at p. 3. However, it goes on to point out that these same
respondents introduced testimony that they received "some level of compensation." *Id.* at 4. If
they received "some level of compensation," it is difficult to see how they were not compensated in
some or any manner.

1 several respondents testified that they were paid for attending NTI, the evidence was inconsistent as
2 to how they were paid (i.e. some were paid at their contractual rate, some as a stipend, and others in
3 some other manner). However, what *was* consistent was the fact that these individuals testified that
4 they were required to attend NTI. In fact, the District's own documentation states that NTI is
5 "mandatory pre-service program for all teachers new to [the District]." See Exhibit Q (Printout
6 from District website stating mandatory nature of NTI). Accordingly, the District entered into the
7 stipulation that it did.

8 After conceding that attendance at NTI is mandatory and agreeing to complete the
9 monumental and time-consuming task of verifying and altering thousands of seniority dates, it is
10 disingenuous for the District now to argue that the mandatory nature of a training is somehow not
11 the critical factor in the analysis to determine whether attendance at that training should count
12 toward a respondent's seniority date. The respondents identified in the District's Opening Post-
13 Hearing Brief (Romi Trutanich (Rank 803), Jisun Gale (Rank 961), Vanessa Quamma (Rank 801),
14 and Holly Camarillo (Rank 932)), as well as others who testified regarding their attendance at
15 various pre-service trainings, stated that in addition to receiving payment for attending such
16 trainings, their attendance was mandatory based on statements by their site administrators or other
17 District personnel at the time of their initial employment. They testified that the subject matter of
18 these trainings included content separate and apart from that covered at NTI and that which was
19 necessary for their specific positions the upcoming school year. These respondents testified that,
20 given their status as new employees, they were told and believed that their attendance at these pre-
21 service trainings was a mandatory component of their employment. In addition to this subjective
22 belief, it is self-evident that a reasonable person would assume that such trainings are mandatory
23 because they are an opportunity for new employees to become accustomed to the standards,
24 methodologies, and protocols of their new employer and, specifically, those of their individual
25 school sites. Although these respondents did not testify that any District administrator told them
26 that failure to attend would jeopardize their employment, it is slightly absurd to argue that this type
27 of overt statement is necessary to make a training mandatory. Thus, certain respondents ask that
28 the ALJ carefully consider their testimonial and documentary evidence regarding the mandatory

1 nature of their attendance at pre-service trainings and change their seniority dates to reflect their
2 true first date of paid service with the District.

3 **III. IF THE DISTRICT IS ALLOWED TO SKIP CERTAIN JUNIOR EMPLOYEES, IT**
4 **IS REQUIRED TO DO SO CONSISTENTLY.**

5 The District skipped individuals based on their ability to teach Advancement Via Individual
6 Determination (hereinafter "AVID"), International Baccalaureate (hereinafter "IB"), and Advanced
7 Placement (hereinafter "AP"). As stated in their closing brief, certain respondents concede that
8 Section 44955 allows a school district to "skip" junior employees provided it can show: (1) a
9 specific need for personnel to teach a specific course; and (2) that the junior employee possesses
10 special training and experience necessary to teach that course. Cal. Educ. Code § 44955(d). Here,
11 the District states that in making its skipping determinations it used an additional criterion not
12 mentioned in Section 44955--that the junior employee be currently teaching the specific course to
13 be eligible for a skip. *See* District's Opening Post-Hearing Brief, at p. 6. Nowhere in Section
14 44955 is it required that a teacher with specialized training in a course of study be currently
15 teaching that assignment. To read such a requirement into that Code section would lead to an
16 arbitrary result because whether an employee, by virtue of his current assignment, is making use of
17 his specialized training has no bearing on whether he possesses that training and can make use of it
18 if the District calls upon him to do so. For example, the District's seniority list shows Paul Mason
19 (Rank 254) has the ability to teach AP classes, but because he is currently assigned to the middle
20 school level, there is no opportunity for him to teach these classes because AP classes are not
21 offered at the middle school level. However, Mr. Mason's Single Subject credential in
22 mathematics and his AP training allow him to teach AP mathematics at the high school level.

23 Furthermore, even assuming the District's use of this extra skipping criterion is valid, the
24 record reflects it did not apply it consistently when implementing this layoff. For example, the
25 District skipped Dawn Lucchese (Rank 763) based on her ability to teach AP classes even though
26 she is currently not teaching any AP classes. And yet, it did not skip Roxana Taboada-Pena (Rank
27 289), presumably because she is not currently teaching any AP classes, even though the seniority
28 list shows she has the requisite training to do so. As another example, the District skipped

1 Whitney Gomes (Rank 332) based on her ability to teach the AVID elective even though she is not
2 currently teaching that elective. And yet, it did not skip Danielle Salisbury (Rank 428), again
3 presumably because she is not currently teaching the AVID elective, even though the seniority list
4 reflects she has all three levels of AVID training and can teach the AVID elective.

5 Thus, based on the District's own implementation of the layoff, its assertion that an
6 individual must be currently teaching AVID, AP and/or IB to be skipped is both inconsistent with
7 what Section 44955 requires and inconsistent with how it implemented the layoff. Accordingly,
8 certain respondents request that if the ALJ upholds the District's skipping criteria, he also compel
9 the District to apply those criteria consistently across the layoff and skip *all* respondents who
10 possess the requisite specialized training in AVID, AP, and/or IB.⁴

11 **IV. ADDITIONAL ARGUMENTS.**

12 **A. Hugo Ehuan (Rank 613)**

13 Mr. Ehuan is a middle school language arts teacher with a Multiple Subject credential and
14 appears to possess a current Board Authorization in English K-8. He also has the ability to obtain
15 Board Authorizations in Computers K-8 and Social Science K-12. It should be noted that since at
16 least November of 2009 he has been on active military duty in Columbia. Accordingly, he is on a
17 military leave of absence from the District.

18 1. Mr. Ehuan should be treated as a respondent in this matter and afforded all the rights of a
19 respondent to challenge the District's attempt to terminate his employment.

20 The District did not consider Mr. Ehuan a respondent in this matter based on his failure to
21 submit a request for hearing in a timely fashion. Accordingly, the District's Governing Board
22 voted to issue him a final layoff notice at its meeting on May 11, 2010. Mr. Ehuan concedes that
23 his request for hearing was untimely. However, the reason for this delay was due to his current
24 location and military duties. Based on his current assignment, Mr. Ehuan did not receive notice of
25 his preliminary layoff until about March 30, 2010, which was already past the statutory deadline to
26

27
28 ⁴ Because the District already verified employees' possession of specialized training and noted such possession on its seniority list (AVID - 17C, IB - 17D, and AP - 17A), it would not be difficult for the District to go back and apply its skipping criteria consistently across the seniority list.

1 request a hearing. Regardless, as soon as his duties would permit, he submitted his request for
2 hearing to the District via U.S. mail.⁵ Based on his good faith effort to submit a request for
3 hearing, Mr. Ehuan should be considered a respondent in this matter, especially since at the hearing
4 the District agreed to include as respondents other employees who submitted untimely requests for
5 hearing.

6 Aside from equity, federal law also mandates that the District's Governing Board rescind
7 Mr. Ehuan's final layoff notice and incorporate him into the current proceedings. The Uniformed
8 Services Employment and Reemployment Rights Act (hereinafter "USERRA"), codified at 38
9 U.S.C. §§ 4301 *et seq.*, protects an employee from an adverse employment effect based on his
10 military service. Here, although Mr. Ehuan does not challenge the District's right to serve him with
11 a preliminary layoff notice pursuant to Section 44955, he does contest the fact that the District did
12 not honor his right to challenge the issuance of this notice. Although his request for hearing was
13 untimely, his late submission was due solely to his active duty in the military, which lengthens the
14 time it takes for him to receive correspondence and also limits the time he has to review, and then
15 increases his response time, to that correspondence. Thus, the District must rescind Mr. Ehuan's
16 final notice and allow him an opportunity to participate in the proceedings, albeit at this late stage.

17 2. Mr. Ehuan is Qualified to Bump Into the Positions of Several Retained Junior Employees.

18 Mr. Ehuan's seniority and qualifications allow him to bump into the positions of the
19 following retained junior employees because he can teach their complete assignments:

20 (a) Jessica Kane (Rank 442), Karla Sorensen (Rank 439), and Sharon Barker (Rank
21 382) - Mr. Ehuan's current Board Authorization in English K-8 allows him to teach
22 these three individuals' complete assignments. In fact, he is even listed on the
23 District's seniority list as a "Language Arts" teacher under the "LYNX Subjects"
24 column.

25 (b) Joel Lovelace (Rank 396) - Mr. Ehuan's current Board Authorization in English K-8
26 allows him to teach Mr. Lovelace's complete assignment.

27

28

⁵ It is unclear whether the District ever received Mr. Ehuan's request for hearing.


1 (c) Kari Milton (Rank 522) - Ms. Milton, whose assignment consists largely of
2 computer classes, currently possesses Single Subject credentials in Geosciences and
3 Social Science. The District's seniority list indicates she has the ability to obtain a
4 Board Authorization in Computer Concepts/Applications, even though she currently
5 does not possess this authorization.⁶ Mr. Ehuan has the ability to obtain a Board
6 Authorization in Computers.⁷

7 **V. CONCLUSION.**

8 In closing, certain respondents would like to reiterate that the District's Opening Post-
9 Hearing Brief failed to address the majority of certain respondents arguments that were raised at
10 the hearing. Consequently, there was very little to reply to in this brief. As stated above, certain
11 respondents ask that the Administrative Law Judge not reward the District for its bad-faith tactics
12 and preclude any new arguments from consideration in his proposed decision.

13 DATED: June 16, 2010

REICH, ADELL & CVITAN
A Professional Law Corporation

14
15 By: 
16 MARIANNE REINHOLD
17 KENT MORIZAWA
Attorneys for Certain Respondents

18
19
20
21
22
23
24
25
26
27 ⁶ As it stands, Ms. Milton is currently "misassigned" because her two Single Subject teaching
credentials do not allow her to teach computer classes.

28 ⁷ As stated in their Closing Brief, certain respondents believe that their Board Authorizations must
be incorporated into the calculus of assignments and reassignments under Section 44955.