CERTIFICATED EMPLOYEES

Schools Legal Service
Orange County Department of Education

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DUTIES AND RESPONSIBILITIES

Every teacher in the public schools has a duty to enforce the course of study, the use of legally authorized textbooks and the rules and regulations prescribed for the public schools.[1] Each teacher has the duty to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism and a true comprehension of the rights, duties and dignity of American citizenship including kindness towards domestic pets, the humane treatment of living creatures, and to teach pupils to avoid idleness, profanity and falsehood and to instruct pupils in manners and morals and the principles of a free government.[2] Each teacher has a duty to present the prescribed curriculum to their students regardless of their personal opinions.[3]

Teachers also have the responsibility to hold pupils to a strict account for their conduct on the way to and from school, on the playground and during recess.[4] In Forgone v. Salvadore Union Elementary School District, the Court of Appeal held that teachers have the legal duty to prevent misconduct on the part of pupils which could result in injury to a pupil and which may lead to school district liability.[5]

In later cases, the California Supreme Court has reiterated the principle that school employees have a legal duty to supervise pupils and if there is a breach of the legal duty to supervise students that proximately caused an injury to a pupil, the district may be held liable.[6] In the majority of these cases, the California Supreme Court has remanded the matter to the lower courts to apply the legal principles established to the particular circumstances in that case.[7]

For example, in Dailey v. Los Angeles Unified School District, the question was whether the absence of a teacher patrolling the grounds during lunch proximately caused the injury to the pupil.[8] In Hoyem v. Manhattan Beach City School District, the issue was whether the failure of a teacher to report the absence of an elementary school pupil from class proximately caused the injury to the child.[9] In both cases, the California Supreme Court held that the school district may be liable and remanded the cases back to the trial court for the jury to decide the factual issues.

The issue of whether school districts have the duty to provide safe schools to all students and are liable when a student is stabbed or injured by an outside intruder on a school campus remains unclear as a result of conflicting court decisions.[10]

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[1] Education Code section 44805.
[2] Education Code section 44806.
[3] 77 Ops.Cal.Atty.Gen. 204 (1994); see, also, Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994).
[4] Education Code section 44807.
[5] Forgone v. Salvadore Union Elementary School District, 41 Cal.App.2d 423, 106 P.2d 932 (1940).
[6] See, Dailey v. Los Angeles Unified School District, 2 Cal.3d 741 (1970); Hoyem v. Manhattan Beach City School District, 22 Cal.3d 508 (1978).
[7] Ibid.
[8] Dailey v. Los Angeles Unified School District, 2 Cal.3d 741 (1970).
[9] Hoyem v. Manhattan Beach City School District, 2 Cal.3d 508 (1978).
[10] Leger v. Stockton Unified School District, 202 Cal.App.3d 1448 (1988); Rodriguez v. Inglewood Unified School District, 186 Cal.App.3d 707 (1986). See, also, Article I, Section 28(c), which states, "Right to Safe Schools. All students and staff of public primary elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."

TEACHER CREDENTIALS

A position requiring certification qualifications is one in which all or some of the duties assigned to the position must be performed by a person holding a certificate and one for which certification qualifications are established pursuant to the California Education Code.[11] The Education Code prescribes the types of credentials required for various positions and contains provisions regarding the issuance, renewal, suspension and revocation of these credentials.[12]

The Education Code establishes a Commission on Teacher Credentialing to administer the laws relating to certification of teachers and administrators.[13] The Commission on Teacher Credentialing consists of fifteen members, fourteen of whom shall be appointed by the governor with the advice and consent of the State Senate.[14] The governor must appoint six persons employed as certificated personnel (who must be full time classroom teachers) in California public elementary and secondary schools. One member must be an administrator and one member must hold a credential other than an administrative services credential or a teaching credential.[15] There must also be one faculty member of an accredited public or private college or university in California that grants baccalaureate degrees. Also included is one school board member and four representatives of the public none of whom shall have been employed by an elementary or secondary school district in a position requiring certification, or shall have served as a school board member in the five year period immediately prior to his/her appointment to the commission.[16]

The Education Code specifies that any employee employed in a position in which 50% percent or more of the duties specified below are required to be performed, must be credentialed.[17] These duties include:

1. The work of instructors in the instructional programs for pupils.

2. Educational or vocational counseling, guidance and placement services.

3. School extracurricular activities related to, and an outgrowth of, the instructional and guidance program of the school.

4. Planning the courses of study to be used in the public schools of the state.

[11] Education Code section 44001.
[12] Education Code sections 44200, et seq.
[13] Education Code section 49210.
[14] Education Code section 44210(b).
[15] Education Code section 44210(c)(f).
[16] Education Code section 44210(e).
[17] Education Code section 44065.

5. The selection, collection, preparation, classification, or demonstration of instructional materials of any course of study for use in the development of the instructional program in the schools of the state.

6. Research connected with the evaluation and the efficiency of the instructional program.

7. The examination, selection, in-service training or assignment of teachers, principals or other certificated personnel involved in the instructional program.

8. The school health program.

9. Activities connected with the enforcement of the laws relating to compulsory education, coordination of child welfare activities involving the school and the home, and the school adjustment of pupils.

10. The school library services.

11. The preparation and distribution of instructional materials.

12. The in-service training of certificated personnel.

13. The interpretation and evaluation of the school instructional program.[18]

The Education Code authorizes four basic types of teacher credentials. These credentials are the single subject instruction credential, the multiple subject instruction credential, the specialist instruction credential, and the designated subjects credential.[19] The single subject instruction credential generally authorizes the holder to teach the subjects designated in grades 7 through 12. The multiple subject instruction credential generally authorizes the holder to teach multiple subject matter instruction in California elementary schools and in early childhood education programs. The specialist instruction credential generally authorizes service in such fields as: reading specialist, mathematics specialist, specialist in special education or early childhood education and such other specialties as the commission may determine. The designated subjects credential authorizes the holder to teach technical trade or vocational courses that may be a part of a program of trade, technical or vocational education.[20]

[18] Ibid.
[19] Education Code section 44256.
[20] Ibid.

The Education Code also specifies several types of service credentials. These credentials include: specialization in pupil personnel services, health, clinical rehabilitative services, library services, administrative services and limited services credential.[21]

EMERGENCY PERMITS

In Summerfield v. Windsor Unified School District,[22] the California Court of Appeal held that under Education Code section 44911, time spent teaching under an emergency teaching credential may not be counted in computing an employee's progress toward permanent status, unless the employee is credentialed in another state and works under a California emergency credential pending completion of CBEST.

Education Code section 44911 states:

> "Service by a person under a provisional credential shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.
>
> "This section shall not be applicable to teachers granted a one-year emergency credential under the conditions specified in subdivision (b) of Section 44252 and subdivision (h) of Section 44830."

The court reviewed the legislative history of Section 44911, and concluded that emergency teaching credentials, including the emergency permits issued to Summerfield, are "provisional credentials" within the meaning of the statute. The court also concluded that the exception set forth in the second paragraph of Section 44911 is a narrow one, applying only to teachers credentialed in another state who work under a California emergency credential pending completion of CBEST. In a footnote, the court noted that although the district initially, mistakenly, classified Summerfield as a probationary employee while she continued to work under an emergency permit, it is well settled that the two-year probationary period for teachers is mandatory and may not be shortened by the advice or actions of a school district.[23]

The court held as follows:

> "Because Summerfield did not hold a valid teaching credential from another state, the statutory exception does not apply, and the two years Summerfield worked for the District under emergency permits may not be included in computing her years of service toward attainment of permanent status ('44911). Accordingly, the District had complete discretion to terminate Summerfield's employment by issuing a notice of non-reelection before March 15

[21] Education Code sections 44266, 44267, 44268, 44269, 44270 and 44272.
[22] 95 Cal.App.4th 1026, 116 Cal.Rptr.2d 233 (2002).
[23] Id. at 1030-1035.

> of her first probationary year, and the trial court erred in granting Summerfield's petition for writ of mandate."[24]

In California Teachers' Association v. Governing Board of the Golden Valley Unified School District,[25] the Court of Appeal held that a teacher who holds only an emergency permit has probationary status, and may not be terminated mid-year unless the district follows the for-cause dismissal procedure set forth in Education Code section 44948.3.

The teacher was initially employed for the 1998-1999 school year, under a written contract that classified her as a "probationary" employee. Her qualification to teach was based solely on an Emergency Long Term Multiple Subject Teaching Permit. At the end of the 1998-1999 school year, the teacher accepted a notice/offer of employment for the following, 1999-2000 school year. This offer also indicated her status as "probationary." In August, 1999, the district sent her a letter stating that she would not be reemployed for the 1999-2000 school year, because she had not fulfilled contractual requirements for obtaining a regular California teaching credential. The teacher and CTA filed a petition for writ of mandate against the district, requesting payment of back pay and benefits for the 1999-2000 school year, declaratory relief that she was wrongfully terminated, and attorney fees. The teacher and CTA appealed the trial court's denial of the petition. The Court of Appeal reversed the trial court's decision.[26]

The Court of Appeal's decision was based on the language of Education Code section 44915 which provides:

> "Governing 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."

Since the district did not classify the teacher as a permanent or substitute employee, Section 44915 required the district to classify her as a probationary employee. While acknowledging that the first paragraph of current Education Code section 44911 provides that service under an emergency permit does not count towards permanent status, the court nevertheless construed Sections 44911 and 44915 as allowing a teacher serving only under an emergency permit to be classified as a probationary employee. Since the teacher was "probationary," the District could not terminate her mid-year without following the for-cause dismissal procedure set forth in Education Code section 44948.3.[27]

The Court also rejected the district's argument that the teacher's employment was prohibited by Education Code section 44300 in that the district could not provide the Commission on Teacher Credentialing with a declaration of need to justify issuing an emergency permit to the teacher for the 1999-2000 school year, in light of the more than 25 applications the district received from teachers who were fully credentialed and qualified to teach. The Court

[24] Id. at 1035.
[25] 98 Cal.App.4th 369, 119 Cal.Rptr.2d 642 (2002).
[26] Id. at 372.
[27] Id. at 376-384.

held that the district had an implied contractual obligation to apply for the emergency permit, because such an obligation was necessary to effectuate the contract that the district and the teacher had entered into at the conclusion of the 1998-1999 school year.[28]

COMMISSION ON TEACHER CREDENTIALING

A. Applications for Credential

The Commission on Teacher Credentialing is required to establish the standards and procedures for the initial issuance and renewal of all credentials.[29] The minimum age for obtaining a credential is eighteen.[30] The Commission on Teacher Credentialing may require an applicant to provide a medical certificate from a licensed physician or surgeon stating that the applicant is free from any contagious and communicable disease which would make the applicant unfit to instruct or associate with children.[31] The applicant must subscribe to an oath or affirmation to support the federal and state constitution and the laws of the United States and the State of California.[32] Each applicant must also pass a state basic skills proficiency test.[33]

The Commission on Teacher Credentialing may deny an application for the issuance of a credential or for the renewal of a credential, for any of the following reasons when an applicant:

1. Lacks the qualifications which are prescribed by law or regulations adopted by the Commission on Teacher Credentialing.

2. Is physically or mentally so disabled as to be rendered unfit to perform the duties authorized by the credential.

3. Is addicted to the use of intoxicating beverages to excess.

4. Is addicted to the use of controlled substances.

5. Has committed an act involving moral turpitude.

6. Has had a certification document revoked.

7. Has intentionally practiced or attempted to practice any material deception or fraud in his or her application.

8. Fails or refuses to furnish reasonable evidence of identification or good moral character.

[28] Id. at 384-385.
[29] Education Code section 44252.
[30] Education Code section 44862.
[31] Education Code section 44336.
[32] Education Code section 44334.
[33] Education Code section 44252.

9. Has been convicted of certain specified offenses.[34]

The Commission on Teacher Credentialing is required to deny an application to any person who could be determined to be a sexual psychopath, has been convicted of any sex offense or has been convicted of a controlled substance offense.[35] However, if the person who has been convicted of a sex or controlled substance offense has obtained a certificate of rehabilitation or probation has been terminated and the information or accusation has been dismissed pursuant to Section 1203.4 of the Penal Code, then the person cannot be denied a credential.[36]

The Commission may issue a credential to a person convicted of a controlled substance offense if it determines from the evidence presented that the applicant has been rehabilitated for at least five years or has received a certificate of rehabilitation and pardon, or if the accusation or information has been dismissed and the person released from all disabilities resulting from any offense.[37]

No person may be denied a credential solely on the basis that the applicant is physically handicapped if the applicant is able to carry out the duties of the position.[38] No person may be denied a credential solely on the ground that he has a physical disability if such disability does not pose a threat of substantial harm to the health or safety of other individuals.[39]

An applicant for the renewal of a credential who has been denied a renewal by the Committee of Credentials may request a reevaluation of his or her application by the Commission.[40] A person, who is arbitrarily denied a certification document or its renewal when he or she has met all the requirements, may obtain judicial relief after all available administrative remedies have been exhausted.[41]

B. Suspension or Revocation of Credential

The Commission on Teacher Credentialing also has the power to suspend or revoke a credential.[42] A credential holder who, without good cause, fails to fulfill a valid contract of employment with a school district or leaves the service of the school district without the consent of superintendent or the governing board may have his or her credential suspended by the Commission on Teacher Credentialing for not more than one year or if the offense has occurred before, the credential may be suspended for not more than two years.[43]

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[34] Education Code section 44345.
[35] Education Code section 44346.
[36] Education Code section 44346(b).
[37] Education Code section 44346(c).
[38] Education Code section 44337.
[39] Education Code section 44338.
[40] Education Code section 44247.
[41] Pete v. State Board of Education, 144 Cal.App.2d 38 (1956).
[42] Education Code section 44420, et seq.
[43] Education Code section 44420.

The Commission on Teacher Credentialing is required to revoke or suspend a credential for immoral or unprofessional conduct, evident unfitness for service or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the public school system or for any cause which would have warranted the denial of an application for a credential or the renewal of a credential.[44] However, in order to revoke or suspend a credential, the teacher's conduct must relate to the teacher's fitness to teach.[45] In determining fitness to teach, the courts take the following factors into consideration:

1. The likelihood of recurrence of the questioned conduct;

2. Extenuating or aggravating circumstances;

3. The effect of notoriety and publicity;

4. The impairment of the teacher-student relationship;

5. Disruption of the educational process;

6. Motive; and

7. The proximity or remoteness in time of the conduct.[46]

The Commission on Teacher Credentialing is required to revoke the credential of a credential holder who is convicted of certain specified crimes.[47] If the conviction is reversed and the credential holder is acquitted of the offense in a new trial or the charges against him are dismissed, the Commission on Teaching Credentialing must terminate the suspension of the credential. However, if the conviction becomes final or when imposition of the sentence is suspended, the Commission must forthwith revoke the credential.[48]

The Commission on Teacher Credentialing must revoke the credential of a person who is determined by a court to be a sexual psychopath.[49] If the determination is reversed and the credential holder is determined not to be a sexual psychopath in a new proceeding or the proceeding to determine whether he is a sexual psychopath is dismissed, the Commission shall forthwith terminate the suspension of the credential. When the determination that the credential holder is a sexual psychopath becomes final, the Commission on the Teacher Credentialing shall forthwith revoke the credential.[50]

Thirty days prior to considering the suspension or verification of a credential, the Committee of Credentials must notify the certificated employee of the specific allegations of

[44] Education Code section 44421.
[45] Morrison v. State Board of Education, 1 Cal.3d 214, 82 Cal.Rptr. 175 (1969).
[46] Id. at 229; San Dieguito Union High School District v. Commission on Professional Competence, 135 Cal.App.3d 278, 185 Cal.Rptr. 203 (1982).
[47] Education Code sections 44424, 44425.
[48] Education Code section 44425.
[49] Education Code section 44426.
[50] Ibid.

misconduct for which the application or credential may be denied, suspended or revoked in ordinary and concise language setting forth the acts or omissions charged and the statutes or rules violated.[51] The statement of allegations must inform the applicant or employee that such allegations, if they are true, are sufficient to cause his or her application or credential to be denied, suspended or revoked.[52]

The Committee of Credentials must order the investigation of allegations within 21 days after all allegations of misconduct have been filed with the committee and a meeting or hearing shall be scheduled no later than six months, unless an extension for one six month period was made by the chairman of the commission upon submission to the committee of the statement of the cause or causes for the extension.[53] The decision of the Committee on Credentials must be in writing and a copy of the decision must be delivered to the certificated employee personally or sent to him by registered mail within fourteen days after the meeting or hearing together with specific information regarding any administrative hearing to which the employee is entitled.[54]

All meetings and hearings of the Commission and Committee of Credentials to consider the suspension of revocation of credentials are conducted in closed session with only commission members, committee members, staff members, the certificated employee whose application or credential is at issue, the counsel of such employee and any material witnesses in attendance.[55] Whenever a hearing is held to deny, suspend or revoke a credential, the proceeding must be conducted pursuant to the Administrative Procedures Act.[56]

A hearing is not required to revoke or suspend a credential when the revocation or suspension is based on the conviction of the credential holder of certain specified crimes or a determination that the holder is a sexual psychopath.[57] In Di Genova v. State Board of Education, the California Supreme Court held that whenever the holder of a credential issued by the State Board of Education (now issued by the Commission on Teacher Credentialing) has been convicted of a specified sex offense and the statute states that the credential shall forthwith be revoked when the conviction becomes final, a hearing is not required.[58] In addition, since a credential is required to be employed by a school district in a certificated position, the employee would necessarily be terminated from his or her position with the school district without a hearing.[59]

[51] Education Code section 44244.
[52] Ibid.
[53] Education Code section 44244(b).
[54] Ibid.
[55] Education Code section 44245.
[56] Education Code section 44246.
[57] Education Code section 44424, 44425, 44426. See also, Di Genova v. State Board of Education, 45 Cal.2d 255, 288 P.2d 862 (1955).
[58] Ibid.
[59] Ibid.

C. Suspension of Credential for Drunken Driving Conviction

In Broney v. California Commission on Teacher Credentialing,[60] the California Court of Appeal upheld a decision by the Commission on Teacher Credentialing to suspend a teacher's credential based on three convictions for drunk driving.

At the time of the suspension, Shirley Broney was a fifth-grade teacher. She was convicted of drunk driving in 1987 (before she obtained her credential), and in 1997 (when she was serving as a student teacher). For the 1997 conviction, she received probation and attended Alcoholics Anonymous as part of a first offender drunk driver program. Nevertheless, in 2001, Ms. Broney was again arrested for driving under the influence and pleaded guilty.[61] She was sentenced to 30 days in jail, but was permitted to fulfill this sentence at home and at work by wearing an ankle bracelet. The 2001 conviction was expunged in 2006. None of the three drunken driving incidents involved children or occurred on or near school property.[62]

Ms. Broney had disclosed her 1987 conviction to the Commission when she applied for character and identification clearance, and disclosed her 1997 conviction when she applied for a credential. The credential was issued in May 1997 and was valid until June 2002, then renewed until June 2007.

In June 2004, the Commission notified Ms. Broney by letter that it had begun an investigation into her fitness to hold a credential based on her three convictions. As a result of that investigation, the Commission recommended a 60-day suspension of her credential. Ms. Broney then requested an administrative hearing to challenge the recommendation. The matter was heard (after some delay) by an administrative law judge (ALJ) in June 2007. During the hearing, Ms. Broney denied being an alcoholic, but acknowledged she had made some "bad choices." She asserted that she would not ever drink and drive again. Her counselor testified that she was not an alcoholic and did not need any kind of therapy for alcohol abuse. A psychologist who testified on Ms. Broney's behalf testified that she was "psychologically normal and high functioning," but had "some probability of acting out." It also was noted that Ms. Broney continued to drink regularly. The psychologist stated that a "probability of acting out" was similar to someone who might make the "mistake" of drinking and driving.[63]

During the hearing, Ms. Broney's Principal testified that she was a dedicated and talented teacher who is passionate about her work. The Principal said she did not observe Ms. Broney to have traits she identified with alcohol abuse. As a result of the evidence presented at the hearing, the ALJ determined the Commission had failed to prove unprofessional conduct, and recommended the accusation be dismissed. The ALJ found the Commission had not established that Ms. Broney's conduct violated any rules or ethical codes of the teaching profession.[64]

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[60] 184 Cal.App.4th 462, 108 Cal.Rptr.3d 832 (2010).
[61] The 1987 conviction was expunged in 1992 and the 1997 conviction was expunged in 2007.
[62] Id. at 466-67.
[63] Id. at 468-69.
[64] Id. at 470.

The Commission rejected the ALJ's proposed decision and adopted an order finding that Ms. Broney had committed unprofessional conduct indicating she was unfit to teach. The Commission relied on the factors set forth in the Morrison case[65] in holding the conduct was substantially related to Ms. Broney's fitness to teach. The Commission imposed a 60-day suspension but stayed the suspension subject to the successful completion of a 3-year probationary period, which required a psychiatric evaluation and continued therapy, if needed.

Ms. Broney then took her case to the Sacramento County Superior Court, which upheld the Commission's determination. The Superior Court held that Ms. Broney's convictions demonstrated unfitness to teach as a matter of law. The Court also applied the Morrison factors in reviewing the propriety of the discipline imposed by the Commission.[66]

Again, Ms. Broney appealed the decision, this time to the Court of Appeal. The Court of Appeal held that the lower court had erred by holding that the convictions demonstrated unfitness to teach as a matter of law:

> "Driving under the influence is not an offense specified by the Legislature as sufficient per se to justify suspension or revocation of teaching credentials … Plaintiff was entitled to a fitness hearing where the trier of fact weighed the Morrison factors to determine whether she was unfit to teach on account of her unprofessional conduct."[67]

Despite this error, however, the Court of Appeal held that the lower court had, in fact, applied the Morrison factors when determining whether the penalty the Commission had imposed was reasonable. The Court of Appeal held that the lower court's decision would have been the same if it had applied the Morrison factors to the question of "fitness to teach" rather than holding the convictions demonstrated unfitness "per se." The Court of Appeal upheld the lower court's ruling.[68]

This case should be helpful to districts that are considering disciplining certificated employees for unprofessional conduct, including conduct that occurs outside of school hours and at non-school related events. The Court found that the convictions endangered public safety and, if known to students, could adversely impact the teacher's ability to earn the respect of her students. The Court also held that given the repeated nature of the conduct, the convictions were not remote in time. Since districts must apply the Morrison factors when determining whether to discipline a certificated employee, this case may provide support depending on the nature of the employee's misconduct.[69]

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[65] Id. at 471. See, Morrison v. State Board of Education, 1 Cal.3d 214 (1969). The factors are: (1) the likelihood that the conduct may have adversely affected students or fellow teachers, and the degree of such adversity anticipated; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the party involved; (4) the extenuating or aggravating circumstances, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of the recurrence of the questioned conduct; and (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.
[66] Id. at 471-72.
[67] Id. at 475.
[68] Id. at 476.
[69] Id. at 767-80.

D. Reporting Resignations to Commission

In Picton v. Anderson Union High School District,[70] the Court of Appeal held that a nondisclosure provision in an agreement between a school district and a certificated employee who resigned in lieu of dismissal is illegal and cannot be enforced. In addition, the Court of Appeal held that the communication by the school district to the Commission on Teacher Credentialing was absolutely privileged and the teacher could not sue the school district for libel or defamation.[71]

The Court of Appeal noted that the administrative regulations of the Commission on Teacher Credentialing[72] require the school district to report the resignation of the teacher. Section 80303 states in part:

> "(a) Whenever a credential holder, working in a position requiring a credential
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> (1) is dismissed;
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> (2) resigns;
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> (3) is suspended for more than 10 days;
>
> (4) retires; or
>
> (5) is otherwise terminated by a decision not to employ or re-employ as a result of an allegation of misconduct, the superintendent of the employing school district shall report the change in employment status to the Commission within 30 days.
>
> "(b) The report shall contain all known information about each alleged act of misconduct.
>
> "(c) The report shall be made to the Commission regardless of any proposed or actual agreement, settlement, or stipulation not to make such a report. The report shall also be made if allegations served on the holder are withdrawn in consideration of the holder's resignation, retirement or other failure to contest the truth of the allegations.
>
> "(d) Failure to make a report required under this section constitutes unprofessional conduct. The Committee shall

[70] 50 Cal.App.4th 726, 57 Cal.Rptr.2d 829 (1996).
[71] Civil Code section 47(b) (as an official proceeding authorized by law).
[72] 5 California Code of Regulations section 80303.

investigate any superintendent who holds a credential who fails to file reports required by this section

"(e) The superintendent of an employing school direct shall, in writing, inform a credential holder of the content of this regulation . . . Failure to comply with this subdivision by a superintendent of schools constitutes unprofessional conduct which shall be investigated by the Committee of Credentials."[73]

The Court of Appeal stated that under Section 80311, (now Section 80303), the school district was required by law to notify the Commission on Teacher Credentialing of the teacher's resignation. Since that resignation resulted from allegations of acts which appeared to constitute probable cause for the revocation or suspension of the teacher's credential, under Section 80311 the school district was required to provide the Commission with the facts which constitute the causes for the disciplinary action against the teacher. The Court of Appeal held that the school district complied with Section 80311 by submitting documents and testimony to the Commission involving accusations that the teacher had been accused of rape. The Court of Appeal held that as a matter of public policy, a third party nondisclosure provision cannot be enforced due to Section 80311. The school district was required to provide the Commission with all of the facts on which the teacher's resignation was based and allow the Commission and its Committee of Credentials to investigate.[74]

The Court of Appeal also held that Civil Code section 47(b) creates an absolute privilege for judicial proceedings and also creates a privilege for official proceedings involving quasi-judicial power. An administrative body possesses quasi-judicial power for purposes of Section 47(b) if the administrative body is vested with discretion based upon an investigation and consideration of evidentiary facts and is entitled to hold hearings and decide the issue by the application of rules of law to the facts and if that power affects the personal or property rights of private persons.[75]

School districts, in negotiating the resignation of teachers who have been accused of acts or omissions which could possibly justify dismissal or the revocation of a teacher's credential, must consider the provisions of C.C.R. 80311. Whenever a teacher is separated from the district as a result of allegations of his or her commission of acts or omissions which appear to constitute probable cause for the revocation or suspension of any credential, the school district must notify the Commission on Teacher Credentialing within 30 days of such suspension, dismissal, resignation or other termination and provide the Committee of Credentials the underlying facts which constituted the cause or causes for the disciplinary action against the certificated employee.

[73] 5 California Code of Regulations 80311 (now 80303).
[74] Id. at 735.
[75] Id. at 736-737.

Education Code section 44030.5[76] states that a superintendent of a school district or county office of education, or the administrator of a charter school, employing a person with a credential shall report any change in the employment status of the credential holder to the Commission on Teacher Credentialing not later than 30 days after the change in employment status, if the credential holder, as a result of an allegation of misconduct, or while an allegation of misconduct is pending, is dismissed, is nonreelected, resigns, is suspended or placed on unpaid administrative leave for more than ten days as a final adverse action, retires, or is otherwise terminated by a decision not to employ or reemploy. Section 44030.5(b) states that a change of employment status due solely to unsatisfactory performance or a reduction in force is not a result of an allegation of misconduct and does not need to be reported to the Commission on Teacher Credentialing.

Education Code section 44030.5(c) states that the failure to make the report is unprofessional conduct and may subject the superintendent of the school district or county office of education, or the administrator of a charter school, to adverse action by the Commission on Teacher Credentialing. Section 44030.5(d)(1) states that refusing or willfully neglecting to make the report is a misdemeanor, punishable by a fine of not less than $500 or more than $1,000. Section 44030.5(d)(2) states that all fines imposed are the personal responsibility of the superintendent of the school district or county office of education, or the administrator of a charter school, and may not be paid or reimbursed with public funds.

EMPLOYMENT OF CERTIFICATED EMPLOYEES

A. Qualifications for Employment

Only persons who possess the appropriate certification qualifications and commencing on February 1, 1983, persons who have passed the state basic skills proficiency test may be employed by the governing board of a school district in a certificated position.[77] The governing board of a school district may not refuse to employ any person for reason of race, color, religious creed, sex or national origin.[78] The governing board of a school district may not employ or retain in employment persons who have been convicted of any sex offense or controlled substance offense.[79] If however, any conviction is reversed and the person is acquitted of the offense in a new trial or charges against him or her are dismissed, the person may be employed thereafter.[80] Upon conviction of a sex offense or a controlled substance offense, the employee may be terminated without a hearing since the facts are not in dispute and the conviction is a matter of public record.[81]

[76] Stats. 2013, ch. 232 (A.B. 449).
[77] Education Code section 44830.
[78] Ibid.
[79] Education Code section 44836.
[80] Ibid.
[81] Di Genova v. State Board of Education, 45 Cal.2d 255, 288 P.2d 862 (1955).

B. Nature of Certificated Position – Credential Requirement

Education Code section 44065 establishes that any person employed on or after July 1, 1963, by a school district that performs certain duties for 50 percent or more of the school year shall hold a valid teaching or service credential. These types of functions are:

(1) The work of instructors and the instructional program for pupils.

(2) Educational or vocational counseling, guidance and placement services.

(3) School extracurricular activities related to, and an outgrowth of, the instructional and guidance program of the school.

(4) Planning courses of study to be used in the public schools of the state.

(5) The selection, collection, preparation, classification or demonstration of instructional materials of any course of study for use in the development of the instructional program in the schools of the state.

(6) Research connected with the evaluation and efficiency of the instructional program.

(7) The school health program.

(8) Activities connected with the enforcement of the laws relating to compulsory education, coordination of child welfare activities involving the school and the home, and the school adjustment of pupils.

(9) The school library services.

(10) The preparation and distribution of instructional materials.

(11) The in-service training of teachers, principals, or other certificated personnel.

(12) The interpretation and evaluation of the school instructional program.

(13) The examination, selection, or assignment of teachers, principals, or other certificated personnel involved in the instructional program.[82]

The duties of the employee in question consist of rendering service in directing, coordinating, supervising or administering any portion or all of the types of functions listed above.[83]

In addition to examine whether the newly-proposed position would perform these statutory functions for 50 percent or more of the employee's duties, the district should also consider the criteria for creditable service under the State Teachers' Retirement System ("STRS"). Education Code section 22119.5 defines "creditable service" as "any of the following activities performed for an employer in a position requiring a credential, certificate, or permit pursuant to this code":

(1) The work of teachers, instructors, district interns, and academic employees employed in the instructional program for pupils, including special programs such as adult education, regional occupation programs, child care centers, and prekindergarten programs pursuant to section 22161.

(2) Education or vocational counseling, guidance, and placement services.

(3) The work of directors, coordinators, and assistant administrators who plan courses of study to be used in California public schools, or research connected with the evaluation or efficiency of the instructional program.

(4) The selection, collection, preparation, classification, demonstration, or evaluation of instructional materials of any course of study for use in the development of the instructional program in California public schools, or other services related to school curriculum.

(5) The examination, selection, in-service training, or assignment of teachers, principals, or other similar

[82] Education Code section 44065.
[83] Id.

personnel involved in the instructional program.

(6) School activities related to, and an outgrowth of, the instructional and guidance program of the school when performed in addition to other activities described in this section within the hours considered normal on a full-time basis for full-time employees of the employer.

(7) The work of nurses, physicians, speech therapists, psychologists, audiometrists, audiologists, and other supervised employees in the school health program.

(8) Services as a school librarian.

(9) The work of county and district superintendents and other employees who are responsible for the supervision of persons or administration of the duties described in this section.

C. Supervision of Teachers

To supervise the work of teachers more than half time during the school week, a person must hold a valid teacher's certificate authorizing him or her to teach in the schools and classes in which he is to supervise instruction and a valid supervision certificate.[84] No person may be employed as a principal of a school of six or more teachers, including the principal, unless the principal is the holder of a valid teacher's credential and either a valid school administration credential of the same grade as the school to be administered or a valid standard supervision credential authorizing service as a principal of a school the same grade as the school to be administered.[85] A substitute principal holding only a valid teacher's credential of the same grade as the school to be administered may be employed to meet an emergency for not more than five school months of a school year.[86]

D. Valid Credential

Not later than sixty days after the date fixed by the governing board of the school district for the commencement of his or her service, the credential holder must register a valid certification document issued on or before that date, authorizing the credential holder to serve in the position in which he is employed.[87] The governing board of the school district is required to

[84] Education Code section 44870.
[85] Education Code section 44860.
[86] Education Code section 44861.
[87] Education Code section 44857.

notify in writing immediately the county superintendent of schools of the employment of each certificated employee.[88]

E. Notice of Employment

Every certificated employee of a school district of any type of class having an average daily attendance of less than 250, and every certificated employee of any school district in a position requiring a supervision or administrative credential, may be offered a continuing contract to cover a period longer than one year but not to exceed four years.[89] At any time after December 31, any person not employed by the school district may be elected for the next ensuring school year to a position requiring certification qualification.[90] Persons already employed in positions requiring certification qualifications may be elected for the next ensuing school year on or after March 15, and each person so elected is deemed re-elected from year to year, except as specifically provided in the Education Code.[91]

If, without good cause, a probationary or permanent employee of the school district fails prior to July 1 of any school year to notify the governing board of the district of his or her intention to remain in the service of the district, as the case may be, during the ensuing school year if a request to give such notice has been personally served upon the employee or mailed by certified mail with return receipt requested to the employee's last known address not later than the preceding May 30, the employee may be deemed to have declined employment and his or her services as an employee of the district may be terminated on June 30 of that year.[92] If without good cause a probationary or permanent employee of the school district fails to report for duty at the beginning of the ensuing school year after having notified the governing board of the district of his or her intention to remain in the service of the district in accordance with these procedures, the employee may be deemed to have declined employment and his or her service as an employee of the district may be terminated on the day following the twentieth consecutive day of absence. The school district may not terminate any employee unless the district has specifically notified the employee, at least five days in advance, of the time and place at which the employee was to report to work, and the employee did not request or was not granted a leave of absence authorized by the governing board of the district.[93] This procedure only applies to employees who were on leave of absence for twenty or more consecutive working days after April 30 of the previous school year.[94]

F. Extra Duty Positions

In California Teachers Association v. Governing Board of Rialto Unified School District,[95] the California Supreme Court held that Education Code section 44919(b) provides an advantage to presently employed and otherwise qualified credentialed teachers for athletic

[88] Education Code section 44843.
[89] Education Code section 44929.20.
[90] Education Code section 44840.
[91] Ibid.
[92] Education Code section 44842.
[93] Education Code section 44842(b).
[94] Ibid.
[95] 14 Cal.4th 627, 59 Cal.Rptr.2d 671 (1997).

coaching vacancies. However, school districts may adopt policies and regulations which establish locally determined qualifications for coaching positions and assess all applicants to determine whether they meet these qualifications.

Education Code section 44919(b) states:

> "Governing boards shall classify as temporary employees persons, other than substitute employees, who are employed to serve in a limited assignment supervising athletic activities of pupils; provided, such assignment shall first be made available to teachers presently employed by the district. Service pursuant to this subdivision shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district."

The California Supreme Court adopted a middle of the road approach to the issue. The Court rejected the school district's contention that Section 44919(b) only required the school district to advertise openings for athletic coach positions to teachers currently employed in the district and allow them to apply for such positions, but that the statute did not give such teachers any other advantage in the employment process. The Court also rejected the teachers' proposed interpretation of Section 44919(b) that the school district was required to offer all athletic positions to existing teachers and that if the plaintiff was the only credentialed teacher to apply, then he was entitled to the job on demand. The teacher claimed the district was required to give him the opportunity to accept or decline the coaching position before offering it to a noncertificated employee or nonemployee.[96]

The California Supreme Court reviewed the history of the statutory provisions relating to school athletics and determined that the Legislature had repealed provisions giving the State Department of Education control over athletics in favor of local control. The Court noted that former Education Code section 35179.5 gave the State Board of Education authority to adopt minimum qualifications for athletic coaches.[97]

The Court held that school districts retain discretion in two significant areas. First, each district could still evaluate a coaching applicant's knowledge and competency in four relevant subject areas: first aid; coaching techniques; rules of the sport; and, child or adolescent psychology. Second, Title 5 section 5593 expressly permitted districts to continue to set qualification criteria for athletic coaches in accordance with local priorities. The Court noted that Education Code section 35179 remains in effect and grants to school districts authority over the selection of athletic personnel. The Court went on to state that districts may establish the qualifications for athletic coaches as high as necessary to coincide with local preferences and could assess the knowledge, competence, skill and experience of any coaching applicants in accordance with the qualifications so established. Thus, whatever qualifications a district

[96] Ibid.
[97] Id. at 636-637.

establishes, it retains considerable leeway in determining whether an applicant for a coaching position has met those criteria.[98]

The Court noted that although some of these assessments, by their nature, involve the evaluation of intangibles, the Court held that allowing districts to consider such intangibles is consistent with the Legislature's clear policy decision to commit to individual school districts the power both to establish the qualifications for athletic coaches and to determine the competency and knowledge of individual applicants for coaching positions.[99]

Therefore, districts may adopt policies, rules and regulations which set the qualifications for athletic coaches and these policies may allow districts to assess the knowledge, competence, skill and experience of all coaching applicants in accordance with district policy. The district may eliminate from consideration all applicants, including certificated employees, who do not meet the qualifications.

G. Transfer of Teachers

Education Code section 35036 limits the ability of school districts to transfer teachers. Education Code section 35036 states in part, "…the superintendent of a school district may not transfer a teacher who requests to be transferred to a school offering kindergarten or any of grades 1 to 12 inclusive, that is ranked in deciles 1 to 3, inclusive, on the Academic Performance Index if the principal of the school refuses to accept the transfer."

The purpose of the legislation is to decrease the number of poor performing teachers transferred to schools ranked deciles 1 to 3. Section 35036(b) states that the governing board of a school district may not adopt a policy or regulation, or enter into a collective bargaining agreement, that assigns, after April 15 of the school year prior to the school year in which the transfer will become effective, priority to a teacher who requests to be transferred to another school over other qualified applicants who have applied for positions requiring certification qualifications at the school.

Section 35036(c) states that if the prohibitions of Section 35036 are in direct conflict with the terms of a collective bargaining agreement that is in effect on January 1, 2007, the prohibitions of Section 35036 shall become operative upon the expiration of the collective bargaining agreement.

H. Professional Growth for Teachers

Education Code section 44277(a) states that the Legislature recognizes that effective professional growth must continue to occur throughout the careers of all teachers, in order to keep teachers informed of changes in pedagogy, subject matter, and pupil needs. It is the intent of the Legislature to encourage teachers to engage in an individual program of professional growth that extends their content knowledge and teaching skills and for school districts to

[98] Id. at 639-640.
[99] Id. at 652.

establish professional growth programs that give individual teachers a wide range of options to pursue, as well as significant roles in determining the course of their professional growth.

Education Code section 44277(b) states that an individual program of professional growth may consist of activities that are aligned with the California Standards for the Teaching Profession that contribute to competence, performance, or effectiveness in the profession of education and the classroom assignments of the teacher. Acceptable activities may include the completion of courses offered by accredited colleges and universities, participation in professional conferences, workshops, teacher center programs, staff development programs, service as a mentor teacher, participation in school curriculum development projects, participation in systematic programs of observation and analysis of teaching, service in a leadership role in a professional organization, and participation in educational research or innovation efforts. Employing agencies and the bargaining agents of employees may negotiate the terms of programs of professional growth within their jurisdictions.

Education Code section 44277(c) states that an individual program of professional growth may include a basic course in cardiopulmonary resuscitation, which includes training in the subdiaphragmatic abdominal thrust (also known as the "Heimlich Maneuver") and meets or exceeds the standards established by the American Heart Association or the American Red Cross for courses in that subject or minimum standards for training programs established by the Emergency Medical Services Authority. An individual program of professional growth may include a course in first aid that meets or exceeds the standards established by the American Red Cross for courses in that subject or minimum standards for training programs established by the Emergency Medical Services Authority.

Education Code section 44277(d)[100] states that if a local educational agency offers a program of professional growth for teachers, administrators, paraprofessional educators, or other classified employees involved in the direct instruction of pupils, the local educational agency shall evaluate professional learning based on all of the following criteria, and the local educational agency is encouraged to choose professional learning that meets any of the following criteria:

1. Helps attract, grow and retain effective educators.

2. Is a part of every educator's experience in order to accelerate instructional improvement and support pupil learning.

3. Is based on needs assessment of educators and tied to supporting pupil learning.

4. Emphasizes the importance of meeting the needs of all pupils.

[100] Effective January 1, 2015.

5. Is grounded in a description of effective practice, as articulated in the California Standards for the Teaching Profession.

6. Affords educators opportunities to engage with others to develop their craft, including, but not limited to, opportunities to increase their content knowledge.

7. Ensures educators have adequate time to learn about, practice, reflect, adjust, critique, and share what educators need to ensure that all pupils, especially high-needs pupils, develop knowledge and lifelong learning skills that will help the pupils to be successful.

8. Recognizes and utilizes expert teacher and leader skills.

9. Attends to collective growth needs as well as educators' individual growth needs.

10. Contributes to a positive, collaborative, and supportive adult learning environment.

11. Contributes to cycles of inquiry and improvement.

12. Is not limited to a single instance, but supports educators through multiple iterations or engagements.

13. Is based on a coherent and focused plan.

Professional learning activities may also include collaboration time for teachers to develop new instructional lessons, to select or develop common formative assessments, to analyze pupil data, for mentoring projects for new teachers, or for extra support for teachers to improve practice. Appropriate professional learning may be part of a coherent plan that combines school activities within the school, including, but not limited to, lesson study or coteaching, and external learning opportunities that meet all of the following criteria:

1. Are related to the academic subjects taught.

2. Provide time to meet and work with other teachers.

3. Support instruction and pupil learning to improve instruction in a manner that is consistent with academic content standards.

I. Tape Recording of Teachers by Students

The Education Code prohibits the use of tape recording equipment or electronic listening devices in the classroom without the prior consent of the teacher and the principal of the school.

Education Code section 51512 states:

> "The Legislature finds that the use by any person, including pupil, of any electronic listening or recording device in any classroom of the elementary and secondary schools without prior consent of the teacher and the principal of the school given to promote an educational purpose disrupts and impairs the teaching process and discipline in the elementary and secondary schools, and such use is prohibited… This section shall not be construed as affecting the powers, rights, and liabilities arising from the use of electronic listening or recording devices as provided for by any other provision of law.
>
> "Any pupil violating this section shall be subject to appropriate disciplinary action. This section shall not be construed as affecting the powers, rights, and liabilities arising from the use of electronic listening or recording devices as provided for by any other provision of law."

In Evens v. Superior Court,[101] the Court of Appeal held that a violation of Section 51512 by a student does not preclude a school district from disciplining a teacher based in whole or in part on the illegal recording. In Evens, after the student voluntarily gave the illegally recorded tape to the school district, the district suspended the student for violating Section 51512 and later attempted to use the tape against the teacher for disciplinary purposes. The court concluded that a teacher has no "reasonable expectation of privacy" in his or her statements to a classroom, and therefore, the tape could be used.

SALARIES

A. Authority to Set Salaries

Within the express statutory limitations set forth in the Education Code, the governing board of a school district has the authority to fix and order paid the compensation of certificated employees employed by the school district.[102] This authority includes providing salary increases during the school year for certificated employees.[103] These salary increases may be retroactive to the beginning of the fiscal year.[104]

[101] 77 Cal.App.4th 320 (1999).
[102] Education Code section 45022.
[103] Education Code section 45032.
[104] 56 Ops.Cal.Atty.Gen. 461 (1973).

The governing board of each school district is required to adopt and cause to be printed and made available to each certificated employee a schedule of salaries.[105] Every certificated employee employed by a school district, except persons employed in administrative or supervisory positions, must be classified on the salary schedule on the basis of a uniform allowance for years of training and years of experience.[106] The school district cannot place employees in different classifications on the schedule nor pay employees different salaries solely on the basis of the respective grade levels which the employees serve.[107] Substitute teachers and teachers of special day and evening classes may be paid on a different salary schedule.[108]

B. Uniform Salary Schedule

The statutory provisions relating to uniform salary schedules have been the subject of much litigation. In Palos Verdes Faculty Association v. Palos Verdes Unified School District, the California Supreme Court held that a teacher who had one year of public school experience and five years of private school experience was entitled to credit for six years of experience on the salary schedule even though the district rule allowing credit for private school experience was changed one year after the teacher was hired.[109] The California Supreme Court held that the former rule which permitted a district to make reasonable classifications which might deviate from the principle of uniformity of treatment as to salary could no longer be employed with the passage of Education Code section 45028. Rather, the court held that the new statute required that teachers must be classified for salary purposes solely based on years of training and years of experience.[110] The California Supreme Court ordered the school district to reclassify the teacher and allow credit for prior teaching experience in private as well as public schools and awarded the teacher back pay.[111]

In Goddard v. South Bay Union High School District, the Court of Appeal held that under Education Code section 45028, a teacher must be given course credit on the salary schedule for courses taken at a law school.[112] In Mayer v. Board of Trustees of the Los Alamitos School District, the Court of Appeal held that under Education Code section 45028, the school district could define "experience" for purposes of the salary schedule as one for which the teacher received a satisfactory evaluation so long as the provision applied to all teachers in a like manner. The Court of Appeal upheld the district's incentive program which required teachers to receive a satisfactory evaluation in order to receive a "step increase" for a year of experience on the salary schedule.[113]

In California Teachers Association v. Board of Education of Whittier City School District, the Court of Appeal held that the school district's practice of limiting step increases for years of experience to one step when a teacher moved to the next column for educational credit

[105] Education Code section 45023.
[106] Education Code section 45028.
[107] Ibid.
[108] Education Code section 45028, 45030.
[109] Palos Verdes Faculty Association v. Palos Verdes Peninsula Unified School District, 21 Cal.3d 650, 147 Cal.Rptr. 359 (1978).
[110] Ibid.
[111] Id. at 665.
[112] 79 Cal.App.3d 98, 144 Cal.Rptr. 701 (1978).
[113] 106 Cal.App.3d 476, 165 Cal.Rptr. 655 (1980).

even where the next column contained steps for additional years of experience, violated the uniform salary schedule provisions of the Education Code.[114] The Court of Appeal held that the teacher must be given credit for all the additional years of experience when advanced for additional education.[115]

In Wygant v. Victor Valley Joint Union High School District, the Court of Appeal held that a district's unilateral adoption of a professional growth policy violated the uniform salary schedule requirements of the Education Code.[116] The district policy required certificated employees to earn required professional growth units within the time allotted in order to receive credit for two years of experience on the salary schedule. The court affirmed the trial court's order ordering the school district to eliminate and rescind the professional growth policy.[117] The Court of Appeal held that the school district could not place conditions on an increase for years of experience and held that experience for salary purposes results from the performance of the teacher's duties.[118] The court held that the school district's professional growth policy required activities that were separate and distinct from teaching experience.[119]

In San Francisco Teachers Association v. San Francisco Unified School District, the Court of Appeal held that the school district's policy of awarding salary credit for experience only if teachers received additional education credits within a specified time period violated Education Code section 45028 since it resulted in teachers losing credit for experience to which the teachers were entitled.[120] The Court of Appeal held that the district's practice violated the requirement of uniformity on the basis of years of training and the years of experience.[121] The court went on to state that the passage of Government Code section 3543.2 which authorizes school districts to negotiate additional compensation based upon criteria other than years of training and years of experience does not authorize school districts to violate the requirement of uniformity but merely authorizes school districts to negotiate additional compensation such as one time bonuses equally distributed to all teachers regardless of years of training and years of experience.[122]

In United Teachers of Ukiah v. Board of Education of Ukiah Unified School District, the Court of Appeal held that the school district violated the provisions of Education Code section 45028 when it gave additional credit for prior years of experience to teachers hired at a later date.[123] Previously, the school district granted a maximum of five years of experience for prior experience outside the district.[124] The court held that this practice by the school district violated the requirements for a uniform salary schedule based on years of training and experience.[125]

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[114] 129 Cal.App.3d 826, 181 Cal.Rptr. 432 (1982).
[115] Ibid.
[116] Wygant v. Victor Valley Joint Union High School District, 168 Cal.App.3d 319, 214 Cal.Rptr. 205 (1985).
[117] Id. at 327.
[118] Ibid.
[119] Ibid.
[120] 196 Cal.App.3d 627 (1987).
[121] San Francisco Teachers v. San Francisco Unified, 196 Cal.App.3d 627 (1987).
[122] Id. at 635; citing 69 Ops.Cal.Atty.Gen. 268 (1986).
[123] 201 Cal.App.3d 632 (1988).
[124] Ibid.
[125] Ibid.

The Court of Appeal in United Teachers of Ukiah disagreed with an earlier decision by the Court of Appeal in McCammon v. Los Angeles Unified School District and held that the courts had jurisdiction over issues alleging a violation of the uniform salary schedule provisions of the Education Code even where the salary schedule had been negotiated.[126] The Court of Appeal in McCammon held that such disputes were subject to the initial jurisdiction of the Public Employment Relations Board (PERB) and could not be filed in court before administrative remedies with PERB had been exhausted.[127] This disagreement between the Courts of Appeal will have to be resolved at a future date by the California Supreme Court.

In California Teachers Association v. Governing Board of Lancaster School District, the Court of Appeal held that exceptions to Section 45028's uniformity requirements cannot be made for employees hired before its enactment.[128] The court also held that teachers may be encouraged to take advanced course work by creating a special salary category to provide extra compensation for teachers who take advanced course work, but teachers who fail to take additional advanced course work may not be penalized.[129] The court also struck down provisions which limited advancement on the salary schedule for teachers who did not complete course work within two years and provisions which limited advances to one step per year regardless of the amount of course work completed.[130]

In Adair v. Stockton Unified School District,[131] the Court of Appeal held that the salary schedule negotiated between the Stockton Unified School District and its certificated employee union violated the uniform salary schedule provisions of Education Code section 45028. The court held that the negotiated salary schedule moved some teachers to salary steps lower than their actual number of years of service and therefore violated the requirement that the salary schedule be based on uniform allowance for years of training and years of experience.

The Court of Appeal held that Government Code section 3543.2 (e) authorizes the school district and the union to negotiate a schedule which includes "other criteria" but does not allow the school district to negotiate a salary schedule that violates the uniformity requirement of Section 45028. The court ordered the school district to restore the affected teachers to their appropriate salary step that corresponded to their years of experience, which resulted in a cost to the district of more than one million dollars in salary increases.

C. Exceptions to the Uniform Salary Schedule Requirement

In response to the court decisions discussed above, over the past few years the Legislature has amended Education Code section 45028.[132] Section 45028(b) states that it is not a violation of the uniformity requirement of Section 45028 for a school district to negotiate with its exclusive representative a provision which provides for differential credit for employees hired

[126] Id. at 639.
[127] McCammon v. Los Angeles Unified School District, 195 Cal.App.3d 661 (1987).
[128] 229 Cal.App.3d 695, 280 Cal.Rptr. 286 (1991).
[129] Ibid.
[130] Ibid.
[131] 162 Cal.App.4th 1436, 77 Cal.Rptr.3d 62, 232 Ed. Law Rep. 231 (2008).
[132] Stats.1988, ch. 1461.

after a locally specified date for prior years of experience or prior units of credit for initial placement on the district's salary schedule.

A second exception is set forth in Government Code section 3543.2 which requires the public school employer and the exclusive representative, upon the request of either party, to meet and negotiate regarding the payment of additional compensation based upon criteria other than years of training and years of experience. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Education Code section 45028 apply.

An amendment to Government Code section 3543.2(e) states that the public school employer and the exclusive representative shall, upon the request of either party, meet and negotiate a salary schedule (rather than simply additional compensation) based on criteria other than a uniform allowance for years of training and years of experience. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Education Code section 45028 requiring a salary schedule based upon a uniform allowance for years of training and years of experience shall apply. In addition, a salary schedule established pursuant to Government Code section 3543.2(e) shall not result in the reduction of the salary of any teacher.[133]

Education Code section 45028(a) was also amended to state an exception to the uniform salary provisions by creating an exception to Section 45028 when a public school employer and exclusive representative negotiate and mutually agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience.[134]

These amendments to the uniform salary schedule requirements allow school districts to negotiate merit pay and other criteria as part of the salary schedule. However, in practice, it may be difficult to negotiate such provisions.

D. Payment of Salary

The Education Code authorizes the governing board of a school district to arrange to pay certificated employees in ten, eleven or twelve equal installments.[135] Each payment for the calendar month must be paid out no later than the fifth of the next calendar month.[136]

The governing board of each school district, when drawing an order for the salary payment due to a certificated employee of the district, must, with or without charge, reduce the order by the amount requested in a revocable written authorization by the employee. The deduction must be for the purpose of paying the dues of the employee for membership in any local professional organization or any statewide professional organization or any other professional organization affiliated or otherwise connected with a statewide professional

[133] Stats.1996, ch. 959 (S.B.98).
[134] Ibid.
[135] Education Code section 45038.
[136] Education Code section 45048.

organization.[137] No charge may exceed the actual cost to the district of the dues deduction. Any revocation of a written authorization must be in writing and shall be effective commencing with the next pay period.[138]

The governing board of each school district when drawing a warrant for the salary or wage payment due to a certificated employee of a district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer.[139] The organizational security arrangement must provide that any employee may pay service fees directly to the certified or recognized employer organization in lieu of having such service fees deducted from the salary or wage order.[140]

LEAVES OF ABSENCE

A. Leaves of Absence in General

Leaves of absence may be granted by the governing boards of school districts to certificated employees.[141] Governing boards are expressly authorized to grant leaves of absence to employees in connection with certain judicial appearances and jury duty.[142] The governing boards of school districts may also grant leaves of absence with pay on a non-discriminatory basis to employees absent from duty because of religious holidays.[143] At the expiration of the leave of absence, the employee must be reinstated to the position held by the employee at the time of granting the leave of absence unless the employee otherwise agrees.[144]

B. Sick Leave

All certificated employees employed five days a week by a school district are entitled to ten days leave of absence for illness or injury and such additional days as the governing board may allow with full pay for each school year of service. A certificated employee employed for less than five school days a week is entitled to a proportionate part of the ten days leave of absence for illness or injury plus any additional time allowed by the governing board.[145] The employee need not have accrued credit for the leave of absence prior to taking such leave and such leave of absence may be taken at any time during the school year.[146]

The governing board of each school district is required to adopt rules and regulations prescribing the manner of proof of illness or injury for the purposes of sick leave.[147] Sick leave may be utilized for absences necessitated by pregnancy, miscarriage, childbirth and recovery

[137] Education Code section 45060.
[138] Ibid.
[139] Education Code section 45061.
[140] Ibid.
[141] Education Code section 44962.
[142] Education Code section 44036.
[143] 28 Ops.Cal.Atty.Gen. 118 (1956).
[144] Education Code section 44973.
[145] Education Code section 44978.
[146] Ibid.
[147] Education Code section 44978.

therefrom.[148] Unused sick leave may be accumulated from year to year and accumulated sick leave may be transferred when a certificated employee transfers from one school district to another or a community college district.[149]

C. Pregnancy Leave

The governing board of the school district is required to provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duty because of pregnancy, miscarriage, childbirth and recovery therefrom.[150] The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties shall be determined by the employee and the employee's physician.[151]

D. Extended Sick Leave

The Education Code also contains provisions for extended sick leave benefits.[152] The period of extended sick leave benefits begins when the employee has exhausted all available sick leave, including accumulated sick leave for a period of five school months or one hundred days.[153] A certificated employee receives only one period of extended sick leave benefits for each illness or accident.[154]

This provision was interpreted by the courts in Veguez v. Long Beach Unified School District.[155] In Veguez, the Court of Appeal held that an employee was not entitled to differential pay because the medical condition the employee was treated for at that time and the injuries for which she had been treated and received differential pay two years earlier fell within the "per illness" or "per accident" limitation in Education Code section 44977. The court found that the employee's request for sick leave in 2002 was the product of an accident which occurred in 1998 and therefore, it constituted the same illness or accident. The court concluded that because there were no further accidents causing injury to the employee's left knee following her return to work in May of 2000, the medical leave she took in 2002 resulted from the November 1998 accident.

During the extended sick leave period, the certificated employee is entitled to his salary less the amount actually paid to a substitute employee employed to fill his position during his absence or the amount which would have been paid to the substitute had one been employed.[156]

Under Education Code section 44983, it is permissible for districts to adopt a rule that certificated employees will receive one-half of their pay when they have exhausted their sick

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[148] Ibid.
[149] Education Code sections 44979, 44980, 44982.
[150] Education Code section 44965.
[151] Ibid.
[152] Education Code section 44977.
[153] Education Code section 44977; amended Stats.1998, ch. 30 (S.B. 1019), effective January 1, 1999.
[154] Ibid.
[155] 127 Cal.App.4th 406, 25 Cal.Rptr.3d 526 (2005).
[156] Education Code section 44977.

leave. Section 44983 provides an alternative to deducting the substitute employee's salary from the employee's salary for a period of five months or less.

In a case where the employee's physician has released the employee to return to work for four hours per day and a substitute is employed for the remainder of the day, based on the wording of Section 44983, in our opinion, the employee is entitled to one-half of his or her salary for the portion of the day that he or she is absent for up to five months. The employee would receive a prorated salary for the four hours that he or she works and one-half of his or her salary for the remaining hours that he or she is absent.

E. Exhaustion of Leave

When a certificated employee has exhausted all available sick leave, including accumulated sick leave, and continues to be absent on account of illness or accident for a period beyond the five month period and the employee is not medically able to resume the duties of his or her position, the district must engage in the interactive process of accommodation with the employee to determine if the employee can perform the essential functions of his position with or without reasonable accommodation. This process may include discussions regarding possible job restructuring, additional leave, and/or reassignment. If the employee cannot be reasonably accommodated, the employee may be placed on a reemployment list for a period of 24 months (if a probationary employee) or 39 months (if a permanent employee).[157] If the employee is medically able to return during the reemployment period, the employee shall be returned to employment for which he or she is credentialed and qualified.

It should be noted that the language for certificated employees in Education Code section 44978.1 is different than the language for classified employees in Sections 45192 and 45195. Under Section 44978.1, a certificated employee has the right to return to work when medically able regardless of whether there is a vacant position.[158] In Veguez, the Court of Appeal stated, "…section 44978.1 does not condition reinstatement on the availability of a position; it requires reinstatement once an employee is medically able to return to work."

The employee does not necessarily have the right to bump another certificated employee who has taken their former position but the employee does have the right to a position for which they are credentialed and qualified.

F. Industrial Accident and Illness Leave

Governing boards of school districts must establish rules and regulations for industrial accidents and illness leaves for all certificated employees.[159] Such rules and regulations must include allowable leave not less than sixty days in any one fiscal year for the same accident. Allowable leave shall not be accumulated from year to year.

[157] Education Code section 44978.1.
[158] Veguez v. Governing Board of the Long Beach Unified School District, 127 Cal.App.4th 406 (2005).
[159] Education Code section 44984.

Industrial accident or illness leave shall commence on the first day of absence. The certificated employee, when absent from duty, shall be paid that portion of the salary due him for any month when added to his temporary disability indemnity check for workers compensation so that payment to him will not be more than his full salary.[160] In addition, industrial accident or illness leaves shall be reduced by one day for each day of authorized absence. When industrial accident or illness leave overlaps into the next fiscal year, the employee shall be entitled to only the amount of unused leave due him for the same injury or illness.[161] Upon termination of the industrial accident or illness leave, the employee shall be entitled to other sick leave benefits. The governing board may, by rule or regulation, provide for additional industrial accident or illness leaves as it deems appropriate.[162] The certificated employee may endorse to the district the temporary disability indemnity checks received under workers compensation and the district in turn shall issue the employee appropriate salary warrants for payment of the employee's salary.[163]

G. Disability Benefits

The governing board of the school district shall grant a leave of absence to any certificated employee who has applied for disability benefits for a period not to exceed thirty (30) days beyond the final determination of the disability benefits by the State Teachers Retirement System.[164] If the employee is determined to be eligible for the disability benefits by the State Teachers Retirement System, the leave of absence shall be extended for the term of disability but not for more than thirty-nine months from the date of approval of the disability benefits.[165]

However, the application for receipt of disability benefits from the State Teachers Retirement System, by itself, does not affect a retirement or terminate the teacher's previous status or right to seek reinstatement.[166] It is unclear whether after thirty-nine months, the application for disability benefits, if received, would result in a retirement or resignation from the district. If a certificated employee is found not to be disabled by the State Teachers Retirement System, the school district must reinstate the employee to his former position upon receipt by the employer of notification from the State Teachers Retirement System of the denial of the disability benefits.[167]

H. Personal Necessity Leave

A certificated employee may use his leave of absence for illness or injury in cases of personal necessity.[168] The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of personal necessity. The employee

[160] Education Code section 44984.
[161] Education Code section 44984(e).
[162] Education Code section 44984.
[163] Ibid.
[164] Education Code section 44986.
[165] Ibid.
[166] Kalinowski v. Board of Education of Arcadia Unified School District, 90 Cal.App.3d 245, 153 Cal.Rptr. 178 (1979).
[167] Education Code section 44986.1
[168] Education Code section 44981.

is not required to secure advance permission for a personal necessity leave where there is a death or serious illness of a member of the employee's immediate family, an accident involving his person, property or the personal property of a member of his immediate family.[169] The use of sick leave for personal necessity purposes is limited to seven days, unless the collective bargaining agreement of the district provides for additional days.[170]

Every certificated employee is entitled to a leave of absence, not to exceed three days, or five days if out of state travel is required on account of the death of any member of his immediate family. No deduction shall be made from the salary of the certificated employee nor shall such leave be deducted from leave granted by other sections of the Education Code.[171] Members of the immediate family for purposes of bereavement leave include mother, father, grandmother, grandfather or a grandchild of the employee and the spouse, son-in-law, daughter, daughter-in-law, brother or sister of the employee or any relative living in the immediate household of the employee.[172]

I. Study or Travel Leave

The governing boards of school districts may also grant certificated employees leaves of absence for the purpose of permitting study or travel by the employee which will benefit the schools and pupils of the district.[173] The certificated employee must have served the district for at least seven (7) consecutive years preceding the granting of the leave, and not more than one such leave of absence shall be granted in each seven (7) year period.[174]

Every employee granted a study or travel leave of absence may be required to perform services during the leave as the governing board of the school district and the employee may agree upon in writing and the employee shall receive compensation during the period of the leave as the governing board and employee may agree upon in writing.[175] The amount of compensation shall not be less than the difference between the salary of the employee on leave and the salary of the substitute employee in the position in which the employee held prior to the granting of the leave or, in lieu of such difference, the board may pay one half of the salary of the employee on leave or any additional amount up to and including the full salary of the employee on leave.[176] An employee may agree in writing with the governing board of the school district not to receive compensation during the period of the leave.[177]

Every employee, as a condition to being granted a leave of absence for study or travel, must agree in writing to render a period of service in the employ of the governing board of the district following his return from his leave of absence which is equal to twice the period of the

[169] Ibid.
[170] Education Code section 44981.
[171] Education Code section 44985.
[172] Ibid.
[173] Education Code section 44966.
[174] Education Code section 44967.
[175] Education Code section 44968.
[176] Ibid.
[177] Education Code section 44968.5.

leave.[178] Compensation shall be paid to the employee while on the leave of absence in the same manner as if the employee were teaching in the district upon the furnishing by the employee of a suitable bond indemnifying the governing board of the district against loss in the event that the employee fails to render the agreed upon period of service in the employ of the governing board following the return of the employee from the leave of absence.[179]

J. Legislative Leave

Every certificated employee who is elected to the Legislature shall be granted a leave of absence from his duties as an employee of the district.[180] The certificated employee shall be entitled to return to the school district within six months after the employee's term of office in the Legislature has expired.[181]

K. Compulsory Leave of Absence

Whenever a certificated employee of a school district has been charged with the commission of a sex offense, or a controlled substance offense as specified in the Education Code by complaint, information or indictment filed in a court of competent jurisdiction, the governing board of the school district must immediately place the employee upon compulsory leave of absence for a period of time extending not more than ten days after the date of the entry of the judgment in the proceedings.[182] The teacher's credential is suspended for the same period of time.[183] The governing board of the school district may extend the compulsory leave of absence of the employee beyond the period by giving notice to the employee within ten days after the entry of judgment in the proceedings that the employee will be dismissed at the expiration of thirty days from the date of service of the notice, unless the employee demands a hearing as provided in the Education Code.[184]

Any employee placed upon compulsory leave of absence pursuant to Section 44940, shall continue to be paid his or her regular salary if during that time the employee furnishes to the school district a suitable bond or other security acceptable to the governing board as a guarantee that the employee will repay to the district the amount of salary so paid to him or her during the period of the compulsory leave of absence in case the employee is convicted of the charges or fails or refuses to return to service following an acquittal of the offense or dismissal of the charges.[185] If the employee is acquitted of the offense or the charges against the employee are dismissed, the school district shall reimburse the employee for the cost of the bond upon his or her return to service in the district.[186]

[178] Education Code section 44969.
[179] Education Code section 44969.
[180] Education Code section 44801.
[181] Ibid.
[182] Education Code section 44940.
[183] Ibid.
[184] Education Code section 44940.5.
[185] Education Code section 44940.5.
[186] Ibid.

In Unzueta v. Ocean View School District, the Court of Appeal held that where a suspended teacher completed a drug diversion program pursuant to Penal Code section 1000.5, the teacher was entitled to back pay upon reinstatement after dismissal of the criminal case which led to the teacher's suspension.[187] The court held that the school district was entitled to a credit for the amount earned by the teacher in other employment while on suspension, but that the Education Code required the school district to pay the teacher back pay under the circumstances.[188]

In Unzueta, the teacher had been arrested and charged with possession and use of cocaine. The school district exercised its discretion and placed the teacher on compulsory leave of absence pursuant to Education Code section 44940. Unzueta satisfactorily completed a drug diversion program for first time offenders and Unzueta resumed his teaching position. Unzueta then petitioned the superior court for a writ of mandate to compel the district to pay him $40,000 for two years of back pay. The Court of Appeal affirmed the trial court's award of back pay and reduced his award to $10,000 by offsetting other earnings during the period of the leave of absence.[189]

In Tuffli v. Governing Board,[190] the Court of Appeal held that a certificated employee was properly dismissed without a hearing upon his conviction of a sex offense. However, if the conviction was reversed on appeal and the charges were dismissed, the school district must conduct a dismissal hearing in accordance with the Education Code since the certificated employee's property interest in continued employment had been revived or reinstate the employee.[191]

Every certificated employee who enters the active military service of the United States or of the State of California, as defined, during any period of national emergency declared by the president or during any war in which the United States is engaged, is entitled to a leave of absence.[192] Such absence does not affect the classification of the employee and the employee's rights with regard to computation of time toward permanent status.[193] Additional protections are afforded to the employee under the Uniformed Services Employment and Reemployment Rights Act of 1994.[194]

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[187] Unzueta v. Ocean View School District, 6 Cal.App.4th 1689, 8 Cal.Rptr.2d 614 (1992).
[188] Ibid. Penal Code section 1000, et seq., generally authorizes the court to divert from the normal criminal process, first time drug possessors, for the purpose of rehabilitation. The purpose of this statute is to restore first time drug users to productive citizenship without the stigma of a criminal conviction, and to reduce the criminal justice system's backlog of cases. Persons who have been previously convicted, or who have been in the diversion program in the last five years or who have sold or furnished drugs to another person, are not eligible for the diversion program. If the individual completes the program's requirements the criminal charges are dismissed. Penal Code Section 1000.5. states that on successful completion of the diversion program, the arrest upon which the diversion was based is deemed never to have occurred. Section 1000.5 also states that an arrest resulting in successful completion of the diversion program shall not be used in any way which could result in the denial of any employment benefit, license or certificate.
[189] Unzueta v. Ocean View School District, 6 Cal.App.4th 1689 (1992).
[190] 30 Cal.App.4th 1398, 36 Cal.Rptr.2d 433 (1994).
[191] Id. at 1409-1410.
[192] Education Code section 44800.
[193] Ibid.
[194] 38 U.S.C. Section 4301-4335.

A permanent certificated employee on sick leave for work-related mental illness is entitled to reinstatement upon presentation of prima facie medical evidence of recovery sufficient to resume teaching.[195] In order to refuse reinstatement of the tenured teacher, the school district has the burden of proving mental incompetence to resume teaching duties and must comply with the procedural provisions of Education Code section 44942.[196]

TENURE, SENIORITY, CLASSIFICATION AND PERMANENT STATUS

A. Tenure in General

Tenure is the relationship between a teacher and the school district providing job security to the teacher. Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the school district for two complete consecutive school years as a certificated employee and is reelected for the next succeeding school year to a certificated position shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the school district.[197] A school district may not shorten the two year probationary period and grant a teacher tenure after one year.[198]

The governing board of the school district must notify the probationary employee on or before March 15th of the employee's second complete consecutive school year of employment by the district of the decision not to reelect the employee for the next school year to the position.[199] If the governing board does not give notice on or before March 15th, the employee is deemed reelected for the next succeeding school year.[200] The procedure for non-reelection may not be used in place of the statutory lay off procedure but may be used concurrently with the procedure for reassigning an administrator to the classroom.[201]

In calculating the probationary period, leaves of absence must be taken into consideration. In Griego v. Los Angeles Unified School District, the Court of Appeal held that Education Code sections 44929.21 and 44975 must be read together. Section 44975 states that a leave of absence shall not be construed as a break in the continuity of service required for the permanent classification of the employee.[202] The court ordered the Los Angeles Unified School District to classify an employee as a permanent employee when the employee worked a complete school year during the 1989-90 school year and worked slightly less than 75 percent of the days during the 1990-91 school year due to a work-related injury (she was placed on an approved industrial leave of absence). The employee then worked the complete 1991-92 school year as a probationary employee. The school district gave notice on June 23, 1992, that Griego would not

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[195] Raven v. Oakland Unified School District, 213 Cal.App.3d 1347, 262 Cal.Rptr. 354 (1989).
[196] Ibid.
[197] Education Code section 44929.21.
[198] Education Code section 44929.21. Fleice v. Chualar Union Elementary School District, 206 Cal.App.3d 886, 254 Cal.Rptr. 54 (1988).
[199] Education Code section 44929.21. Fleice v. Chualar Union Elementary School District, 206 Cal.App.3d 886, 254 Cal.Rptr. 54 (1988); Grimsley v. Board of Trustees, 189 Cal.App.3d 1440, 235 Cal.Rptr. 85 (1987).
[200] Education Code section 44929.21.
[201] See, Cousins v. Weaverville Elementary School District, 24 Cal.App.4th 1846, 30 Cal.Rptr.2d 310 (1994); Gilliam v. Moreno Valley Unified School District, 48 Cal.App.4th 518, 55 Cal.Rptr.2d 695 (1996).
[202] Griego v. Los Angeles Unified School District, 28 Cal.App.4th 515 (1994).

be reelected to her position for the 1992-93 school year. The court held that the teacher had attained permanent status and should have received notice pursuant to March 15, even though she was on leave for a work-related injury during the 1990-91 school year.[203]

In Cox v. Los Angeles Unified School District,[204] the Court of Appeal held that the certificated employee seeking permanent status was a probationary employee because she failed to complete a school year by failing to work 75% of the days worked during her second consecutive year of employment. Therefore, the court held that the employee was not a permanent employee, but a probationary employee, and could be given a non-reelection notice.

The employee involved successfully completed the 2007-08 school year and was reemployed for the 2008-09 school year. The school district authorized paid maternity leave for the employee from September 2, 2008 through October 31, 2008. The employee returned to work, but did not satisfy the requirements of Education Code section 44908, since she did not work at least 75% of the number of days for that year.[205]

The employee was reemployed for the 2009-10 school year. On March 10, 2010, the employee received a non-reelection notice.[206]

The Court of Appeal noted that Education Code section 44908 defines a "complete school year" as at least 75% of the number of days the regular schools of the district in which the individual is employed are maintained. A probationary employee must serve two complete consecutive school years in a position or positions requiring certification qualifications prior to becoming classified as a permanent employee.[207]

It was undisputed that the employment satisfied the complete school year requirement in 2007-08. In 2008-09, the parties acknowledged that the employee worked 135 days that year. The work year for 2008-09 was 182 days and 75% would be 136.5 days. Therefore, the employee needed to work at least 1.5 additional days.[208]

The employee asserted that she was paid 30 hours for working on a grant application and that she worked an additional partial day of 3.5 hours which must be counted and rounded up. The Court of Appeal noted that the additional hours that the employee worked did not yield another day since those additional hours occurred on regular work days. The court cited Education Code section 44975, which states that "no leave of absence when granted to a probationary employee shall be considered as employment." In essence, the time period when a probationary employee is on a leave of absence does not count toward the complete school year requirement of Education Code section 44908.[209]

The Court of Appeal noted that Education Code section 44908 makes reference to days not hours; therefore, there can be no rounding up of hours. The Court of Appeal stated:

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[203] Ibid.
[204] 218 Cal.App.4th 1441, 160 Cal.Rptr.3d 748, 295 Ed.Law Rep. 719 (2013).
[205] Id. at 1443.
[206] Ibid.
[207] Education Code section 44929.21(b).
[208] Id. at 1446.
[209] Id. at 1447.

> "We conclude that Cox's claims find no support in any evidentiary sense or in the relevant sections of the Education Code. As the trial court observed, 'while it may appear draconian, [Cox's] failure to work 1.5 additional days during the 2008-09 school year supports [LAUSD's] conclusion that the year's service did not constitute a complete school year.' [Cox] was, therefore, properly classified as a probationary employee in 2009-10, and on March 8, 2010, was properly notified that she was non-reelected at the end of that year."[210]

In summary, the Court of Appeal strictly construed the requirements of Education Code section 44908 and did not allow rounding up the number of days to reach 75% of the number of days of the school year to complete a school year.

B. Categorically Funded Positions

In Schnee v. Alameda Unified School District,[211] the Court of Appeal held that a certificated teacher who had been employed for a number of years in a categorically funded position and was subsequently employed by the school district in a probationary position was not entitled to permanent status because she had not served one year as a probationary employee.

Under Education Code section 44909, when a certificated teacher has been employed for several years in a categorically funded program and is subsequently employed in a probationary teaching position, the teacher must be employed by the school district in a probationary position for one year before the teacher can obtain permanent status.

From August 1994 through the 2001-2002 school year, Schnee was employed by the Alameda Unified School District as a reading specialist, a position that was categorically funded under Section 44909. In August, 2002, the district hired her as a full-time third grade teacher, a position supported by general funds as part of the district's regular education program. The district classified her as a second-year probationary employee. On March 12, 2003, the district notified Schnee that she would not be reelected, and terminated her employment at the end of the 2002-2003 school year.

Schnee filed a petition for a writ of mandate, alleging that the district had violated her rights and that she was entitled to be classified as a permanent employee. The lower court concluded that Schnee had been properly classified as a probationary employee and that the district had the right to terminate her employment at the end of the school year so long as she was notified of the district's decision by March 15 of that year. The Court of Appeal affirmed the lower court's decision.

The Court of Appeal concluded that Section 44909, although it does not use the term "temporary," defines a type of employment that is similar to that created by statutes authorizing the employment of temporary employees. The Court of Appeal held that the requirement that the

[210] Id. at 1448.
[211] Schnee v. Alameda Unified School District,125 Cal.App.4th 555, 22 Cal.Rptr. 800 (2004).

individual be "subsequently employed" as a probationary employee contemplates that the individual will be employed for a school year. The Court of Appeal stated:

> "Regardless of the number of years that the employee may have served in a temporary status in a position with certification qualifications, the employee must serve one year as a probationary employee before acquiring permanent status…. We can perceive no reason for treating persons whose employment is temporary by virtue of section 44909 differently in this respect than temporary employees under section 44919. The Legislature has made unmistakably clear that the latter must serve for a year as a probationary employee before receiving credit for the prior period of temporary employment and acquiring permanent status. Although the language in section 44909 is more opaque, we conclude that the same period of probationary employment is required before permanent status may be obtained."[212]

C. Adult School and Regional Occupational Program Positions

Any adult school teacher who has served two years as a probationary teacher is eligible for election to a permanent classification equivalent to the average number of hours per week that he or she has served during his or her probationary years.[213] The governing board of a school district that employs a permanent employee of another district may classify that person as a permanent certificated employee.[214]

In Reis v. Biggs Unified School District,[215] the Court of Appeal held that a teacher who taught part-time in a school district and part-time in a regional occupational program was not entitled to permanent status for the portion of the position related to the regional occupational program.

The teacher held two part-time teaching positions: an agriculture teacher position in the regular educational program of the school district, and a position in the district's regional occupational program.

Under Education Code section 44910 tenure for regional occupational program teachers is limited. Section 44910 states:

> "Service by a person as an instructor in classes conducted at regional occupational centers or programs, as authorized pursuant to Section 52301, shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.

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[212] Id. at 564.
[213] Education Code section 44929.25.
[214] Education Code section 44929.28.
[215] 126 Cal.App.4th 809, 24 Cal.Rptr.3d 393, 195 Ed.Law Rep. 261 (2005).

> "This section shall not be construed to apply to any regularly credentialed teacher who has been employed to teach in the regular educational programs of the school district and subsequently assigned as an instructor in regional occupational centers or programs, nor shall it affect the status of regional occupational center teachers classified as permanent or probationary at the time this section becomes effective."

Originally, the teacher in Reis was employed part-time in a school district and part-time in a classified position in the regional occupational program. The following year and subsequent years, the teacher maintained the same part-time position in the school district and was employed as a certificated employee in the regional occupational program. The teacher contended that because he was subsequently employed as an instructor in the regional occupational program, the second paragraph of Section 44910 applied.

The Court of Appeal disagreed. The Court of Appeal held that the phrase "subsequently assigned" meant that the teacher was teaching in a school district program and was then transferred or subsequently assigned to the regional occupational program. Therefore, the teacher was only entitled to tenure for the part-time position in the school district and not for the part-time position in the regional occupational program.

D. The Effect of Resignation on Tenure

The effect of tenure is mainly in the area of dismissal. A teacher without tenure may be dismissed in the exercise of the limited discretion by school authorities subject only to his right to recover damages if there is a violation of his employment contract.[216]

A probationary employee, on the other hand, may only be dismissed pursuant to the statutory provisions of the Education Code.[217] Permanent certificated employees may only be dismissed after the provisions of the Education Code have been complied with.[218] Tenure of a teacher is not a constitutionally vested right but is within the plenary power of the Legislature and in California is granted by statute.[219] Statutory tenure rights also provide certain rights to permanent and probationary certificated employees upon the reorganization of a school district.[220]

With respect to reemployment after resignation, the courts have read Education Code sections 44848 and 44931 together to mean that reemployment after a resignation restores all individual rights, benefits and burdens of a permanent employee to the individual except for seniority purposes the employee does not regain his or her original hire date. Education Code section 44848 states:

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[216] Snyder v. Regents of the University of California, 33 Cal.App.3d 977, 109 Cal.Rptr. 506 (1973).
[217] See, Education Code sections 44929.21, 44948.3.
[218] Education Code sections 44932, 44944.
[219] Kast v. Board of Trustees, 222 Cal.App.2d 8, 34 Cal.Rptr. 710 (1963); Education Code section 44929.21.
[220] Education Code section 44903.

> "When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.
>
> "When an employee's services are terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service, his original order of employment shall stand."

Education Code section 44931 states:

> "Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code. However, time spent in active military service, as defined in Section 44800, subsequent to the last day of paid service shall not count as part of the aforesaid 39-month period."

In San Jose Teachers Association v. Allen,[221] the Court of Appeal explained the distinction by observing that other employees are affected by the determination of the seniority date and, therefore, Section 44848 setting the seniority date as the rehire date should control. As to the meaning of rights, benefits and burdens, it would be difficult to state with certainty all of the rights, benefits and burdens that might be encompassed within those words, but in Dixon v. Board of Trustees,[222] the Court of Appeal held that the term included classification on the salary schedule (i.e., the employee is placed on the salary schedule based on their full years of experience and training).

In a 1964 Attorney General opinion,[223] the Attorney General stated the term includes accumulated sick leave. The employee would also be classified as permanent employee upon rehire if they were a permanent employee when they resigned. Upon the employee's return, the school district may assign the teacher to any school so long as the assignment is reasonable.[224] In essence, when a permanent certificated employee resigns and is reemployed within 39 months reemployment restores all individual rights, benefits and burdens of a permanent employee. However, for seniority purposes, employee does not regain his or her original hiring date.

[221] 144 Cal.App.3d 627 (1983).
[222] 216 Cal.App.3d 1269 (1989).
[223] 43 Ops.Cal.Atty.Gen. 107 (1964).
[224] Hodge v. Board of Education, 22 Cal.App.2d 341, 70 P.2d 1009 (1937).

E. Administrative or Supervisory Positions

A person employed in an administrative or supervisory certificated position upon completing a probationary period, including any time served as a classroom teacher in the same district having an average daily attendance of 250 or more pupils, shall be classified as and become a permanent employee of the district as a classroom teacher.[225] In a district having an average daily attendance of less than 250 pupils, he or she may be so classified.[226] This permanent status applies only with regard to classroom teaching and does not entitle the certificated employee to continue in the administrative or supervisory position held during the probationary period.[227]

F. Reassignment

Whenever a person employed in an administrative or supervisory position is reassigned to a teaching position, notice must be given by March 15th of the previous school year.[228] In addition, a written statement of the reasons for the reassignment must be given if requested by the employee.[229] Whenever the reasons include incompetency, an evaluation pursuant to the Education Code must be completed not more than sixty days prior to the giving of the notice of the transfer.[230] Where the evaluation was not completed as required by statute, the administrator who was transferred to a teaching position was entitled to back pay (but not reinstated) until the evaluation was completed.[231]

G. Interns

The courts have ruled that district interns are probationary employees of school districts and may only be terminated in accordance with the procedures for terminating probationary certificated employees.

The Court of Appeal in Welch v. Oakland Unified School District,[232] held that the plaintiffs who were district interns were entitled to thirty (30) days' notice and a right to a hearing under Education Code section 44948.3(a) in the same manner as other probationary certificated employees. The District argued that the employees had signed a contract indicating that they were temporary employees and could be terminated by giving fifteen (15) days written notice. The Court of Appeal held that the employment contract was an impermissible attempt to abrogate the mandatory duty of the school district under the Education Code.

Education Code section 44885.5(a) states that any school district shall classify as a probationary employee of the district any person who is employed as a district intern pursuant to Section 44830.3 and any person who has completed service in the district as a district intern

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[225] Education Code section 44897. See, also, Thompson v. Modesto City High School District, 19 Cal.3d 620, 623-24 (1977).
[226] Ibid.
[227] Barthuli v. Board of Trustees, 19 Cal.3d 717, 139 Cal.Rptr. 627 (1977); cert. denied 434 U.S. 1040.
[228] Education Code section 44951.
[229] Education Code section 44896.
[230] Ibid.
[231] Hahn v. Board of Education, 205 Cal.App.3d 744 (1988).
[232] 91 Cal.App.4th 1421, 111 Cal.Rptr.2d 374 (2001).

pursuant to Section 44325(b) and Section 44830.3. Section 44885.5(a) authorizes the governing board of the school district to dismiss or suspend employees as probationary employees pursuant to Section 44885.5 in accordance with the procedures in Section 44948.3 as applicable.[233]

The Court of Appeal ruled that the plaintiffs had probationary status and that terminating their employment on fewer than thirty days as required by the Education Code 44948.3 was impermissible.[234]

H. Employment Contract

In Fine v. Los Angeles Unified School District,[235] the Court of Appeal held that the Education Code does not require a school district to classify a teacher as probationary retroactive to the validity date of the teacher's teaching credential. The Court of Appeal held that a teacher's probationary status begins on the date stated in the teacher's contract.

In Fine, an elementary school teacher for the Los Angeles Unified School District claimed that she was entitled to classification as a permanent employee and, therefore, the district improperly terminated her as a probationary employee. Whether the teacher was a probationary employee or a permanent employee turned on whether the teacher's status as a probationary employee began on the validity date of her preliminary teaching credential or on the date stated in her contract with the school district.

Ms. Fine began working as a teacher in the Los Angeles Unified School District in 1996. At that time she served under an emergency permit. The permit is considered a provisional credential under which individuals with a bachelor's degree who have passed CBEST may be hired to teach. See, Education Code section 44300. Ms. Fine was offered and accepted several successive contracts with the Los Angeles Unified School District as a provisional teacher with an emergency permit.

On June 26, 1999, Ms. Fine signed her fourth successive contract with the school district for employment as a provisional teacher for the 1999/2000 school year. The contract showed an emergency permit effective July 1, 1999. The contract, like her previous contracts, specified a starting date and an ending date and stated that it could be terminated at any time without cause at the discretion of the district and stated Ms. Fine's understanding that service under an emergency permit did not count toward permanent status with the school district.

On September 28, 1999, California State University Northridge sent Ms. Fine a letter entitled, "Credential Recommendation." The letter verified that Ms. Fine had completed all of the requirements necessary for the recommendation for a multiple subject preliminary credential. The letter stated that her credential would be issued effective August 27, 1999. Ms. Fine showed the Cal State Northridge recommendation letter to the school secretary but did not take it or send it to anyone at the district office.

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[233] Id. at 1426-1432.
[234] Id. at 1432.
[235] 116 Cal.App.4th 1070, 18 Cal.Rptr.3d 562, 191 Ed.Law Rep. 838 (2004).

In late February 2000, Ms. Fine received her credential, duly issued, by the State of California's Commission on Teacher Credentialing. The credential stated it was valid from August 27, 1999 to September 1, 2004. Ms. Fine sent a copy of the credential to the personnel division of the school district. On March 1, 2000, Ms. Fine received a note from the district office stating that the original credential was required for registration purposes. A few days later, Ms. Fine brought the original credential to the district.

Upon receiving Ms. Fine's credential, on March 8, 2000, the district offered and Ms. Fine accepted a new contract. The contract was for employment as a probationary teacher. On the same date, Ms. Fine signed a verification of seniority date for teachers verifying that her first date of paid services as a probationary teacher was March 8, 2000.

Ms. Fine continued to teach under the March 8, 2000 contract for the remainder of the 1999/2000 school year, during the full 2000/2001 school year, and during the 2001/2002 school year.

On March 14, 2002, the district notified Ms. Fine that she would not be reemployed during the next succeeding school year. The district's letter was issued pursuant to Education Code section 44929.21, which states that a school district may non-reelect a probationary teacher if notice is given prior to March 15 of the employee's second complete consecutive school year of employment by the district.

Ms. Fine contended that the notice was not given properly and that she should have been classified as a permanent employee because she received her credential effective August 27, 1999. Ms. Fine filed a lawsuit in Los Angeles County Superior Court. The trial court upheld the position of the school district that it had no mandatory duty to classify Ms. Fine as a probationary employee earlier than March 8, 2000.

The Court of Appeal affirmed the decision of the trial court and held that Ms. Fine had no statutory right to probationary status as of August 27, 1999, no right to permanent status based on that date and that the school district properly gave her notice of non-reelection as a second year probationary employee. The Court of Appeal concluded that a teacher serving under an emergency permit continues to serve under that permit and under that contract to which she agreed until the teacher is issued a credential and registers it with the district. The Court of Appeal held that the district has no duty to classify a teacher as probationary retroactive to the validity date of her credential. The Court of Appeal noted that the Education Code requires the registration of the credential and that Section 44330 of the Education Code strongly suggests the registration of a credential operates to authorize the teacher's service under that credential, rather than the validity date of the credential. The Court of Appeal stated:

> "We can only conclude, as matter of contract, that she was serving 'under' those documents and subject to their terms until March 8, 2000, when Fine presented her credential to the District and both parties agreed to new terms. The statute does not compel a different conclusion, and we therefore cannot ignore the terms of the parties' contracts."

I. Constitutionality of Tenure, Dismissal and Layoff Statutes

On April 14, 2016, in Vergara v. State of California,[236] the Court of Appeal reversed the trial court's decision finding teacher dismissal, teacher tenure, and teacher layoff statutes unconstitutional and held that the plaintiffs failed to present evidence to support the trial court's decision declaring the statutes unconstitutional. Therefore, the current statutes remain in force since the Court of Appeal held that the statutes are constitutional and do not violate the California Constitution.

Nine students attending California public schools sued the state of California, alleging that the California statutes which govern how public school teachers obtain tenure, how teachers are dismissed, and how teachers are laid off on the basis of seniority violate the California Constitution's guarantee that all citizens enjoy equal protections of the law.[237] After eight weeks of trial, the trial court ruled that the statutes were unconstitutional and void. The State of California and intervener California Teachers Association (CTA) appealed.

The Court of Appeal reversed the trial court's decision. The Court of Appeal held that the plaintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably caused a certain group of students to receive an education inferior to the education received by other students. The Court of Appeal held that although the statutes may lead to the hiring and retention of more ineffective teachers than a hypothetical alternative system would, the statutes do not address the assignment of teachers. Rather, the Court of Appeal held that school administrators determine where teachers are assigned to teach.[238] The Court of Appeal concluded that the plaintiffs failed to show that the statutes themselves do not make any group of students more likely to be taught by ineffective teachers than any other group of students.

The Court of Appeal ruled that the courts are without power to strike down the challenged statutes and that their job is not to determine whether the statutes are a bad idea, but whether the statutes are constitutional. In addition, the Court of Appeal held that its review is limited to the particular constitutional challenge the plaintiffs decided to bring. The plaintiffs brought a facial equal protection challenge alleging that the statutes violate equal protection on their face.

The plaintiffs' complaint claimed that the challenged statutes negatively impacted the students' rights to an education by causing grossly ineffective teachers to become employed and retained in employment in the school system. Specifically, plaintiffs contended that:

1. The tenure statute, Education Code section 44929.21(b), forced school districts to decide whether new, probationary teachers

[236] ___ Cal.App.4th ___ (2016).
[237] Cal. Const., Article I, Section 7(a).
[238] Butt v. State of California, 4 Cal.4th 668, 681 (1992). The Legislature has assigned much of the governance of the public schools to local school districts; Education Code section 35035; Government Code section 3543.2; United Teachers of Los Angeles v. Los Angeles Unified School District, 54 Cal.4th 504, 515 (2012). The assignment of teachers to specific schools is decided by school administrators subject to conditions imposed by collective bargaining agreements.

should be granted tenure before the teacher's effectiveness could be determined.

2. The dismissal statutes, Education Code sections 44934, 44938, and 44944, made it nearly impossible to dismiss poorly performing teachers.

3. The reduction in force statute, Education Code section 44955, required school districts, in the event of layoffs, to terminate teachers based on seniority alone, regardless of their teaching effectiveness.

The plaintiffs' complaint identified two groups of students who allegedly were denied equal protection of the laws because of the challenged statutes. The first group (Group 1) was a "subset" of the general student population, whose fundamental right to education was adversely impacted due to being assigned to grossly ineffective teachers. The Group 1 members were disadvantaged because they received a lesser education than students not assigned to grossly ineffective teachers.

The second group (Group 2) allegedly impacted by the challenged statutes was made up of minority and economically disadvantaged students. Plaintiffs alleged that the schools predominantly serving these students have more than their proportionate share of grossly ineffective teachers, making the assignment to a grossly ineffective teacher more likely for a poor or minority student.

At trial, plaintiffs presented testimony from numerous witnesses who agreed that effective teachers are vital to a child's education. The testimony indicated that a highly effective teacher significantly improves a child's outcomes, while having an ineffective teacher does substantial harm. The testimony indicated that highly ineffective teachers impede a child's access to a reasonable education and while a host of factors, including child poverty and safety, affects student achievement as well, teachers nevertheless have a highly important and significant impact on student learning.

Several of plaintiffs' witnesses testified that the two year probationary period before teachers receive tenure is too short and is not a sufficient amount of time to determine whether a teacher will be successful and effective. Plaintiffs' witnesses testified that performance-based teacher dismissal proceedings lasted anywhere from one to ten years before completion, and costs ranged from $50,000-$450,000. Plaintiffs' witnesses testified that the time and cost of the teacher dismissal proceedings were a significant disincentive to initiating dismissal proceedings. The plaintiffs presented evidence that from 2003 to 2013, approximately two teachers statewide were dismissed on average per year for unsatisfactory performance by completion of the full formal dismissal process, out of an approximate total of K-12 public school teacher population of 277,000.

Plaintiffs presented evidence that ineffective teachers are often transferred into and concentrated in schools that predominantly serve minority and low income children. Poorly

performing teachers often end up at schools serving poor and minority students because unlike schools serving more affluent students, parents of low income students are less likely to complain about ineffective teachers. Plaintiffs presented evidence that schools in some districts serving low income and minority students have higher proportions of inexperienced teachers and experience more layoffs. As a result, there is a constant turnover of faculty and staff at high poverty, high minority schools due to the seniority-based reduction in force statute.

Defendants presented evidence that the in-school effects of children's achievement were generally overstated when compared to out-of-school effects. David Berliner, an educational psychologist and professor emeritus from Arizona State University, testified that teachers account for approximately 10 percent of the variation in aggregate test scores, with the remaining 90 percent attributable to other factors. Berliner testified that value added analysis was unreliable and invalid in assessing educational outcomes. Dr. Berliner acknowledged that the analysis should be able to identify the very bad teachers. Dr. Berliner estimated that approximately one to three percent of teachers consistently have strong negative effects on student outcomes, regardless of the classroom and school composition.

Defendants presented testimony that the challenged statutes protect teachers from arbitrary discipline and dismissal and that they promote academic freedom. Defendants presented evidence that the effects of the teacher dismissal statutes helped districts attract and retain teachers, because the statutes provide job security.

Susan Mills, Assistant Superintendent of Personnel for the Riverside Unified School District, testified on behalf of defendants that the period of two years' probation provided sufficient time to make a permanent employee reelection decision. On cross-examination, John Deasy, former Superintendent of the Los Angeles Unified School District,[239] testified that when the Los Angeles Unified School District moved from a passive tenure system to an affirmative tenure system, requiring a more thorough review of a probationary teacher's abilities, the rate of tenure dropped from close to 100 percent to 50 percent. Linda Darling-Hammond, a professor of education at Stanford University, testified that a relatively short probationary period forced districts to make reelection decisions quickly, and that lengthening the period could result in highly ineffective probationary teachers remaining in the classroom longer.

Robert Fraisse, former Superintendent of the Laguna Beach Unified School District, Conejo Valley Unified School District, and Hueneme Elementary School District, testified that he was able to use a number of strategies for resolving dismissals short of the formal dismissal process, including letting poorly performing teachers know that there were serious concerns which often led to resignation, paying a small amount of compensation in return for a resignation, and working with the teachers union to counsel poorly performing teachers to resign.

The Court of Appeal noted that records from the Los Angeles Unified School District showed that a larger number of teachers resigned to avoid the formal dismissal process than those who elected to go through the process. These records showed that the number of teachers

[239] Dr. Deasy testified on behalf of the plaintiffs. The Court of Appeal cited his testimony on cross-examination as supportive of the defendants' position.

dismissed or resigning to avoid dismissal increased from a total of 16 in 2005-2006 to a total of 212 in 2012-2013. From May 2007 through April 2013, the Los Angeles Unified School District negotiated 191 settlements to informally resolve dismissal cases, with a total payout of slightly more than $5 million, approximately $26,000 per teacher.

Defendants also presented testimony that the reduction in force statute based on seniority was a fair method for laying off teachers. Defendants' witnesses testified that a seniority system was easier to administer, less costly and that ranking teachers for effectiveness was difficult and contentious.

The testimony from both plaintiffs and defendants indicated that decisions on how and where to assign and transfer teachers were determined by local school district administrators and collective bargaining agreements. Several witnesses testified that difficult working conditions impaired districts' efforts to recruit or retain experienced teachers at disadvantaged schools.

The Court of Appeal held that the constitutionality of a statute is a question of law which it reviews de novo. Statutes related to education are provided a presumption of constitutionality and doubts are resolved in favor of validity.[240] The Court of Appeal stated that its obligation is to determine if the statute violates constitutional protections, not to make policy judgments which are left to the Legislature. The Court of Appeal stated that the judiciary does not pass on the wisdom of legislation but its constitutionality.

The Court of Appeal noted that a plaintiff seeking to void a statute as a whole for facial constitutionality must demonstrate that the statutory provisions, based on the language and text of the statute itself, not its application, will inevitably pose a total and fatal conflict with the California Constitution. The Court of Appeal noted that the right to equal protection is guaranteed by the California Constitution.[241] Equal protection of the laws requires that people who are similarly situated for purposes of the law are generally treated similarly by the law.[242] Therefore, plaintiffs must show that the language of the statute has adopted a classification that affects two or more similarly situated groups in an unequal manner, and that the statute discriminates explicitly between groups of people.

The Court of Appeal then reviewed plaintiffs' claims with respect to Group 1, the unlucky subset of the general student population that is denied the fundamental right to basic educational equality because the students within this subset are assigned to a grossly ineffective teacher. The Court of Appeal held that the unlucky subset is not an identifiable class of persons sufficient to maintain an equal protection challenge because the group members do not have a common characteristic other than the fact that they are assertedly harmed by the statute. The court stated that the "unlucky subset" is nothing more than a random assortment of students who, in any given year, are assigned to the approximately one to three percent of California teachers who are grossly ineffective. This group is subject to constant flux and is not an identifiable class sufficient to maintain an equal protection claim. Therefore, the Court of Appeal held that plaintiffs' claim as to Group 1 cannot be affirmed.

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[240] Arcadia Unified School District v. State Department of Education, 2 Cal.4th 251, 260 (1992).
[241] California Constitution, Article 1, Section 7; Butt v. State of California, 4 Cal.4th 668, 678 (1992).
[242] Cooley v. Superior Court, 29 Cal.4th 228, 253 (2002).

With respect to Group 2, poor and minority students who suffer disproportionate harm by being assigned to grossly ineffective teachers, the Court of Appeal held that this is an identifiable class sufficient to maintain an equal protection claim. However, the Court of Appeal held that the challenged statutes did not cause low income and minority students to be disproportionately assigned to grossly ineffective teachers. The Court of Appeal held that a statute is facially unconstitutional when the constitutional violation flows inevitably from the statute, not the actions of the people implementing it. The Court of Appeal stated:

> "It is clear that the challenged statutes here, by only their text, do not inevitably cause poor and minority students to receive an unequal, deficient education….
>
> Instead, the evidence at trial firmly demonstrated that staffing decisions, including teaching assignments, are made by administrators, and that the process is guided by teacher preference, district policies, and collective bargaining agreements. This evidence is consistent with the process set forth in the Education Code, which grants school district superintendents the power to assign teachers to specific schools or to transfer teachers between schools within a district, subject to conditions imposed by collective bargaining agreements, district policies, and by statute….thus, it is administrative decisions (in conjunction with other factors), and not the challenged statutes, that determine where teachers are assigned throughout a district."[243]

The Court of Appeal stated that while plaintiffs have identified troubling problems, they have not properly targeted the cause. The court held that the challenged statutes do not inevitably lead to the assignment of more inexperienced teachers to schools serving poor and minority children, but rather, assignments are made by administrators and are heavily influenced by teacher preference and collective bargaining agreements. Although an alternative system might reduce the number of grossly ineffective teachers in the educational system, the Court of Appeal held that this is a matter of policy, not a constitutional issue that would give rise to an equal protection violation. The Court of Appeal stated:

> "In sum, the evidence presented at trial highlighted likely drawbacks to the current tenure, dismissal, and layoff statutes, but it did not demonstrate a facial constitutional violation….The evidence did not show that the challenged statutes inevitably caused this impact. Plaintiffs elected not to target local administrative decisions, and instead opted to challenge the statutes themselves. This was a heavy burden and one plaintiffs did not carry. The trial court's judgment declaring the statutes unconstitutional, therefore, cannot be affirmed."

[243] Id. at ___.

The Court of Appeal remanded the matter back to the trial court to enter judgment in favor of the state of California, and the California Teachers Association. The plaintiffs have indicated that they intend to appeal to the California Supreme Court.

EVALUATION AND ASSESSMENT

A. Guidelines for Evaluation and Assessment

The governing board of every school district is required to develop and adopt specific guidelines for the evaluation and assessment of the performance of certificated personnel and is required to establish standards of expected pupil achievement for each grade level in each area of study.[244] The governing board of each school district is required to evaluate and assess certificated employee competency as it reasonably relates to the following:

1. The progress of pupils toward the standard of expected pupil achievement at each grade level in each area of study.

2. The instructional techniques and strategies used by the employee.

3. The employee's adherence to curricular objectives.

4. The establishment and maintenance of a suitable learning environment within the scope of the employees responsibilities.[245]

The governing board may evaluate and assess certificated employees in additional areas.[246]

The governing board of each school district is required to establish and define job responsibilities for certificated noninstructional personnel including but not limited to supervisory and administrative personnel whose responsibilities cannot be evaluated appropriately in the same manner as teachers.[247]

B. Evaluation Procedures

The evaluation and assessment must be reduced to writing and a copy transmitted to the certificated employee not later than thirty days before the last school day scheduled on the school calendar adopted by the governing board for the school year in which the evaluation takes place. The certificated employee has the right to initiate a written reaction or response to the evaluation and the response becomes a permanent attachment to the employee's personnel file.[248] Before

[244] Education Code section 44662.
[245] Ibid.
[246] Education Code sections 35160, 44662(e).
[247] Education Code section 44662(c).
[248] Education Code section 44663(a).

the last school day scheduled on the school calendar adopted by the governing board for the school year, a meeting shall be held between the certificated employee and the evaluator to discuss the evaluation.[249]

In the case of a certificated noninstructional employee who is employed on a twelve month basis, the evaluation and assessment must be reduced in writing and a copy transmitted to the certificated employee no later than June 30th of the year in which the evaluation and assessment is made.[250] A certificated noninstructional employee who is employed on a twelve month basis shall have the right to initiate a written reaction or response to the evaluation and the response shall become a permanent attachment to the employee's personnel file. Before July 30th of the year in which the evaluation and assessment takes place, a meeting shall be held between the certificated employee and the evaluator to discuss the evaluation and assessment.[251]

The evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis at least once each school year for probationary personnel and at least every other year for personnel with permanent status.[252] The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee.[253]

C. Unsatisfactory Performance

In the event an employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance.[254] The employing authority shall thereafter confer with the employee making specific recommendations as to the areas of improvement in the employee's performance and endeavor to assist the employee in his or her job performance.[255]

When any permanent certificated employee has received an unsatisfactory evaluation, the employing authority must annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district.[256] Any evaluation which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined necessary by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority.[257]

[249] Ibid.
[250] Education Code section 44663(b).
[251] Ibid.
[252] Education Code section 44664(a).
[253] Ibid.
[254] Education Code section 44664(a).
[255] Ibid.
[256] Education Code section 44664(a).
[257] Education Code section 44664(b).

When a teacher receives periodic evaluation reports with unsatisfactory ratings supported by specific instances and including recommendations for improvement, the evaluation fulfills the requirement to establish a system of evaluation and assessment of teacher performance contained in the Education Code. Such a system informs the teacher of the standards expected and the teacher's failure to attain those standards of performance justifies dismissal.[258] In the case of unsatisfactory certificated employees, the evaluation and assessment serves as one of the prerequisites to suspension and dismissal.

D. Evaluation of Principals

Education Code section 44670 states that the governing board of a school district may identify who will conduct the evaluation of a school principal. A school principal may be evaluated annually for the first and second year of employment as a new principal in a school district. The governing board may determine the frequency at regular intervals of evaluations after this period. Additional evaluations that occur outside of the regular intervals determined by the governing board may be agreed upon between the evaluator and the principal. The evaluators and principals may review school success and progress throughout the year. This review should include goals that are defined by the school district.

Education Code section 44671 states that criteria for effective school principal evaluations may be based upon the California Professional Standards for Education Leaders. These standards identify a school administrator as being an educational leader who promotes the success of all students through leadership that fosters all of the following:

1. A shared vision;

2. Effective teaching and learning;

3. Management and safety;

4. Parent, family and community involvement;

5. Professional and ethical leadership; and

6. Contextual awareness.

Education Code section 44671(b) states that a school principal evaluation may include, but not be limited to, evidence of all of the following:

1. Academic growth of pupils based on multiple measures that may include pupil work as well as pupil and school longitudinal data that demonstrates pupil academic growth over time. Assessments used for this purpose must be valid and reliable and used for the purposes intended and for

[258] Perez v. Commission on Professional Competence, 149 Cal.App.3d 1167, 1171-1172, 197 Cal.Rptr. 390 (1983).

appropriate pupil populations.

2. Effective and comprehensive teacher evaluations, including, but not limited to, curricular and management leadership, ongoing professional development, teacher-principal teamwork, and professional learning communities.

3. Culturally responsive instructional strategies to address and eliminate the achievement gap.

4. The ability to analyze quality instructional strategies and provide effective feedback that leads to instructional improvement.

5. High expectations for all pupils and leadership to ensure active pupil engagement and learning.

6. Collaborative professional practices for improving instructional strategies.

7. Effective school management, including personnel and resource management, organizational leadership, sound fiscal practices, a safe campus environment, and appropriate pupil behavior.

8. Meaningful self-assessment to improve as a professional educator.

9. Consistent and effective relationships with pupils, parents, teachers, staff and other administrators.

This legislation provides guidance for principal evaluations, but is not mandatory.

SUSPENSION AND DISMISSAL

For purposes of suspension and dismissal, the classification of certificated employees determines the method and the procedure for dismissing the employee. The classification of certificated employees is required to be made at the time of employment and thereafter in the month of July of each school year.[259]

[259] Education Code section 44916.

A. Substitute and Temporary Employees

Substitute employees are persons who are employed in positions to fill the positions of regularly employed persons absent from service.[260] Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year as a probationary employee, be classified by the governing board as a probationary employee in the previous year of employment and shall be deemed to have served one year as a probationary employee for purposes of acquiring permanent status.[261]

Any employee classified as a substitute or temporary employee who serves during one school year for at least 75 percent of the number of days the schools of the district were maintained shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.[262] Such temporary or substitute employees shall be reemployed for the following school year to fill any vacant position in the school district for which the employee is certified and qualified to serve unless the employee was released pursuant to subdivision (b) of Section 44954.[263] If the employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

Thus, the courts have held that the discretion of the governing board of the school district is somewhat limited and the school district must reemploy a temporary employee who has served a complete school year unless he does not hold the appropriate credentials or lacks both appropriate academic preparation and experience in the subject matter.[264] Employees classified as substitutes and who are employed to serve on an on-call status to replace absent regular employees on a day to day basis do not have reemployment rights.[265]

There is no statutory method or procedure for terminating substitute or temporary employees for cause. These employees may be released at will by the board prior to serving at least 75 percent of the school year. If the employee has served over 75 percent of the school year, notification of non-reelection is given before the end of the school year. Temporary or substitute employees who are under contract may be terminated for breach of their employment contract if they are notified in writing before the end of the school year.[266]

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[260] Education Code section 44917.
[261] Ibid.
[262] Education Code section 44918.
[263] Education Code section 44918, 44954.
[264] Taylor v. Board of Trustee of Del Norte Unified School District, 36 Cal.3d 500, 204 Cal.Rptr. 711 (1984); see, also, Eureka Teacher's Association v. Board of Education, 202 Cal.App.3d 469 (1988).
[265] Education Code section 44918.
[266] Education Code section 44918, 44954. The governing board should authorize the notices of termination either by resolution or board action.

In Kavanaugh v. West Sonoma County Union High School District,[267] the California Supreme Court, ruled that Education Code section 44916 requires a school district to provide a statement indicating the temporary status of a certificated employee to the employee on or before the date that employee first renders paid service to the district. The California Supreme Court reversed a Court of Appeal decision holding that the notice must be given shortly after the governing board takes formal action.

Education Code section 44916 states in part:

> "At the time of initial employment during each academic year, each new certificated employee at the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status." [Emphasis added.]

In Kavanaugh, the employee's first day of work for the school district was August 26, 1999. At its regular meeting on September 9, 1999, the governing board of the school district took action to employ Kavanaugh, among other new teachers, effective August 26, 1999. On September 13, 1999, the district's personnel manager informed Kavanaugh by letter that the board had approved her employment as a temporary teacher, effective August 26, 1999. On October 18, 1999, the employee was informed that her salary would be increased retroactively as a result of final confirmation of additional credits she had earned in her prior employment, and asked the employee to stop by the personnel office to sign her contract. On November 9, 1999, the employee signed the contract, which described her term of employment as commencing August 26, 1999, and terminating June 8, 2000, and specifying her placement on the certificated salary schedule and her classification as temporary.[268]

On April 20, 2000, the governing board of the school district took action to terminate Kavanaugh and district personnel notified Kavanaugh pursuant to Section 44954 that she would not be re-employed. The employee filed a petition for writ of mandate in the Superior Court, seeking re-employment as a probationary teacher, back pay and benefits, and other relief. The employee alleged that the district had a duty under Section 44916 to classify her as a probationary employee for the 1999-2000 school year, and because it failed to provide timely written notice that her employment was temporary, she must be deemed re-employed as a probationary employee for the following year because she was not notified otherwise before March 15, 2000.[269]

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[267] 29 Cal.4th 911, 129 Cal.Rptr.2d 811 (2003).
[268] Id. at 915-916.
[269] Id. at 916.

The Superior Court ruled in favor of the employee. The Court of Appeal reversed. The California Supreme Court reversed the Court of Appeal and held:

> "We conclude plaintiff Kavanaugh was not given written notice of her status as a temporary employee 'at the time of her initial employment,' because she did not receive such notice on or before her first day of paid service. Accordingly, pursuant to Section 44916, she must be considered a probationary employee as a matter of law."[270]

In summary, the California Supreme Court concluded that Section 44916 requires a school district to provide a written statement to a new certificated temporary employee, indicating the individual's temporary status and salary, on or before the date that the new employee first renders paid service to the district. Failure to indicate the temporary nature of the employment in writing results in the employee being deemed probationary.[271]

In Bakersfield Elementary Teachers Association v. Bakersfield City School District,[272] the Court of Appeal held that the school district's policy of classifying teachers and counselors as temporary employees based on the type of their credential was invalid.

The Court of Appeal held that the District may classify as temporary employees only those persons who are, by virtue of the position they occupy or the manner of service they perform, defined or described as temporary employees in the Education Code. The court held that all certificated employees who are not properly classified under the Education Code as permanent or substitute employees, must be classified as probationary employees and must be accorded the rights of probationary employees including the right to tenure and seniority and the rights to notice and hearing in the event of a certificated employee layoff.

In Bakersfield Elementary Teachers Association, the school district classified certificated employees having less than a regular (i.e., preliminary or clear) credential as temporary employees and required them to sign a contract acknowledging their temporary status. The court held that as a general rule, classification and certification operate independently of one another. The court stated:

> ". . . A person who has been determined to be qualified to teach is not a temporary employee simply because he or she is not yet fully accredited, but rather because he or she occupies a position the law defines as temporary. It is necessary, therefore, to differentiate the teacher's classification from his or her certification." [273]

The court then reviewed the provisions of the Education Code relating to classification of certificated employees and stated that there are four classifications: permanent, probationary,

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[270] Id. at 926.
[271] Id. at 926.
[272] 145 Cal.App.4th 1260, 52 Cal.Rptr.3d 486 (2006).
[273] Id. at 1277.

substitute, and temporary. Substitute and temporary employees are hired to fill the short range needs of a school district and generally may be summarily released. The court noted that the Education Code provides for a rigid system of classification that recognizes two general kinds of temporary employees: those who are employed to serve for less than three to four months, or in some types of limited, emergency or temporary assignments or classes,[274] and those who are employed for up to one year to replace a certificated employee who is on leave or has a lengthy illness.[275] In addition, persons employed in categorically funded programs, or in programs operated by a district under contract, are treated like temporary employees in certain respects,[276] as are persons employed as substitute teachers.[277]

In Bakersfield Elementary Teachers Association, the Court of Appeal noted that all of the 154 persons classified by the District as temporary employees were in either long-term replacement positions or in categorically funded programs. The court noted that 133 of the 154 temporary employees were long-term replacement teachers and that these teachers possessed something less than a regular credential, either a pre-intern certificate,[278] a university internship credential,[279] an emergency teaching permit,[280] or a credential waiver.[281] The court noted that the undisputed evidence showed that there were at most 22 regular teachers on long-term absences during that school year and that the statute directs that a district may employ no more long-term replacement teachers than it has permanent or probationary teachers absent on leave at any one time.[282] Therefore, the court concluded that the District was not permitted to classify more than 22 teachers as temporary long-term replacement teachers. As a result, the court concluded that the remainder of the teachers classified as temporary teachers should have been classified as probationary teachers.

The court rejected the District's argument that the temporary teachers were properly classified since they did not have a preliminary or clear credential. The Court of Appeal stated:

> "If a certificated employee occupies a position the Education Code defines as temporary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee. . . . The Code grants school districts no discretion to deviate from this statutory classification scheme..."[283]

The court went on to state that a probationary employee working under an emergency teaching or specialist permit does not accrue credit toward permanent status, but is entitled to the statutory protections accorded probationary employees in the event of a dismissal for cause or

[274] Education Code sections 44919, 44921, 44986.
[275] Education Code sections 44920, 44918.
[276] Education Code section 44909.
[277] Education Code section 44917.
[278] Education Code section 44305.
[279] Education Code section 44450 et seq.
[280] Education Code section 44300 et seq.
[281] Education Code section 44225.
[282] Welch v. Oakland Unified School District, 91 Cal.App.4th 1421, 1431-1432 (2001).
[283] Id. at 1279.

unsatisfactory performance or a layoff as a result of a reduction in the workforce. The court noted that temporary employees are not entitled to these protections and concluded that if the Legislature had intended that only probationary and permanent employees with a preliminary or clear credential should acquire seniority, it would have done so. The court recognized that in some cases teachers with emergency permits or interns might accrue more seniority that a teacher with a regular credential, but held that the Legislature chose not to require probationary employees to have a preliminary or clear credential in order to accrue seniority.

For these reasons, the Court of Appeal rejected the District's policy of classifying teachers and counselors as temporary employees if they did not have a preliminary or professional clear credential.

In Stockton Teachers Association v. Stockton Unified School District,[284] the Court of Appeal considered whether nine teachers hired under Section 44909 contracts should be treated as temporary or probationary. The District had hired the teachers under temporary contracts after July 1, 2008 for a term ending May 29, 2009, meaning they were for less than a full school year; the contracts did not indicate the particular categorical program for which each employee was hired. The contracts provided that the employees were being hired "as a certificated employee assigned to a categorical program or as the replacement of a certificated employee who has been assigned to a categorical program."

The District issued the employees precautionary layoff notices in March 2009 and the employees requested a hearing. After hearing, the Administrative Law Judge (ALJ) found the District was not prohibited from entering into temporary agreements with employees working in categorically funded programs under Section 44909, and that because the affected teachers were provided with an opportunity to participate in the hearing, any due process concerns were satisfied. The Association then filed a writ of mandate challenging the ALJ's decision, arguing that the proper classification of teachers assigned to categorically funded programs is probationary rather than temporary, that the District unlawfully included temporary teachers in the layoff proceedings, and that the ALJ's findings were not supported by the evidence. The trial court denied the writ and the Association appealed.

The Court of Appeal noted that Section 44909 does not expressly state how employees hired under that section are to be classified. The court also noted that probationary status is the default classification and the temporary classification is to be strictly construed. However, the court did note that Section 44909 "was intended to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or cut back."

The court interpreted the language in Section 44909 providing that employees hired under that section "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

[284] 204 Cal.App.4th 446, 139 Cal.Rptr.3d 55 (2012).

other than Section 44918." The court held that the "contract" referred to in the above provision is the contract entered into between the governing board of the school district and another public or private agency for a program or project, not the employment agreement between the school district and the teacher.

The court held:

> "We agree with Hart, *supra*, and Bakersfield, *supra*, that the only time a section 44909 employee may be terminated 'without regard to other requirements of this code respecting the termination of probationary or permanent employees' is at the termination of the categorically funded program or the end of the contract with the public or private agency. Thus, the only time such employees may be terminated as if they were temporary employees, is at the termination of the program or end of the contract."

The court also clarified that employees hired under Section 44909 are to be treated as temporary employees for purposes of re-employment under Section 44918 (assuming they are terminated at the expiration of the contract or categorically funded program).

Please note that the language of the decision is quite specific in terms of the length of the employment agreement as that is the key to whether the employee must be classified as temporary or permanent:

> "Section 44909 employees are thus treated like probationary or temporary employees depending on the duration of their employment. A person employed under section 44909 is to be treated like a temporary employee, *provided* the person is employed for the duration of the contract with a public or private agency or categorically funded project. In other words, a person may be hired for the particular project (or contract) term and be terminated at the end of that term without the notice that would be required for a probationary or permanent employee. Under such circumstances the employee would be treated as a temporary employee for purposes of accruing service required as a prerequisite to classification as a permanent employee, for the purpose of rehire rights and for the purpose of seniority.
>
> What a district may not do, is hire a person for *more or less than* the term of the contract or project, and treat such a person as a temporary employee. For example, if a district terminates a Section 44909 employee before the end of the term of the project or contract, the employee must be given the notice to which a probationary employee would be entitled. Because an employee who is terminated before the end of the contract or project, or who is hired for a period less than the term of the contract or project is

> not a person hired "pursuant to this section" such an employee must be treated as a probationary employee--the default classification. Said employee accrues service time as a probationary employee. In terms of seniority and re-employment rights, employees hired for less than the term of the project or contract and employees terminated before the end of the contract or project are entitled to be treated like probationary employees." (Emphasis added.)

In applying this holding to the facts, the Court of Appeal found the District had failed to prove the employees were temporary. The court held that to prove its employees were temporary, the District was required:

> 1. To show that the employees were hired to perform services conducted under contract with public or private agencies or categorically funded projects which are not required by federal or state statutes;
>
> 2. To identify the particular contract or project for which services were performed;
>
> 3. To show that the particular contract or project expired; and
>
> 4. To show that the employee was hired for the term of the contract or project.

The court found that one employee was told she was being funded through QEIA funds, but there was no evidence that QEIA funding was eliminated. Thus, she was a probationary employee. Another employee was alleged to be funded with CAHSEE funding, but the court held there was no evidence that CAHSEE was a categorically funded program, or that it was being eliminated. Again, the court found her to be probationary. Another employee testified she was hired as a literary specialist. No evidence was presented that the funding for the specialist position was being eliminated. Again, the court held the district fell short in meeting its burden of proof in establishing the teacher was temporary.

In Fair v. Fountain Valley School District,[285] the Court of Appeal held that the school district is not required to choose the temporary teachers with the most seniority to make them probationary. In Fair, the Court of Appeal held that the Education Code does not establish a seniority system for temporary teachers. The Court of Appeal did note that Education Code section 44918 does give temporary teachers a right of reemployment if they have served more than 75% of the number of days school was maintained during the school year.

[285] 90 Cal.App.3d 180, 153 Cal.Rptr. 56 (1979).

In Edwards v. Lake Elsinore Unified School District,[286] the Court of Appeal held that the Lake Elsinore Unified School District properly classified Lori Edwards as a substitute teacher for the 2007-2008 school year. The teacher contended that because she provided teaching services during the entire school year, she was a permanent employee and therefore was unlawfully deprived of a retroactive salary increase for the 2007-2008 school year. The Court of Appeal concluded that the teacher was properly classified as a substitute teacher and the school district was not required to pay the teacher back pay.

The school district hired Edwards as an elementary school teacher for the 2003-2004 school year. After teaching two consecutive school years, Edwards became a permanent certificated employee. Edwards continued teaching until she voluntarily resigned in July 2006.[287]

On January 8, 2007, Edwards applied for reemployment with the school district. On May 4, 2007, Edwards acknowledged receiving a form that she filled out stating that she was a substitute teacher.[288]

On June 8, 2007, the school district issued a notice stating that the school district had employed Edwards as a certificated substitute teacher, effective June 8, 2007. Edwards began substitute teaching on August 11, 2007. Edwards substituted for a teacher on indefinite medical leave and taught for the entire 2007-2008 school year. Edwards submitted signed substitute time sheets to the school district throughout the 2007-2008 school year. The time sheets each stated at the top of the form, "SUBSTITUTE TIMESHEET."[289]

The school district paid Edwards in accordance with its substitute salary schedule. Edwards contended that she should be paid as a permanent tenured employee. Edwards accepted the paychecks for substitute teaching and filed an administrative complaint seeking back pay. On August 12, 2008, the school district responded to Edwards' objections stating that she was properly classified as a substitute teacher.[290]

On August 21, 2008, the governing board of the school district met and considered Edwards' complaint that she should have been classified as a permanent teacher rather than a substitute, and by letter dated August 26, 2008, notified Edwards that the board had rejected her claim. The letter indicated that because Edwards had served more than 75% of the 2007-2008 school year as a substitute teacher, she was entitled to priority in any regular teaching position vacancy for the 2008-2009 school year pursuant to Education Code section 44918. Edwards was placed in a vacancy and was told under Section 44931 that she had been restored to permanent status as of August 2008.[291]

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[286] 230 Cal.App.4th 1532 (2014).
[287] Id. at 1537
[288] Id. at 1537
[289] Id. at 1537.
[290] Id. at 1538.
[291] Id. at 1538-39.

On February 25, 2009, Edwards filed a Level 1 grievance with the board, alleging she had been misclassified in the 2007-2008 school year. Following a board hearing on August 13, 2009, the board voted unanimously to deny Edwards' claim.[292]

On September 17, 2010, Edwards filed a verified petition for writ of mandate under Code of Civil Procedure section 1085, alleging that the school district misclassified and underpaid her as a substitute teacher during the 2007-2008 school year. Edwards further alleged that the school district should have given her a retroactive salary increase after she was rehired as a regular teacher for the 2008-2009 school year.[293]

On August 9, 2012, the trial court heard Edwards' writ petition, took the matter under submission, and issued an order on August 17, 2012, denying the petition on the grounds Edwards' employment during the 2007-2008 school year was not a reappointment under Section 44931, she was not entitled to a retroactive salary increase for 2007-2008 under Section 44918, Edwards was aware she was serving as a substitute teacher during the 2007-2008 school year, and Edwards' petition was barred by the three-year statute of limitations.[294]

Edwards appealed. The Court of Appeal reviewed the Education Code and noted that there are four classifications:

1. Permanent;
2. Probationary;
3. Substitute; and
4. Temporary.[295]

The Court of Appeal noted that permanent and probationary employees are employed for a school year; temporary employees are hired as needed during a given semester or school year because a regular employee has been granted a long-term leave of absence or is experiencing a long-term illness; and substitute employees, who are employed from day-to-day to fill the position of a regular employee who was absent from service on a short-term basis.[296] The Court of Appeal noted that the Education Code authorizes the governing boards of school districts to hire, classify, promote, and dismiss certificated employees. Under Education Code section 44915, the governing board of a school district is required to 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. Although Section 44915 sets probationary status as the default classification for teachers, it does not prohibit a school district from classifying an employee as a temporary or a substitute employee.[297]

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[292] Id. at 1539.
[293] Id. at 1539.
[294] Id. at 1539.
[295] Id. at 1540. See, Education Code sections 44915, 44919. See, also, Kavanaugh v. West Sonoma County Union High School District, 29 Cal.4th 911, 916 (2003); Bakersfield Elementary Teachers' Association v. Bakersfield City School District, 145 Cal.App.4th 1260, 1278 (2006); Ham v. Los Angeles City High School District, 74 Cal.App.2d 773, 775 (1946).
[296] Neily v. Manhattan Beach Unified School District, 192 Cal.App.4th 187, 193 (2011).
[297] Id. at 193.

The Court of Appeal noted that under Education Code section 44916, the classification initially must be made at the time of employment and thereafter in July of each school year. At the time of initial employment, the employee must receive a written statement of employment status and salary. The Court of Appeal noted that Edwards was informed that she was rehired as a substitute teacher and that since Edwards was not hired as a temporary employee or a regular permanent or probationary certificated employee, Section 44916 does not apply.[298]

The Court of Appeal also held that Edwards' reliance on Education Code section 44909 is misplaced. Section 44909 requires school districts to provide written employment contracts, but it only pertains to certificated employees hired to perform services under contract with public or private agencies, or certain categorically funded programs. The Court noted that Edwards was hired to substitute teach for a categorically funded temporary teacher out on medical leave. The Court held that Section 44909 does not apply to Edwards because she was not hired as a categorically funded employee or to backfill a position vacated by an employee placed in a categorically funded position. As a substitute teacher, Edwards was not filling a vacated position.[299]

The Court of Appeal noted that Edwards was not hired to teach a new class as a result of class size reduction requirements, but was hired as a substitute to fill the position of a regularly employed teacher who was on medical leave.[300] The Court of Appeal stated:

> "Here, there is substantial evidence that Edwards was seeking a substitute teacher job and was aware that she was hired and paid as such. In May 2007, in response to Edwards' employment application, the school district provided her with an initial notification of reasonable assurance of employment for the 2007-2008 school year. Edwards signed the notice form, acknowledging receipt and that she was seeking employment as a substitute teacher for the 2007-2008 school year. . . ."[301]

The Court of Appeal held that a former permanent teacher rehired as a substitute teacher is not entitled to permanent status while employed as a substitute. However, if a teacher substitute teaches at least 75% of the school year and is rehired the following school year as a regular teacher, the teacher may receive a year of credit toward classification as a permanent teacher and seniority credit pursuant to Education Code sections 44914 and 44918. In the instant case, the school district employed Edwards as a substitute teacher during the 2007-2008 school year and did not retroactively reclassify her as a permanent teacher for the 2007-2008 school year. The school district hired Edwards the following year as a permanent teacher for the 2008-2009 school year under Section 44931. Since Edwards resigned in 2006 and was rehired in 2008

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[298] 230 Cal.App.4th 1540 (2014).
[299] Id. at 1541-42.
[300] The Court of Appeal distinguished the decision in Vasquez v. Happy Valley Union School District, 159 Cal.App.4th 969 (2008), noting that Vasquez involved teaching a new class as a result of class size reduction requirements, not filling the position of a regularly employed teacher who was on medical leave.
[301] Id. at 1542.

as a regular teacher filling a vacant position, and not as a substitute, she was entitled to classification as a permanent employee at that time and thereafter under Section 44931.[302]

The Court of Appeal rejected Edwards' argument that under Education Code section 44918(a) she was entitled to retroactive pay for her employment as a substitute teacher during the entire 2007-2008 school year. The Court held that while Section 44918 provides substitute and temporary employees with credit for time served as a substitute teacher for purposes of qualifying for permanent employment status and seniority, Section 44918 does not provide for retroactive pay or benefits.[303] The Court concluded:

> "Although under Section 44918 Edwards was entitled to preferential hiring and one year of teaching credit as a probationary employee based on her year of substitute teaching and subsequent employment as a regular teacher, she received prospective permanent status under Section 44931, upon being hired as a regular teacher in 2008."[304]

In summary, the Court of Appeal concluded that Edwards was properly classified and paid as a substitute teacher during the 2007-2008 school year, and therefore, was not entitled to back pay. The school district carefully documented the employment status of Edwards at each stage of her employment.

The decision in this case points out the importance of making sure that all employment documents are carefully prepared and accurately reflect the employment status of the employee. This decision may be appealed to the California Supreme Court.

B. Probationary Employees

1. Nonreelection of Probationary Employees

The probationary employee must be notified on or before March 15 of the employee's second complete consecutive year of the decision to not reelect the employer for the following year.[305] Under this procedure, teachers are not entitled to a statement of reasons for their nonretention nor are they entitled to a hearing.[306] School districts may utilize this procedure and the layoff procedures with the same employees, if appropriate.[307]

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[302] Id. at 1543.
[303] Id. at 1545.
[304] Id. at 1545.
[305] Education Code section 44929.21.
[306] Grimsley v. Board of Trustees of Muroc Joint Unified School District, 189 Cal.App.3d 1440, 235 Cal.Rptr. 85 (1987). See, also, Fontana Teachers Association v. Fontana Unified School District, 201 Cal.App.3d 1517 (1988), in which the Court of Appeal held that the nonretention of probationary certificated employees was not subject to arbitration; Cousins v. Weaveville Elementary School District, 24 Cal.App.4th 1846, 30 Cal.Rptr.2d 310 (1994). In Board of Education of the Round Valley Unified School District, 13 Cal.4th 269, 52 Cal.Rptr.2d 115 (1996), the California Supreme Court ruled that a school district could not negotiate additional requirements for giving notice to probationary employees including allowing arbitration of any disputes over non-reelection. The court held that the provisions of Education Code section 44929.21 preempt the EERA, Government Code section 3540, et seq.
[307] California Teachers Association v. Mendocino Unified School District, 92 Cal.App.4th 522, 111 Cal.Rptr.2d 879 (2001).

Probationary employees may be dismissed during the school year for unsatisfactory performance or any of the causes for which permanent certificated employees may be dismissed.[308] To dismiss a probationary employee in a district of an average daily attendance of 250 pupils or more, the superintendent of the district or the superintendent's designee must give thirty days prior written notice of dismissal not later than March 15th in the case of second year probationary employees. The notice must include a statement of the reasons for the dismissal and notice of the opportunity to appeal.[309]

In the event of dismissal for unsatisfactory performance, a copy of the evaluation conducted pursuant to the statutory provisions of the Stull Act must accompany the written notice.[310] The employee has fifteen days from the receipt of the notice of the dismissal to submit to the governing board a written request for a hearing. The governing board may establish procedures for the appointment of an administrative law judge to conduct the hearing and submit a recommended decision to the governing board if it wishes. The failure of an employee to request a hearing within fifteen days from the receipt of the dismissal notice constitutes the waiver of a right to a hearing.[311]

The governing board may suspend the probationary employee for a specified period of time without pay as an alternative to dismissal.[312] The hearing is conducted before the governing board unless the governing board establishes procedures for the appointment of the administrative law judge.[313]

In Culbertson v. San Gabriel Unified School District,[314] the Court of Appeal held that a school district is not required to give a March 15 notice of non-reelection to an employee pursuant to Education Code section 44929.21(b) unless that employee is eligible for permanent employment. The Court of Appeal held that a probationary teacher, who taught one year under an emergency permit and the following year under a clear credential, is not a second year probationary teacher entitled to receive a non-reelection notice prior to March 15.

During the 1999-2000 school year, the teacher was employed by the school district pursuant to a one year employment contract under an emergency permit. The teacher then received a professional clear single subject teaching credential and during the 2000-2001 school year the district classified the teacher as a probationary employee.[315]

On May 23, 2001, the district sent the teacher a written notice of non-reelection of employment for the upcoming 2001-2002 school year. The teacher filed suit contending that he had completed two years of service in a teaching position requiring certification qualifications and that based on these two years of employment, he had a right to notice of non-reelection by March 15, 2001. The teacher asserted that the May 23, 2001, notice of non-reelection was

[308] Education Code section 44948.3.
[309] Ibid.
[310] Education Code section 44948.3.
[311] Ibid.
[312] Education Code section 44948.3(b).
[313] Education Code section 44948.3.
[314] 121 Cal.App.4th 1392, 18 Cal.Rptr. 234, 191 Ed.Law Rep. 833 (2004).
[315] Id. at 1395.

untimely and that the school district was required to reemploy him for the 2001-2002 school year.[316]

The trial court denied the teacher's petition and found that the district's May 23, 2001, notice of non-reelection was timely pursuant to Education Code section 44929.21(b). The trial court concluded that the school district had no duty to reemploy the teacher for the 2001-2002 school year. The teacher appealed.[317]

The Court of Appeal reviewed the provisions of Education Code section 44929.21 and held that the teacher was not eligible for permanent employment because he was employed during his first year under an emergency permit and during his second year under a clear credential.[318]

The Court of Appeal held that the tenure and notice provisions of Section 44929.21 are interdependent and that the teacher cannot insist upon notice prior to March 15 if he is not eligible for permanent employment pursuant to the tenure provision of Section 44929.21. The Court of Appeal held that the teacher must be eligible for permanent employment under the tenure provision before he is entitled to the March 15 notice of non-reelection. The Court of Appeal held that the notice provision of Section 44929.21 was intended to apply only to teachers eligible for permanent employment. The Court of Appeal concluded that the teacher was not entitled to the March 15 notice and that the school district's May 23, 2001 notice was timely.[319]

In Petersil v. Santa Monica-Malibu Unified School District,[320] the Court of Appeal denied the plaintiff's petition for writ of mandate seeking reinstatement as a permanent certificated employee. The Court of Appeal held that the school district properly nonreelected the plaintiff.

Plaintiff began work as a certificated employee for the school district on August 28, 2008. The next day, appellant signed a written offer of employment agreeing to work as a temporary certificated employee for the 2008-09 school year. The plaintiff worked more than 75% of the 2008-09 school year.[321]

On March 9, 2009, the school district mailed a certified letter to plaintiff stating that she would not be rehired for the following school year. The notice of nonreelection cited Education Code section 44954.[322]

On July 29, 2009, the school district reemployed plaintiff as a temporary certificated employee for the 2009-10 school year. The plaintiff worked more than 75% of the 2009-10 school year.[323]

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[316] Id. at 1395-96.
[317] Id. at 1396.
[318] Id. at 1397-98. See, Summerfield v. Windsor Unified School District, 95 Cal.App.4th 1026, 1028 (2002).
[319] Id. at 1398.
[320] 219 Cal.App.4th 529, 161 Cal.Rptr.3d 851, 296 Ed.Law Rep. 558 (2013).
[321] Id. at 853.
[322] Ibid.

On March 5, 2010, the school district sent plaintiff a certified letter notifying her that she would not be rehired for the 2010-11 school year. The notice of nonreelection cited Education Code section 44954.[324]

Before the beginning of the 2010-11 school year, the school district contacted plaintiff to see if she wished to return for another year as a temporary employee. Because plaintiff recently had a child, she notified the school district that she needed a short maternity leave. Because she could not report to work at the beginning of the school year, the school district declined to offer her a temporary position. In November 2011, she began working as a part-time employee for the school district.[325]

On July 19, 2011, plaintiff filed a petition for a writ of mandate alleging that she was improperly classified as a temporary employee instead of a probationary employee for the 2008-09 school year. Plaintiff alleged that she had been employed for two complete school years as a probationary employee and that the school district's notice of nonreelection was ineffective, and therefore, she should be reinstated as a permanent certificated employee.[326]

The school district conceded that because plaintiff had started working the day before she signed her first contract as a temporary employee, she became, by operation of law, a probationary employee for the 2008-09 school year.[327] The school district contended that the two notices of nonreelection were effective because Section 44929.21(b) does not, by its terms, apply to first-year probationary employees, and the reference to the incorrect statutory provision did not prejudice plaintiff's due process rights.[328]

On March 21, 2012, the Superior Court denied plaintiff's petition. Plaintiff appealed.[329]

The Court of Appeal noted that the Education Code establishes four possible classifications for certificated employees: permanent, probationary, substitute, and temporary.[330] Probationary employees may be nonreelected without providing cause or other procedural protections and without regard to contrary provisions in the collective bargaining agreement.[331]

The Court of Appeal held that because plaintiff worked one day before she signed her first contract, she was, by operation of law, a first-year probationary employee for the 2008-09 school year. The Court of Appeal noted that the plaintiff does not dispute the timeliness of the original notice of nonreelection, but rather, contends that the notice was defective because it referred to Section 44954, rather than Section 44929.21(b).[332]

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[323] Id. at 854.
[324] Ibid.
[325] Ibid.
[326] Ibid.
[327] See, Kavanaugh v. West Sonoma County Union High School District, 29 Cal.4th 911, 926 (2003).
[328] 219 Cal.App.4th 529, 534 (2013).
[329] Ibid.
[330] Taylor v. Board of Trustees, 36 Cal.3d 500, 504-505 (1984).
[331] See, Board of Education v. Round Valley Teachers Association, 13 Cal.4th 269, 281 (1996).
[332] Id. at 538.

The Court of Appeal held that because Section 44929.21 does not specify the particular form of the notice of nonreelection, that the notice was timely and valid. The Court of Appeal further held that the plaintiff failed to meet the requirements to become a permanent employee under Section 44929.21(b) and denied the plaintiff's appeal.[333]

2. Service of Notice of Nonreelection

In Hoschler v. Sacramento City Unified School District,[334] the Court of Appeal held that a probationary certificated employee must receive actual notice of nonreelection by March 15. The Court of Appeal held that since the statute does not prescribe how such notice shall be given, personal service or actual notice is required and notice by certified mail, without proof of actual notice of receipt prior to March 15, is insufficient.

In Hoschler, the employee began a second credentialed year as a probationary teacher in 2003-2004. On March 11, 2004, the governing board of the district decided that the employee would not be reelected for the 2004-2005 school year. On March 12, the district mailed the employee a notice of nonreelection informing him of its decision not to reelect him for the following school year. The notice was sent by certified mail with a return receipt. The employee testified he did not receive the letter from the district and did not see the notice until May 8, when he received a copy from his attorney.[335]

The Court of Appeal reviewed the language of Education Code section 44929.21 and its legislative history and held that since the statute does not specifically authorize the use of certified mail, personal service and actual notice is required. The Court of Appeal noted that other statutes specifically authorize service by certified mail.[336]

The Court of Appeal held that its ruling would not apply retroactively since retroactive application would cause major disruption to established practices around the state. The Court of Appeal held that its decision would apply to all teachers who are issued notices pursuant to Section 44929.21 after the Court of Appeal's decision becomes final (July 11, 2007). As a result of the Hoschler decision, notices of nonreelection for the 2008-2009 school year and thereafter must be served personally on employees.[337]

In Sullivan v. Centinela Valley Union High School District,[338] the Court of Appeal held that a school employee may not purposefully evade service of process when the school district attempts to serve a notice of nonreelection on a probationary certificated employee. Education Code section 44949.21 requires districts to notify a probationary teacher of nonreelection by March 15 of the employee's second complete consecutive school year. The statute is silent on the method of service. However, a previous decision holds that where no specific form of service is prescribed, personal service "or some other method equivalent to imparting actual

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[333] Ibid.
[334] 149 Cal.App.4th 258 (2007).
[335] Id. at 262.
[336] Id. at 264.
[337] Id. at 270-72. A decision of the Court of Appeal becomes final 30 days after filing. The decision Hoschler was filed on April 3, 2007. See, Cal. Rules of Court, Rule 8.264(b).
[338] 194 Cal.App.4th 69, 122 Cal.Rptr.3d 871 (2011).

notice" must occur. The issue in Sullivan is whether an employee can successfully evade service by making himself unavailable during the time service is attempted.

In Sullivan, the District's director of Human Resources met with the teacher on March 10, 2008 to inform him that the District had determined not to recommend his reelection to the Board of Education. On March 13, Mr. Sullivan appeared at the Board meeting with his attorney to ask the Board to reconsider. The Board nevertheless voted to non-reelect Mr. Sullivan and publicly announced its decision after the closed session. Mr. Sullivan's attorney was present during the announcement. Mr. Sullivan then called in sick the following day, March 14. On March 15, Mr. Sullivan was not present at his residence. However, Rita Sullivan was present at the residence and signed for a certified letter addressed to Mr. Sullivan. The letter was Mr. Sullivan's notice of nonreelection. Mr. Sullivan alleged that Rita Sullivan was not his agent and had no authority to sign on his behalf.

Mr. Sullivan argued that he was not timely served with notice of non-reelection and, therefore, attained tenure. The court disagreed, holding that Mr. Sullivan's willful attempts to avoid service prevent him from successfully asserting failure of service under section 44929.21. The court also denied relief to Mr. Sullivan on the alternative grounds that he received actual notice before the statutory deadline; this holding is based on Rita Sullivan's ostensible authority to sign on Mr. Sullivan's behalf as well as the conversation that occurred between Mr. Sullivan and the District's director of Human Resources on March 10.

In Grace v. Beaumont Unified School District,[339] the Court of Appeal held that a probationary school nurse received actual notice when she was served by e-mail from the district's head of human resources. The Court of Appeal held that the e-mail was sufficient notice and denied the employee's petition for writ of mandate to overturn her nonreelection.

The Court of Appeal noted that Education Code section 44929.21(b) authorizes the governing board of a school district to notify a probationary teacher on or before March 15 of the teacher's second complete consecutive year of employment of the decision to reelect or not reelect the teacher for the next succeeding school year. If the notice is not given, the teacher is deemed reelected for the next school year and must be classified as a permanent employee of the district at the commencement of that year.

No method of giving notice is stated in the section. In Hoschler v. Sacramento City Unified School District,[340] the Court of Appeals held that if the statute is silent, then personal notice of the decision not to reelect or some other method equivalent to imparting actual notice is required.[341] The Court of Appeal noted that Hoschler does not discuss what some other method equivalent to imparting actual notice might be, but noted that the implication is if the employee has actual notice, personal service is not required.

In Grace, the Court of Appeal found that Grace had actual notice when Grace was sent an e-mail asking her to be available for a meeting and she indicated that she would not be. The

[339] 216 Cal.App.4th 1325, 157 Cal.Rptr.3d 737, 293 Ed.Law Rep. 971 (2013).
[340] 149 Cal.App.4th 258 (2007).
[341] Id. at 269.

assistant superintendent for personnel services responded by e-mail stating that the purpose of the meeting was to provide due notice that the district will not be offering Grace a contract for next school year. The Court of Appeal held that the e-mail was sufficient actual notice not to rehire Grace for the next school year and, therefore, the district complied with Education Code section 44929.21.[342]

3. Dismissal During the School Year

In Achene v. Pierce Joint Unified School District, the Court of Appeal held that prior to dismissing a probationary teacher for unsatisfactory performance pursuant to Education Code section 44948.3, a district is required to issue the teacher a 90-day notice of unsatisfactory performance under Section 44938 and issue a performance evaluation (and opportunity to improve) under Section 44664.[343]

Sarah Achene was a first-year probationary teacher in the Pierce Joint Unified School District during the 2006-07 school year, assigned to teach high school English. Her principal was responsible for formally evaluating her performance. Her principal walked through Ms. Achene's classroom on a weekly or bi-weekly basis and discussed his observations with her. He also performed two formal observations, one on October 19, 2006 and one on November 30, 2006. During the October 19th observation, the principal discussed the class with Ms. Achene and emphasized the importance of putting together classroom rules and procedures. He did not tell Ms. Achene her performance was unsatisfactory. His written summary of the observation was fairly positive although he did note that Ms. Achene had allowed the students to get off task for several minutes and recommended that Ms. Achene continue to work on classroom management, lesson organization and personal control of emotion in the classroom.[344]

After the November 30th observation, the principal met with Ms. Achene to discuss the class. The principal stated that some of the students were off task during class and one student was permitted to leave the class without good cause. The principal also noted that Ms. Achene should have given the students short paragraphs to read, and answer questions, in preparation for the exit exam, which some of her 12th grade students had yet to pass. The principal also told Ms. Achene the board had discussed terminating her effective January 2007. The written observation summary indicated that the lesson was student driven and not challenging enough; that students were off task and somewhat disruptive; and that Ms. Achene needed to develop total awareness of her classroom.[345]

On December 8, 2006, the district notified Ms. Achene that she was being dismissed effective January 10, 2007 based on unsatisfactory performance. The notice attached a copy of a written performance evaluation that had not been provided to Ms. Achene previously, as well as the observation reports of October 19th and November 30th. Ms. Achene timely requested a

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[342] Id. at 1331. See, Sullivan v. Centinela Valley Union High School District, 194 Cal.App.4th 69, 71 (2011).
[343] Achene v. Pierce Joint Unified School District, 176 Cal.App.4th 757, 97 Cal.Rptr.3d 899 (2009). Section 44948.3 states in part, "First and Second Year probationary employees may be dismissed during the school year for unsatisfactory performance determined pursuant to Article 11 (commencing with Section 44660) of Chapter 3, or for cause pursuant to Section 44932" according to the procedures set forth in Section 44948.3. Sections 44664, 44938 and 44948.3 are attached hereto.
[344] Id. at 762-63.
[345] Id. at 763-64.

hearing before the governing board. After the hearing, the board voted to dismiss Ms. Achene from her position.[346]

The court held that Ms. Achene had a fundamental vested right in continuing her employment through the 2006-07 school year and could not be dismissed except for cause or unsatisfactory performance. The court rejected the district's argument that the obligation to issue a 90-day written notice of unsatisfactory performance under Section 44938 applies only to permanent employees. The court held that Section 44938 does not contain any such limitation – it applies to any charges of unsatisfactory performance.[347]

The court further held that the district failed to confer with Ms. Achene and give her an opportunity to correct her unsatisfactory performance pursuant to Section 44664. The court noted that Section 44948.3 requires the district to include the 44664 evaluation in the written notice of dismissal. Therefore, according to the court, a district must conduct an evaluation *before* it can dismiss a probationary teacher for unsatisfactory performance during the school year. The court emphasized that Section 44664 requires the district to confer with the employee, make specific recommendations for improvement, and endeavor to assist the employee in his or her performance. The court invalidated the district's attempt to issue the evaluation at the same time it notified Ms. Achene of her dismissal.[348]

This decision imposes a significant burden on districts that wish to terminate a probationary teacher mid-year for unsatisfactory performance. The court's reasoning applies to cases involving unprofessional conduct as well. A district could not terminate a probationary teacher mid-year for unprofessional conduct unless the teacher was first given a 45-day notice of unprofessional conduct and an evaluation pursuant to Section 44664. Some districts may choose to wait out the year and nonreelect the teacher pursuant to Section 44929.21.

C. Permanent Certificated Employees – Grounds for Dismissal

With permanent certificated employees, the grounds for dismissal are limited to the causes specified in the Education Code. The primary grounds for dismissal of a permanent certificated employee include:

1. Immoral or unprofessional conduct.

2. Dishonesty.

3. Unsatisfactory performance.

4. Evident unfitness for service.

5. Physical or mental condition unfitting him to instruct or associate with children.

[346] Id. at 764-65.
[347] Id. at 766-67.
[348] Id. at 768-71.

6. Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

7. Conviction of a felony or of any crime involving moral turpitude.

8. Alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children.[349]

In Atwater Elementary School District v. California Department of General Services,[350] the California Supreme Court held that the statute that prohibits the introduction of evidence relating to matters accruing more than four years before a school district files a notice of intention to dismiss a teacher is not absolute. The court held that in some circumstances, when equitable relief or equitable estoppel is appropriate, the courts may allow evidence to be introduced that is more than four years old.

The Atwater case involved a credentialed teacher who allegedly engaged in sexual misconduct with five students between 1992 and 1998. The teacher moved to dismiss the charges claiming that the allegations were more than four years old. The administrative law judge dismissed the charges and the Court of Appeal upheld that dismissal holding that the provisions of Education Code section 44944(a) were an absolute bar to introducing evidence more than four years old.[351]

The California Supreme Court reversed the ruling by the Court of Appeal and held that where a school district can show that the employee's conduct induced others to refrain from coming forward within the four year period, the employee may not use Education Code section 44944(a) as a bar to introducing evidence of events that occurred more than four years prior to the filing of the notice of intention to dismiss. In essence, if the district can show that a teacher or other employee used their power or authority to induce students to refrain from reporting sexual misconduct by the employee, the district will be allowed to introduce evidence of incidents of sexual misconduct falling outside the four year period.[352]

The California Supreme Court's decision in Atwater Elementary School District is extremely significant and opens the door to allowing schools districts to bring actions against teachers and other employees who engage in sexual misconduct where the students and other victims do not come forward to report the sexual misconduct within four years of the incident.

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[349] Education Code section 44932. The Legislature amended Education Code section 44932 and substituted the term "unsatisfactory performance" for "incompetency." Stats.1995, ch. 392 (A.B. 729). It is impossible to predict how the courts will interpret this change. However, it may lessen the burden on school districts in seeking the dismissal of certificated employees. As of September, 1999, there have been no published judicial decisions interpreting the term "unsatisfactory performance."
[350] 41 Cal.4th 227, 59 Cal.Rptr.3d 233 (2007).
[351] Id. at 230.
[352] Id. at 231-37.

D. Permanent Certificated Employees–Unprofessional Conduct/Unsatisfactory Performance

In cases involving unprofessional conduct, the employee must be given notice forty-five calendar days prior to charges being filed. The specific instances of misconduct must be stated so as to give the employee the opportunity to correct his faults. The written notice must include the employee's last evaluation.[353]

The forty-five day notice has been held by the courts not to be jurisdictional, but an evidentiary consideration.[354] In Blake v. Commission on Professional Competence, the court held there was no express language in the statute that states that the governing board must, in addition to providing notice of the specific charges, provide the teacher with more than an opportunity to remedy objectionable conduct before proceeding to act upon that conduct.[355]

In Blake, the teacher was employed as an English and drama teacher with the district from September, 1972, until her dismissal in 1987. In October, 1984, while performing her classroom duties, she injured her back. Because of her injury, she did not work from February, 1985, through the remainder of the 1984-85 school year. Blake did not request a leave of absence, and did not return to work until September, 1985.

On February 10, 1985, Blake received a notice of unprofessional conduct from the district which cited forty-four incidents of unacceptable behavior and failure to follow administrative directives. Blake claimed that she was unable to correct the alleged faults in the notice because of her extended absence from the classroom due to her back injury and illness. On May 20, 1985, the district served the teacher with a notice of intention to dismiss.

Blake alleged that the statute had not been complied with because she had not been given the opportunity to correct her deficiencies and overcome the charge of unprofessional conduct. The Court of Appeal held that the school district had met its obligation by giving the notice and that the Commission on Professional Competence was not barred from considering the grounds for dismissal.[356]

In a later case, the Court of Appeal held that where the teacher corrected his conduct after receiving a notice of unprofessional conduct, as set out in a stipulation between the parties, the teacher could not be suspended.[357]

In cases involving unsatisfactory performance, the employee must be given notice 90 calendar days prior to the filing of the charges of specific instances of misconduct of unsatisfactory performance so as to give the employee an opportunity to correct his faults.[358]

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[353] Education Code section 44938.
[354] Blake v. Commission on Professional Competence, 212 Cal.App.3d 513, 260 Cal.Rptr. 690 (1989).
[355] Ibid.
[356] Id. at 516-518.
[357] Crowl v. Commission on Professional Competence, 225 Cal.App.3d 334, 275 Cal.Rptr. 86 (1990).
[358] Education Code section 44938.

E. Permanent Certificated Employee – Hearing Procedures

To initiate dismissal proceedings, the district files formal written charges against the employee. The employee has 30 days to file a response or the employee is terminated. The written charges may not be served upon the employee between May 15th and September 15th.[359] The same procedure may be used to suspend a permanent certificated employee without pay for a specified period of time.[360]

In DeYoung v. Commission on Professional Competence,[361] the Court of Appeal held that the failure of the school district governing board to consider either verified written charges prepared by the district or written charges formulated by the Board itself, pursuant to Education Code section 44934, was a non-substantive error. The Board based its decision to go forward with the dismissal proceeding on oral charges presented by a district representative alleging that the teacher had physically abused students.

The teacher contended that the Board's failure to consider or formulate written charges before initiating his dismissal nullified all further proceedings. The Commission on Professional Competence, the trial court, and the Court of Appeal all held that this failure was a procedural error that was nonsubstantive and not prejudicial.

The Court of Appeal concluded:

> "In sum, DeYoung's informal notification of charges, eventual receipt of written charges, representation by counsel, involvement in the discovery process and participation in a four-day evidentiary hearing confirm he was provided notice and a full opportunity to oppose the charges. He has not shown the governing board's reliance on an oral presentation of charges in initiating his dismissal undermined his preparation or otherwise prejudiced his defense. The trial court did not err by denying his mandate petition."[362]

If the employee requests a hearing, the employee is served with a formal accusation and a Commission on Professional Competence is convened consisting of one member appointed by that employee, one member appointed by the school district and an administrative law judge appointed by the Office of the Administrative Hearings.

The two members appointed by the employee and the district must have five years of experience in the last ten years in the discipline of the employee to be dismissed and hold a current valid credential. The hearing is conducted pursuant to the Administrative Procedures Act, Government Code sections 11500, et seq., except that the scope of discovery is similar to that of civil matters and is broader than discovery in most administrative matters. The

[359] Education Code sections 44934, 44936, 44937.
[360] Education Code sections 44932, 44934, 44936, 44937.
[361] 228 Cal.App.4th 568 (2014).
[362] Id. at 581.

Commission must either dismiss or reinstate the employee. The Commission cannot suspend the employee unless the school district initiated suspension procedures rather than dismissal proceedings.[363]

The hearing must be commenced within sixty days of the date of the employee's demand for a hearing. However, it is not unusual for the hearing to be commenced and continued to a later date.[364]

At the administrative hearing, all witnesses must testify under oath or affirmation and no testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice of intention to dismiss.[365] Following the administrative hearing in which witnesses testify and evidence is introduced, the decision of the Commission on Professional Competence is made by a majority vote. The Commission prepares a written decision containing findings of fact and determination of issues and a disposition which will state whether the employee should or should not be dismissed or suspended and whether the employee should be suspended for a specific period of time without pay.[366] The Commission has the discretion to determine whether a teacher should be dismissed once it finds grounds for dismissal.[367]

The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.[368] The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board. Either party may appeal to the superior court.[369] The superior court shall exercise its independent judgment in reviewing the administrative record and, thus, the court has broad discretion in overturning the Commission's decision.[370]

If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the administrative law judge.[371] If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board must pay the expenses of the hearing including the cost of the administrative law judge and the other members appointed to the Commission on Professional Competence, including but not limited to expenses for travel, meals and lodging, and the cost of substitute employees.[372]

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[363] Education Code section 44944.
[364] Education Code Section 44944. See, also, Powers v. Bakersfield City School District, Cal.App.3d 560, 204 Cal.Rptr. 185 (1984).
[365] Education Code section 44944.
[366] Ibid.
[367] Fontana Unified School District v. Burman, 45 Cal.3d 208, 246 Cal.Rptr. 733 (1988).
[368] Education Code section 44944.
[369] Education Code sections 44944, 44945.
[370] Education Code section 44945.
[371] Education Code section 44944.
[372] Ibid.

F. Permanent Certificated Employees – Multiple Grounds for Dismissal

In many cases, when charges are brought against a teacher, several grounds for dismissal are alleged, such as unprofessional conduct, evident unfitness for service and refusal to obey school rules. A particular act or omission by a teacher may constitute more than one of the causes for dismissal under the Education Code.[373] In Board of Education v. Swan, the California Supreme Court stated:

> "Manifestly, a particular act or omission of a teacher may constitute unprofessional conduct, evident unfitness for service, and a persistent violation of or refusal to obey prescribed rules and regulations. Defendant's citation of Fresno City High School District v. De Caristo, . . . does not strengthen her position. There it was merely said that each of the causes for removal stated in the code refers to >acts or omissions not necessarily included in the others...' That is not a statement that the acts or omissions charged may not be included in one or more causes for removal."[374]

In Bevli v. Board of Trustees, the Court of Appeal stated:

> "The threshold question which presents itself is set forth in appellant's brief: Whether the appellant District is entitled to plead multiple causes for dismissal which are all or in part supported by common factual allegations . . .
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> "This court is unaware of any rule of law which proscribes the use of single facts to support multiple theories of legal responsibility."[375]

In Johnson v. Taft School District, the Court of Appeal held that conduct on the part of a teacher consisting of continual insubordination and a refusal to recognize constituted authority constitutes unprofessional conduct and makes the teacher unfit for service in a school even through her other qualifications may be sufficient.[376] The Court of Appeal explained its reasoning as follows:

> "A board of education is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The

[373] Board of Education v. Swan, 41 Cal.2d 546, 551, 261, P.2d 261 (1953); Bevli v. Board of Trustees, 165 Cal.App.3d 812 (1985).
[374] Id. at 551.
[375] Bevli v. Board of Trustees, 165 Cal.App.3d 812, 816-17 (1985).
[376] 19 Cal.App.2d 405 (1937).

> example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though her other qualifications may be sufficient."[377]

The California Supreme Court in Board of Education v. Swan similarly ruled that a teacher who is continually insubordinate and who refuses to recognize constituted authority may be unfit for service in the school.[378] One of the allegations which the Court found to be true was that the teacher had failed to report for teaching assignments on two occasions when instructed to do so by the superintendent of schools and failed to attend meetings called by the superintendent of schools.[379] Based on these allegations and several other allegations which the Court found to be true, the trial court concluded that there was cause for the teacher's dismissal on the grounds of unprofessional conduct, evident unfitness for service and persistent violation of and refusal to obey the school laws of the state and reasonable regulations prescribed for the government of the public schools by the State Board of Education and by the Board of Education of the City of Los Angeles.[380] In discussing the charges, the California Supreme Court stated:

> "Willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. . . . A teacher, and more particularly a principal, in the public school system is regarded by the public and the pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under her care and protection . . .
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> "The phrase 'unprofessional conduct,' as used in the Education Code, is to be construed according to its common and approved usage, having regard for the context in which the Legislature used it. . . . The word 'unprofessional' is a relative expression without technical meaning or arbitrary connotation. 'Unprofessional conduct' is defined...as 'that which violates the rules or ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing.' Thus, it has been held that the violation of a teacher's oath as prescribed by the school code justified revocation of his credentials and constituted 'unprofessional conduct' within the meaning of the statutory provisions governing dismissals. Conduct which produced serious friction in the school and showed the teacher's insubordination and refusal to conform to the instruct-ions and requirements of her superior was held 'unprofessional conduct.' The taking of a leave

[377] Id. at 408.
[378] 41 Cal.2d 546 (1953).
[379] Ibid.
[380] Ibid.

> of absence by a teacher without the consent of a school board in violation of its rule was adjudged 'unprofessional conduct.'
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> "The fact that the term unprofessional conduct is not defined by statute authorizing the dismissal of a teacher . . . does not render it void for uncertainty."[381]

The Court of Appeal in Board of Education v. Matthews held that a teacher's absence in violation of district policy constituted unprofessional conduct and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.[382] In Matthews, the teacher was absent from school during the weeks of October 12, 1953, and October 19, 1953, in violation of the rules and regulations of the district and was absent from duty beginning September 7, 1954. The Court of Appeal distinguished Fresno City High School District v. De Caristo which said that two absences without leave may not be a persistent course of conduct and indicated that in Matthews there was ten absences opposed to two in De Caristo.[383] The Court of Appeal in Matthews stated:

> "Appellant's failure to report for duty after having been directed to do so by the superintendent, her absences being without just cause, constitutes a breach of her contract of employment, and is unquestionably unprofessional conduct. In Board of Education v. Swan . . . it was said that in discussing a teacher's refusal to report for a teaching assignment that 'a particular act or omission may constitute unprofessional conduct, evident unfitness for service, and a persistent violation of a refusal to obey prescribed rules and regulations.' The court further stated that, 'The refusal of a teacher to accept an assignment which the school authorities have the power to make constitutes a violation of school laws as grounds for dismissal citing numerous grounds for dismissal citing numerous authorities.' In Evard v. Board of Education of the City of Bakersfield . . . it was held that a teacher with permanent tenure who left her position before the expiration of the time specified in her contract without the consent of the trustees of her district, was guilty of unprofessional conduct and subject to the statutory penalties prescribed."[384]

In Evard v. Board of Education of the City of Bakersfield, a teacher failed to report for work following the denial by the governing board of the school district of her request for a leave.[385] In Evard, the Court of Appeal stated:

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[381] Id. at 551-553.
[382] 149 Cal.App.2d 265, 308 P.2d 449 (1957).
[383] Ibid.
[384] Id. at 271.
[385] 64 Cal.App.2d 745 (1944).

> ". . . We must conclude the plaintiff forfeited her tenure in the Bakersfield City School District when she voluntarily ceased her employment with that district without the consent of the school board. The question of her good or bad faith, and the question of her unprofessional conduct, is not necessarily involved here."[386]

In Palo Verde Unified School District v. Hensey, the Court of Appeal defined "evident unfitness for service" and held that the tearing out of a loudspeaker, vulgar remarks which embarrassed students and vulgar gestures and statements constituted evident unfitness for service.[387] The court referred to the dictionary definition of unfit which included in part "not fit, not adapted to a purpose, unsuitable, incapable, incompetent, and not adapted for a particular use or service."[388]

In Governing Board of Ripon Unified School District v. Commission on Professional Conduct,[389] the Court of Appeal held that a school district could terminate a permanent certificated employee who refuses to obtain their English language certification.[390] The Court of Appeal held that a teacher who refuses to obtain their EL certification may be terminated by the school district for evident unfitness for service, unprofessional conduct and persistent violation of or refusal to obey the reasonable regulations of the school district.[391]

In Ripon, Theresa Messick was the only music teacher at Ripon High School. Ms. Messick refused to obtain the EL certification and the school district initiated termination proceedings against her. An administrative law judge determined that the school district lacked authority to terminate the teacher. The trial court granted the district's petition for writ of mandate and authorized it to proceed with the termination proceedings. The Court of Appeal affirmed the trial court's decision and authorized the school district to proceed with the termination proceedings.[392]

The Court of Appeal held that under federal law, a school district must ensure its students learning the English language are provided with equal opportunities.[393] Federal law prohibits a school district from denying equal educational opportunity to an individual on account of his race, color, sex or national origin, by failing to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[394]

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[386] Id. at 751.
[387] 9 Cal.App.3d 967, 88 Cal.Rptr. 570 (1970).
[388] Id. at 972.
[389] 177 Cal.App.4th 1379, 99 Cal.Rptr.3d 903 (2009).
[390] The Court of Appeal used the term English language or EL certification to include the CLAD (Cross-cultural, Language and Academic Development) and BCLAD (Bilingual, Cross-cultural, Language and Academic Development), Bilingual Credential or SDAIE (Specially Designed Academic Instruction in English) Certificate. The court referred collectively to all of these certifications as EL certifications.
[391] Education Code section 44932.
[392] Id. at 1382-84.
[393] See, 20 U.S.C. Section 1703.
[394] 20 U.S.C. Section 1703(f).

In California, public school teachers are required to be specially certified to teach EL students.[395] The State Department of Education monitors and sanctions school districts who assign an EL student a teacher who is not certified EL students.[396]

In May 2002, the State Department of Education determined that the Ripon Unified School District was out of compliance with state law for the 2001-2002 school year, because the district had assigned EL students to classes taught by teachers who lacked EL certification.[397]

The district responded to the compliance audit by developing an EL plan which required all certificated teachers to sign a written commitment agreement to obtain EL certification. The district also negotiated an agreement with the teachers' union that all certificated staff obtain EL certification by December 30, 2005, or else resign or be terminated. The district agreed to pay for the training if the teacher obtained it through the county office of education, and the district agreed to provide the teachers an additional $400 stipend.[398]

Messick refused to sign a written commitment to receive EL training. In January 2006, the district began termination proceedings against Messick.[399]

The Court of Appeal held that under the permissive code, Education Code section 35160, a school district had broad authority to make decisions and to require employees to obtain EL certification. The Court of Appeal rejected Messick's argument that the district's actions conflicted with or were preempted by state law and held that the district's actions were consistent with federal law[400] and state law.[401] The court held that unless there is a law that prohibits the district's action of requiring teachers to obtain EL certification, Education Code section 35160 clearly authorizes it.[402]

The Court of Appeal held that the district's requirement that all certificated teachers become EL certified is lawful and, therefore, Messick's persistent refusal to comply with the district's requirement is a lawful ground on which to initiate termination proceedings against her. The Court of Appeal held that the district could terminate Messick for unprofessional conduct, evident unfitness for service, and persistent violation of or refusal to obey, reasonable regulations prescribed by the district.[403]

The Court of Appeal also held that state credentialing laws did not prevent the district from requiring a teacher to satisfy additional certification requirements in order to continue in employment. The court also held that Education Code section 45033, which prohibits a school district from reducing a tenured teacher's salary on account of the teacher's failure to meet additional educational requirements imposed by the district, does not apply to dismissal.[404]

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[395] Education Code sections 44253.3, 44253.4, 45253.10.
[396] Education Code sections 44258.9, 45037.
[397] Id. at 1383.
[398] Id. at 1383-84.
[399] Id. at 1384.
[400] 20 U.S.C. Section 1703.
[401] Education Code sections 44253.3, 44253.4, 45253.10, 44258.9, 45037.
[402] Id. at 1385-86.
[403] See, Education Code section 44932.
[404] Id. at 1386-87.

The Court of Appeal also rejected Messick's assertions that the EL certification requirement is outside the scope of permissible bargaining between the teacher's union and the district and was an unlawful waiver of statutory requirements regarding the causes and procedures for dismissing a certificated teacher. The Court of Appeal held that the negotiation of a requirement that all teachers become EL certified and receive a financial stipend related to wages and conditions of employment and thus was negotiable. The Court of Appeal also held that the district's actions requiring EL certification only added a regulation and did not alter the statutory causes and procedures for dismissal nor did it require Messick to waive any protected statutory rights.[405]

In San Diego Unified School District v. Commission on Professional Competence,[406] the Court of Appeal held that there was insufficient evidence to support termination of a teacher for inappropriately touching a student. The three-member Commission on Professional Competence determined that the school district had not proven the teacher's evident unfitness to teach, immoral conduct, or persistent violation of district regulations. The district filed a petition for writ of mandate with the superior court, which granted the petition and vacated the Commission's decision.

On appeal, the Court of Appeal held that substantial evidence does not support the superior court's finding that the teacher touched the student in an inappropriate manner. The Court of Appeal reversed the judgment of the superior court and remanded the matter back to the trial court with directions to enter a new judgment denying the petition for writ of mandate.[407]

The Court of Appeal reviewed the testimony of the witnesses and the record and the legal standards for determining evident unfitness to teach. The Court of Appeal ruled that the trial court did not base its decision on all of the evidence in the administrative record. The Court of Appeal held that the trial court was required to examine the administrative record for errors of law and exercise its independent judgment upon the weight of the evidence produced. The Court of Appeal concluded that the evidence in the administrative record did not contain substantial evidence supporting factual findings of the teacher's immoral conduct, evident fitness for service, or persistent violation of laws pursuant to Education Code section 44932.[408]

G. Permanent Certificated Employees – Evident Unfitness for Service

In Oakland Unified School District v. Olicker,[409] the Court of Appeal discussed the meaning of evident unfitness for service as follows:

> "In Palo Verde Unified School District v. Hensey, . . . the reviewing court accepted the dictionary definitions of 'evident' as meaning 'clear to the vision and understanding' and the dictionary definition of 'unfit' as 'not fit, not adapted to a purpose,

[405] Id. at 1390-91.
[406] 214 Cal.App.4th 1120, 154 Cal.Rptr.3d 751 (2013).
[407] Id. at 1153.
[408] Id. at 1151.
[409] 25 Cal.App.3d 1098, 102 Cal.Rptr. 421 (1972)

> unsuitable; incapable; incompetent, and physically or mentally unsound.' . . . The court also accepted the following definition or 'unfit' as defined in California Words, Phrases and Maxims, page 440: 'Unsuitable, incompetent and not adapted for a particular use or service.' . . . In Hensey, the teacher was charged with evident unfitness for service and immoral conduct and the appellate court upheld the trial court's determination that the charges were true and constituted sufficient grounds for dismissal upon the basis that the incidents of the teacher's conduct, taken in the aggregate, served as a substantial basis for the trial court's determination. Although the reviewing court was reluctant to find that any one incident in and of itself constituted unfitness, it concluded that each incident was evidence of unfitness, and that taken in the aggregate they justified a finding that the defendant was 'evidently unfit' to teach.
>
> "We observe, moreover, that the term 'evident unfitness for service' should not be given a definite technical meaning and that a court should not arbitrarily find that it is subsumed under some set formula . . . In applying the standard due consideration must be given to the circumstances of the case at hand."[410]

H. Permanent Certificated Employees – Criteria to Determine Fitness to Teach

Generally, the courts have held that while a specific act or omission may constitute several grounds for dismissal, it must be determined whether the teacher is fit to teach before the teacher can be dismissed regardless of the cause for dismissal.

In Morrison v. State Board of Education, the California Supreme Court held that in determining whether the teacher is unfit to teach, the following factors are to be considered:

1. The likelihood of recurrence of the questioned conduct;

2. Extenuating or aggravating circumstances;

3. The effect of notoriety and publicity;

4. The impairment of teacher-student relationship;

5. Disruption of the educational process;

6. Motive; and

[410] 25 Cal.App.3d 1098, 1107-1108; 102 Cal.Rptr. 421 (1972).

7. Proximity or remoteness in time of the conduct.[411]

In Morrison, the State Board of Education was seeking to revoke a teacher's credentials to teach in the public secondary schools of California. The teacher had engaged in a private homosexual act with a consenting adult but had never been accused or convicted of any criminal activity. The incident was reported to the district superintendent and the teacher resigned his teaching position. Nineteen months after the incident became known to the district superintendent, the State Board of Education conducted a hearing concerning possible revocation of the petitioner's credential to teach. There was no evidence of any homosexual activity other than the one incident away from the school site.[412] The court concluded that there was insufficient evidence that Morrison was unfit to teach and remanded the matter back to the superior court for further proceedings.[413]

In Board of Trustees v. Judge, the Court of Appeal held that a teacher who had been convicted of cultivating a single marijuana plant could not be dismissed for evident unfitness for service unless the teacher's actions indicated an unfitness to teach. The Court of Appeal held that there must be a nexus or connection between the teacher's conduct and his usefulness to the school district. In Judge, there was no evidence that the teacher's conviction would have an adverse effect upon the school or that there was a likelihood of recurrence of his conduct.[414]

In San Dieguito Union High School District v. Commission on Professional Competence, the Court of Appeal explained the process for determining fitness to teach.[415] The Court of Appeal in San Dieguito, stated:

> "The first ground for Harris' dismissal was 'evident unfitness' for service. The applicable standard or determinative test in a teacher discharge case is whether the person is fit to teach . . . Fitness to teach is probably a question of ultimate fact . . . In Board of Education v. Jack M. . . . the Supreme Court delineates the process for determining fitness. This objective and analytical approach to determining fitness to teach was first enunciated in Morrison v. State Board of Education . . ."[416]

In San Dieguito, the Court of Appeal held that an excessive number of absences did not show a per se unfitness to teach and remanded the matter back to the trial court to make findings under the Morrison standard. The findings were made by the trial court and dismissal of the teacher was affirmed on appeal.[417]

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[411] Id. at 229.
[412] Morrison v. State Board of Education, 1 Cal.3d at 218-220.
[413] Id. at 238-40.
[414] 50 Cal.App.3d 920, 123 Cal.Rptr. 830 (1975).
[415] 135 Cal.App.3d 278, 175 Cal.Rptr. 103 (1982).
[416] Id. at 284.
[417] San Dieguito Union High School District v. Commission on Professional Competence, 174 Cal.App.3d 1176, 220 Cal.Rptr. 351 (1985). See, also, Fontana Unified School District v. Burman, 45 Cal.3d 208, 219-221 (1988) in which the California Supreme Court reviewed the Morrison decision and stated that the Morrison criteria apply to teacher dismissal cases.

In Bassett Unified School District v. Commission on Professional Competence, the Court of Appeal held that even in cases involving dishonesty, the Morrison criteria regarding unfitness to teach must be applied. In Bassett Unified School District, the testimony was uncontradicted that the teacher received paid sick leave from the school district while teaching at another school at the same time. The superior court found that the teacher had been dishonest and that the finding was supported by substantial evidence, but the Court of Appeal reversed and held that the superior court should have considered whether the teacher was unfit to teach and should have applied the Morrison criteria.[418]

In Woodland Joint Unified School District v. Commission on Professional Competence, the Court of Appeal discussed the difference between "evident unfitness for service" and "unprofessional conduct."[419] The Court of Appeal held that evident unfitness for service required that the unfitness be attributable to a defect in temperament and indicated that the Morrison criteria must be analyzed to determine whether the cited conduct indicated unfitness for service.

In Woodland Joint Unified School District, the teacher was served by the district with a notice of intention to dismiss from his position as an English teacher on grounds of evident unfitness for service and persistent refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district. The charges against the teacher included failure to follow proper procedures for disciplining students, writing sarcastic and belittling notes about students, insulting students in class, using profanity in class, behaving rudely and contemptuously toward parents, making sarcastic remarks about other teachers in the presence of students, displaying insubordination and disrespect toward administrators, bullying and threatening other teachers and disrupting the grading process by interfering with the grading policy of a substitute who took over one of his classes.[420]

The superior court made specific findings describing the teacher's misconduct and measured that conduct against the criteria for unfitness for service set out by the California Supreme Court in Morrison v. State Board of Education.[421] The superior court found a number of aggravating circumstances under the Morrison criteria and found that the cumulative effect of the teacher's behavior showed a pattern and course of misconduct justifying dismissal for evident unfitness for service.[422] The Court of Appeal reviewed the case law with respect to dismissal of permanent certificated employees and stated:

> "As we shall explain, we believe the De Caristo-Tarquin-Hensey line of cases contains the preferred analysis. (1) Combining the definitions offered in Hensey and De Caristo in light of the context of the statute as a whole, 'evident unfitness for service' in section

[418] Bassett Unified School District v. Commission on Professional Competence, 201 Cal.App.3d 1444, 247 Cal.Rptr. 865 (1988).
[419] Woodland Joint Unified School District v. Commission on Professional Competence, 2 Cal.App.4th 1429, 4 Cal.Rptr.2d 227 (1992).
[420] Id. at 1434-35.
[421] Woodland Joint Unified School District v. Commission on Professional Compliance, 2 Cal.App.4th 1435-1440.
[422] Id. at 1440-41, see, also, Governing Board v. Haar, 28 Cal.App.4th 369, 33 Cal.Rptr.2d 744 (1994) (upholding trial court's application of the Morrison criteria to case of sexual harassment).

> 44932, subdivision (a)(5), properly means 'clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.' Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district...
>
> "[C]onduct constituting 'evident unfitness for service' will often constitute 'unprofessional conduct,' but the converse is not true. 'Evident unfitness for service' requires that unfitness for service be attributable to a defect in temperament – a requirement not necessary for a finding of >unprofessional conduct.'...
>
> "[W]here a flaw of temperament is the root cause of a teacher's bad conduct, there is no reasonable likelihood the teacher can so reform his or her temperament within 45 days as to assure the employing school district the bad conduct will not recur."[423]

The Court of Appeal went on to find that the district was not required to give the teacher a 45-day notice of unprofessional conduct.[424] The court found that notice of remediation would be inappropriate where evident unfitness for service is at issue because by definition one who is evidently unfit for service is incapable of correcting one's offensive behavior.[425] The Court of Appeal also rejected the teacher's claim that his constitutional rights to due process of law were violated because the district did not warn or progressively discipline him for his offensive conduct.[426] The court found that the teacher should have known the misconduct was wrongful, and because of their professional expertise, teachers should be able to determine what kind of conduct indicates unfitness to teach.[427]

In San Diego Unified School District v. Commission on Professional Competence,[428] the Court of Appeal upheld the District's termination of Frank Lampedusa, a permanent certificated employee who was serving as the Dean of Students at Farb Middle School.

The District charged Mr. Lampedusa with evident unfitness for service, immoral conduct and persistent refusal to follow State Board of Education guidelines or the law. The District based its decision on Mr. Lampedusa's advertisement soliciting sex on the Craigslist "men seeking men" site; the ad contained very graphic photos of his body, a photograph of his face, and obscene written text.[429] The ad did not give Mr. Lampedusa's name and did not indicate that

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[423] Id. at 1444-1445.
[424] Woodland Joint Unified School District v. Commission on Professional Competence, 2 Cal.App.4th at 1147.
[425] Ibid.
[426] Id. at 1453.
[427] Ibid.
[428] 194 Cal.Rptr.3d 1454, 124 Cal.Rptr.3d 320 (2011).
[429] The "men seeking men" section of the Craigslist Web site contains a disclaimer requiring agreement by the users that they are 18 years old and acknowledgement that the "men seeking men" site may include adult content. The disclaimer requires users to click their consent to the agreement before entering the site.

he was a teacher or that he was affiliated with the District. However, an anonymous male who viewed the site identified Mr. Lampedusa as an employee of the District and contacted the police. The anonymous caller stated to the police that he was a parent of a student at Farb Middle School.[430]

Mr. Lampedusa's principal was then informed of the site and upon viewing it determined that she had lost confidence in him and questioned his ability to serve as a role model for students as either the Dean of Students or as a teacher. The principal suggested to Mr. Lampedusa that he remove the listing. Mr. Lampedusa complied. The District also initiated dismissal proceedings shortly after learning of the listing.[431]

During the hearing before the Commission on Professional Competence ("the Commission"), Mr. Lampedusa testified that he did not intend for any student to view the Web site. However, he also testified that he assumes parents will monitor their children's use of the Internet and that children will not access Internet sites that are not intended for minors. He further testified that if his students had seen the ad he did not believe there would be a significant impact on his ability to teach them. Mr. Lampedusa testified that he planned to continue to place ads soliciting sex but that he would be careful not to include photographs that people might find objectionable.[432]

The Commission did not find cause for dismissal. While it found that Mr. Lampedusa's ad was vulgar and inappropriate and demonstrated a serious lapse in good judgment, it found "the District failed to prove any nexus whatsoever to respondent's employment with the District." The Commission noted that had any student, parent, or teacher viewed respondent's ad, it surely would have washed over into his professional life and interfered with his ability to serve as a role model at school. However, that did not happen in this case.[433]

The District challenged this determination in Superior Court, but the Court agreed that the Commission's findings were supported by the weight of the evidence. The Superior Court adopted the Commission's findings of fact and conclusions of law.[434]

The District then appealed to the Court of Appeal, which sided with the District and found that Mr. Lampedusa's conduct constituted grounds for dismissal based upon evident unfitness to teach and immoral conduct. The Court applied the factors for analyzing a teacher's unfitness to teach as set forth in Morrison v. State Board of Education:[435]

1. The likelihood that the conduct may have adversely affected students or fellow teachers and the degree of such adversity anticipated;

2. The proximity or remoteness in time of the conduct;

[430] Id. at 1458.
[431] Id. at 1458-59.
[432] Id. at 1459-60.
[433] Id. at 1460.
[434] Id. at 1461.
[435] 1 Cal.3d 214 (1969).

3. The type of teaching certificate held by the party involved;

4. The extenuating or aggravating circumstances, if any, surrounding the conduct;

5. The praiseworthiness or blameworthiness of the motives resulting in the conduct;

6. The likelihood of the recurrence of the questioned conduct; and

7. The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

The Court of Appeal concluded that, contrary to the Commission's finding, a parent did see Mr. Lampedusa's ad and the individual who anonymously reported it to the police stated that he was a parent of a student at the school. The Court also relied on the fact that Mr. Lampedusa's principal viewed the ad and lost confidence in his ability to serve as a role model. The Court found aggravating circumstances surrounding the conduct in that Mr. Lampedusa, "rather than taking complete responsibility for his conduct, shifted responsibility to parents and students to not access his site." The Court held that his conduct was "extremely blameworthy in the pornographic, obscene manner" in which he sought a date on the Internet. The Court also found that the District had reason to believe the conduct might recur.[436]

In analyzing Mr. Lampedusa's constitutional rights, the Court relied on City of San Diego v. Roe,[437] in which the City terminated a police officer for his off-duty selling of sexually explicit videos of himself on eBay. The video showed him stripping off a generic police uniform and engaging in sexual acts. The officer also sold police equipment on the site, including official uniforms of the San Diego Police Department. In that case, the U.S. Supreme Court held that Roe took "deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." The Court held that Roe's speech was not protected under the First Amendment because it did not pertain to a matter of public concern nor was it a communication intended to be private. Relying on Roe, the court in Lampedusa concluded: "It is established that disciplining Lampedusa for publicly posting his ad does not infringe on his constitutional rights or the rights of other teachers."[438]

In summary, the court held that Mr. Lampedusa's behavior demonstrates evident unfitness to teach and immoral conduct (defined as "that which is hostile to the welfare of the general public and contrary to good morals.") This case is helpful for districts and provides support should a district seek to discipline a teacher based on information posted on the Internet. However, because of the free speech issues that may arise when a teacher is disciplined based on the content of his or her speech, we would recommend that districts seek legal advice before imposing such discipline.

[436] Id. at 1462-66.
[437] 543 U.S. 77 (2004).
[438] Id. at 1465.

I. Attorneys' Fees

In Boliou v. Stockton Unified School District,[439] the Court of Appeal held that a school district was liable for attorney's fees in a teacher dismissal proceeding even when the school district dismissed the proceedings before hearing.

In Boliou, the Stockton Unified School District filed an accusation against a tenured teacher. The teacher denied the conduct and demanded a hearing. After the school district and the teacher litigated the case for 18 months and the school district received some unfavorable rulings, the school district attempted to dismiss the charges before the hearing on the merits of the charges. The Commission on Professional Competence granted the school district's motion to dismiss the charges over the teacher's objections.[440]

The teacher filed two writ petitions in Superior Court and the Superior Court issued a writ of administrative mandate to order the Commission to modify its dismissal order to include a determination that the teacher should not be dismissed, and issued a writ of administrative mandate to order the school district to pay the teacher's reasonable attorney's fees and costs.[441]

Education Code section 44944 states that if the Commission determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing and reasonable attorney's fees incurred by the employee.

The Court of Appeal affirmed the trial court's decision and concluded that under Education Code section 44944, the Commission should have issued a decision that the teacher should not be dismissed. The Court of Appeal also affirmed the trial court's decision that the teacher was entitled to reasonable attorney's fees and costs under Section 44944.[442]

J. Suspension of Credential

In Shields v. Poway Unified School District, the Court of Appeal held that suspension of a teaching credential does not automatically deprive a permanent certificated employee of the right to continued employment, nor does it relieve a school district of the duty to comply with the dismissal procedures set forth in the Education Code.[443]

In Shields, the plaintiff was a tenured classroom teacher who had worked for his district since 1970. Effective March 3, 1995, his teaching credential was suspended for ten years, based on allegations of sexual misconduct involving a student, threats against the student and her family, and directing the student to lie about the misconduct. On March 28, 1995, the plaintiff's district informed him of its intention to terminate his employment due to the suspension of his credential as well as the allegations of misconduct. The district also informed the plaintiff that although there was cause to dismiss him, he was not entitled to a hearing under Education Code sections 44934, et seq., because he no longer held a valid credential. Although the plaintiff

[439] 207 Cal.App.4th 170, 143 Cal.Rptr.3d 189, 280 Ed.Law Rep. 952 (2012).
[440] Id. at 172-74.
[441] Id. at 174-75.
[442] Id. at 179.
[443] 63 Cal.App.4th 955 (1998).

requested a hearing under those sections, the request was denied and the district's governing board terminated his employment. The plaintiff then filed a petition for writ of mandate, seeking to have the district's termination of him set aside and requiring the district to conduct a hearing in accordance with applicable statutory requirements.[444]

The Court of Appeal affirmed the trial court's decision, holding that suspension of a teaching credential does not automatically deprive a permanent certificated employee of the right to continued public employment, nor does it relieve a school district of the duty to comply with the due process requirements of notice and the opportunity for hearing embodied in the Education Code. The court rejected the district's argument that without a valid credential, the plaintiff was neither "permanent" nor an "employee," and was therefore not entitled to the dismissal procedures contained in Education Code sections 44934, et seq. The court stated that "[b]ecause Shields' lack of authorization to perform the duties of classroom teacher and receive pay is temporary, he necessarily retains his status as a permanent employee . . . ," and was therefore entitled to the protection of the statutory disciplinary procedures that apply to permanent certificated employees.[445]

DISMISSAL PROCESS EFFECTIVE IN 2015

A. Two Separate Dismissal Processes

On June 25, 2014, Governor Brown signed Assembly Bill 215.[446] Assembly Bill 215 makes major changes in the teacher dismissal process effective **January 1, 2015**.

Assembly Bill 215 creates a separate dismissal process for egregious misconduct, allows the introduction of evidence of egregious misconduct that is more than four years old, allows charges to be filed year around, allows service of a single set of documents to begin the process rather than two sets of documents, and allows greater flexibility with respect to the qualifications of the panel members on the Commission on Professional Competence in non-egregious misconduct dismissals. Assembly Bill 215 also requires completion of the hearing process for non-egregious misconduct in seven months, with some allowances for continuances and limits discovery in dismissals for non-egregious misconduct.

B. Grounds for Dismissal

Assembly Bill 215 amends Education Code section 44932 to create a separate ground for dismissal for immoral conduct that includes egregious misconduct. Egregious misconduct is defined as immoral conduct that is the basis for an offense described in Education Code section 44010 (sex offenses) or Section 44041 (drug offenses), or Penal Code sections 11165.2 to 11165.6, inclusive (child neglect, willful harming of a child, or endangering the health of a child, unlawful corporal punishment, abuse or neglect in out-of-home care, and child abuse or neglect).

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[444] Ibid.
[445] Id. at 960.
[446] Stats. 2014, Chapter 55 (A.B. 215).

C. Notice of Dismissal

Education Code section 44936(a) would allow a school district to give notice of dismissal or suspension at any time of year, except for charges of unsatisfactory performance which may only be given during the instructional year of the school site where the employee is physically employed. Section 44936(c) allows service of the notice of dismissal or suspension given during the instruction year at the school site where the employee is physically employed by personal service or U.S. Registered Mail addressed to him or her at his or her last known address. However, Section 44936(d) requires personal service, if served outside of the school year.

D. Egregious Misconduct

Education Code section 44934 authorizes proceedings based solely on charges of egregious misconduct to be initiated pursuant to a new Education Code section 44934.1. Section 44934(d), as proposed, would allow the amendment of charges less than 90 days before the hearing only upon a showing of good cause. If a motion to amend charges is granted by the administrative law judge, the employee shall be given a meaningful opportunity to respond to the amended charges. Section 44934(e) would allow notice under the Education Code to be sufficient notice to initiate a hearing under Government Code section 11503, and a separate accusation or second set of documents would not have to be filed.

Education Code section 44934.1 applies to dismissal or suspension proceedings based solely on charges of egregious misconduct. Any written statement of charges of egregious misconduct must specify instances of behavior and the acts or omissions constituting the charge so that the employee will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules that the employee is alleged to have violated, and it shall also set forth the facts relevant to each occasion of egregious misconduct. We view a separate process for egregious misconduct as a positive step forward.

Education Code section 44939.1 applies only to dismissal or suspension proceedings for egregious conduct. Section 44939.1(b) would authorize the governing board to immediately suspend the employee from his or her duties as part of the notice of dismissal.

Section 44939.1(c) prohibits school districts, county offices of education, and charter schools from entering into an agreement that would prevent a mandatory report of egregious misconduct to the Commission on Teacher Credentialing or any other state or federal agencies. Section 44939.1(d) would prohibit school districts, county offices of education, and charter schools from entering into an agreement that would authorize expungement from a school employee's personnel file credible complaints of unsubstantiated investigations into, or discipline for, egregious conduct. Districts could agree to remove documents containing allegations that have been the subject of a hearing before an arbitrator, school board personnel commission, Commission on Professional Competence, or an administrative law judge in which the employee prevailed, the allegations were determined to be false, not credible, or unsubstantiated, or a determination was made that the discipline was not warranted.

Education Code section 44939.1(e) requires a school district, county office of education, or charter school that has made a report of an employee's egregious misconduct to the

Commission on Teacher Credentialing to disclose this fact to a school district, county office of education, or charter school considering an application of employment from the employee, upon inquiry. Education Code section 44939.1(f) states that any school employee who alleges that another school employee has engaged in egregious misconduct, knowing at the time of making the allegation that the allegation was false, shall be subject to certificate revocation, if applicable. The provisions in Education Code section 44939.1 are generally positive with respect to dismissal for egregious misconduct.

Education Code section 44939.5 prohibits school districts, county offices of education, and charter schools from entering into agreements that would prevent a mandatory report of egregious misconduct. Section 44939.5(b) prohibits school districts, county offices of education, and charter schools from expunging from an employee's personnel file credible complaints of, substantiated investigations into, or discipline for, egregious misconduct. This prohibition does not preclude removing, or entering into any agreement to remove, documents containing allegations that have been the subject of a hearing before an arbitrator, school board, personnel commission, Commission on Professional Competence, or administrative law judge, in which the employee prevailed, the allegations were determined to be false, not credible, or unsubstantiated, or a determination was made that the discipline was not warranted.

Education Code section 44944.1 applies only to dismissal or suspension proceedings for egregious misconduct. Section 44944.1(b) states that once the governing board of the school district has initiated dismissal or suspension proceedings, pursuant to Section 44934.1, the process in Section 44944.1 shall be the exclusive means of pursuing the dismissal or suspension for the acts or events constituting the charge of egregious misconduct. Section 44944.1(b) states that the specific acts or events shall not be used to support any additional or subsequent notice of suspension or dismissal for non-egregious conduct. Once the governing board of the school district has initiated dismissal or suspension for egregious misconduct, the process described in Section 44944.1 shall be the exclusive means of pursuing the dismissal or suspension against the certificated employee until a written decision has been reached by the administrative law judge. If the suspension initiated against an employee, pursuant to Section 44934.1 is upheld, and a dismissal was not pursued from the same charges, the entry of judgment of the suspension, under Section 44934.1 may be considered as evidence to support a subsequent notice of dismissal based on other charges. If a suspension initiated against an employee pursuant to Section 44934.1 is upheld, but the employee prevailed on the dismissal proceeding based on the same charges, the entry of judgment of the suspension under Section 44934.1 shall not be considered as evidence to support a subsequent notice of dismissal based on other charges. These provisions are somewhat confusing and should be clarified.

Education Code section 44944.1(c) grants the power to an administrative law judge to conduct a hearing for egregious misconduct. Section 44944.1(d) states that the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing, and the Office of Administrative Hearings shall prioritize the scheduling of dismissal or suspension proceedings initiated pursuant to Section 44934.1 over other proceedings related to certificated school employees. However, Section 44944.1 does not require completion of the hearing within a specific timeline. Under Section 44944.1, the right of discovery of the parties is not limited. However, no testimony shall be given or evidence introduced relating to matters that occurred

more than four years before the date of the filing of the notice except evidence of egregious misconduct which shall not be excluded based on the passage of time.

Education Code section 44944.1(e) states that the administrative law judge shall prepare a written decision containing findings of fact, determination of issues, and the disposition that shall be, solely, one of the following:

1. That the employee should be dismissed.

2. That the employee should be suspended for a specific period of time without pay.

3. That the employee should not be dismissed or suspended.

Education Code section 44944.1(f) states that if the administrative law judge determines that the employee should be dismissed or suspended, the governing board in the state shall share equally the expenses of hearing, including the cost of the administrative law judge. If the administrative law judge determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge and reasonable attorney's fees incurred by the employee.

E. Non-Egregious Misconduct

Education Code section 44934 authorizes proceedings based solely on charges of egregious misconduct to be initiated pursuant to a new Education Code section 44934.1. Section 44934(d), as proposed, would allow the amendment of charges less than 90 days before the hearing only upon a showing of good cause. If a motion to amend charges is granted by the administrative law judge, the employee shall be given a meaningful opportunity to respond to the amended charges. Section 44934(e) would allow notice under the Education Code to be sufficient notice to initiate a hearing under Government Code section 11503, and a separate accusation or second set of documents would not have to be filed.

Education Code section 44939 would apply only to dismissals or suspensions for non-egregious conduct. Section 44939(b), as amended, would allow a school district to immediately suspend an employee from his or her duties. Section 44939(c) would allow the employee who has been placed on suspension to file a motion for immediate reversal of the suspension, review of the motion by the Office of Administrative Hearings, and would be limited to a determination as to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension.

The motion must be served on the school district within 30 days after service upon the employee of the initial pleading. The school district may file a written response to the motion. The hearing on the motion for immediate reversal of suspension shall be held no later than 30 days after the motion is filed with the Office of Administrative Hearings. The administrative law judge shall, no later than 15 days after the hearing, issue an order denying or granting the motion. The grant or denial of the motion shall be without prejudice to consideration by the Commission on Professional Competence based upon the full evidentiary record before it, of the validity of

the grounds for dismissal. A ruling shall not be considered by the Commission in determining the validity of the grounds for dismissal and shall not have any bearing on the conditions of determination regarding the grounds for dismissal.

An order granting a motion for immediate reversal of suspension shall become effective within five days of service of the order. The school district shall make the employee whole for any lost wages, benefits, and compensation within 14 days after service of an order granting the motion. A motion made pursuant to Section 44939 shall be the exclusive means of obtaining interlocutory review of suspension pending dismissal to grant or deny that the motion shall not be subject to interlocutory conditional review. A motion for immediate reversal of suspension pursuant to Section 44939 shall have no bearing on the authority of the governing board of the school district to determine the physical placement and assignment of an employee who is suspended or placed on administrative leave during the review of the motion or while dismissal charges are pending.

Education Code section 44944 applies only to non-egregious conduct, dismissals or suspensions. A.B. 215 amends Section 44944(b) to allow commencement of the hearing within six months from the date of the employee's demand for a hearing, and only allows continuances of this deadline for extraordinary circumstances. Section 44944(b) requires the closing of the record within seven months of the date of the employee's demand for hearing. A continuance shall not extend the date for the closing of the record more than seven months from the date of the employee's request for a hearing, except for good cause, as determined by the administrative law judge.

Education Code section 44944(b)(2) allows testimony or evidence to be introduced in a dismissal hearing that occurred more than four years before the date of the filing of the motion for dismissal for sex offenses under Education Code section 44010 or offenses listed in Penal Code section 11165.2 to 11165.6, inclusive. Allowing this evidence in is an improvement over current law and is a step forward in protecting student safety.

Education Code section 44944(c) allows the waiver of the Commission on Professional Competence if both parties agree. Education Code section 44944(c)(4) requires the parties to object to the appointment of a panel member to the Commission on Professional Competence within 10 days of the date that the notice of selection is filed. Within seven days after the filing of any objection, the administrative law judge shall rule on the objection or convene a teleconference with the parties for argument.

Education Code section 44944(c)(5) modifies the qualifications for panel members with the Commission on Professional Competence. For an elementary school teacher subject to dismissal whose most recent teaching assignment is in grades K-6, a current K-6 teacher may serve on the panel. For an employee being dismissed in grades 7-12, inclusive, a current teacher in grades 7-12, inclusive, whose most recent teaching assignment is in grades 7-12 in the same area of study, may serve on the Commission on Professional Competence. This will eliminate the possibility of school districts appointing recently promoted administrators to serve on the panel on the Commission on Professional Competence.

Education Code section 44944.05 establishes a disclosure process in lieu of written discovery for non-egregious dismissal proceedings. Section 44944.05(b) requires initial disclosures within 45 days of the employee's demand for a hearing and an obligation to properly supplement its initial disclosures as new evidence or information becomes known or available. Supplemental disclosures must be made as soon as possible and no later than 60 days before the date of the commencement of the hearing. A party's failure to make supplemental disclosures properly upon discovery of the availability of new information shall preclude the party from introducing witnesses or evidence not disclosed at the hearing unless the party shows good cause for its failure to timely disclose.

Education Code section 44944.05 establishes a procedure for the disclosure of expert testimony and prehearing disclosures. Expert witness disclosures must be made no later than 60 days before the date of the commencement of the hearing. Prehearing disclosures must be made at least 30 days before the hearing. In addition, Section 44944.05 authorizes discovery by oral deposition. The school district may take the depositions of the employee and no more than four other witnesses, and the employee may take depositions of no more than five witnesses. Each witness's deposition is limited to seven hours and an administrative law judge may allow the parties to conduct additional depositions only upon a showing of good cause.

LAYOFF

A. Layoff Procedure

In addition to dismissal for cause, permanent and probationary certificated employees may be laid off when there is a reduction in staff due to a reduction in a particular kind of service or due to declining enrollment.[447] Whenever a particular kind of service is to be reduced or discontinued, and it becomes necessary to decrease the number of permanent employees of the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year.[448]

Except as otherwise provided by the Education Code, the services of no permanent employee may be terminated while any probationary employee, or any other employee with less seniority, is retained to render a service which the permanent employee is certificated and competent to render. As between employees who first rendered paid service to the school district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof.[449]

Generally, by resolution, the governing boards of school districts adopt criteria for termination of teachers employed on the same date. Upon the request of any employee, when

[447] Education Code section 44955, see, Black v. Board of Trustees, 46 Cal.App.4th 493, 54 Cal.Rptr.2d 140 (1996) (the provisions of section 44955 do not apply to reassignments or reductions in hours where no termination takes place; district has broad discretion to reassign adult school teachers). See, also, Gallup v. Board of Trustees, 41 Cal.App.4th 1571, 49 Cal.Rptr.2d 289 (1996) (district may lay off district psychologist and then contract out for independent contractors to provide psychological services).
[448] Education Code section 44955(b).
[449] Ibid.

order of termination is so determined, the governing board shall furnish in writing, no later than five days prior to the commencement of the hearing, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group.[450]

Notice of the termination of services shall be given prior to March 15 and a hearing shall be held before an administrative law judge and final notice of termination of services shall be given before May 15.[451] The services of certificated employees shall be terminated in the inverse of the order in which they were employed.[452] A school district may deviate from terminating a certificated employee in order of seniority if the district demonstrates a specific need for personnel to teach a specific course or course of study or to provide services authorized by a services credential in pupil personnel services or health and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide others with services which others with greater seniority do not possess.[453]

If discontinued services are reestablished, employees have a preferred right of reappointment.[454] However, a part time employee who has been laid off is not entitled to be reinstated to a full time position which subsequently opens up.[455]

The layoff provisions of Education Code section 44955 should be utilized where a termination of a probationary employee is prompted by economic considerations.[456] The nonreelection provisions of Education Code section 44929.21 should not be utilized to terminate a probationary employee in an economic layoff to avoid the necessity of the layoff hearing.[457] The Court of Appeal stated:

> "A school district may elect not to retain a probationary employee and need not assert a reason for termination but where, as here, it is undisputed that termination was prompted by the conditions described in Section 44955 (decline in daily attendance, reduction or discontinuance of services, modification of curriculum) then a school district is obliged to provide appropriate notice and right to a hearing as prescribed by Section 44949. . . ."[458]

In addition, a school district may deviate from terminating a certificated employee in order of seniority, ". . . for purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws."[459] The exact meaning of that provision has

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[450] Education Code section 44955(b).
[451] Education Code section 44955(c).
[452] Ibid.
[453] Education Code section 44955(d).
[454] Education Code section 44956.
[455] Murray v. Sonoma County Office of Education, 208 Cal.App.3d 456, 256 Cal.Rptr. 353 (1989).
[456] Cousins v. Weaverville Elementary School District, 24 Cal.App.4th 1846, 30 Cal.Rptr.2d 310 (1994).
[457] Ibid.
[458] Id. at 1854.
[459] Education Code section 44955.

not been interpreted by the California courts and it is unclear what constitutional requirements related to the equal protection of the laws apply.

In California Teachers Association v. Vallejo City Unified School District,[460] the Court of Appeal held that provisionally credentialed teachers are entitled to the same statutory layoff rights in the Education Code that are provided to fully credentialed probationary teachers.

The ruling in Vallejo City Unified School District is similar to the recent decision in Bakersfield Elementary Teachers Association v. Bakersfield City School District,[461] in which the Court of Appeal held that teachers with preliminary or provisional credentials could not be automatically classified as temporary employees unless they meet the narrow statutory definitions for temporary employees under the Education Code. Both decisions hold that classification and certification operate independently of one another.

In Vallejo City Unified School District, as part of a district-wide reduction in workforce, the Vallejo City Unified School District sent a letter to 214 certificated employees notifying them of an impending layoff and advising them of their right to request a hearing under Education Code section 44955. On April 12, 2004, the school district sent a letter to 43 teachers that rescinded the prior layoff notice but nevertheless terminated their employment. The letter stated that these teachers had erroneously been given the layoff notice that applied to probationary and permanent employees and instead, the school district released these 43 employees from employment at the end of the school year. All of these 43 teachers had preliminary or provisional credentials and were either district interns[462], pre-interns or holders of emergency teaching permits or credential waivers.

The trial court ruled in favor of the school district but the Court of Appeal reversed. The Court of Appeal held that the Legislature sharply limited the school district's ability to hire temporary teachers and that there was no evidence that the 43 teachers involved fell within the narrow categories of temporary employment defined in the Education Code. The Court of Appeal held that under Education Code section 44915, teachers who cannot properly be classified as permanent or temporary must be classified as probationary.

The Court of Appeal noted that the Education Code establishes four possible classifications for certificated employees: permanent, probationary, substitute and temporary.[463] Substitute and temporary employees fill the short range needs of a school district and generally may be summarily released.[464]

Education Code section 44915 states:

> "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring

[460] 149 Cal.App.4th 135, 56 Cal.Rptr.3d 712 (2007).
[461] 145 Cal.App.4th 1260, 52 Cal.Rptr.3d 486; 215 Ed.Law Rep. 106 (2006).
[462] Education Code section 44830.3.
[463] See Taylor v. Board of Trustees, 36 Cal.3d. 500, 504 (1984).
[464] Id. at 505.

> certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees."

Section 44915 establishes probationary status as the default classification for teachers whom the Education Code does not require to be classified otherwise.[465] The Education Code recognizes two general kinds of temporary employees: those who are employed to serve for less than three or four months, or in some type of limited, emergency or temporary assignment or classes, and those who are employed for up to one year to replace a certificated employee who was on leave or has a lengthy illness.[466] In addition, persons employed in categorically funded programs or in programs operated by a district under contract are treated like temporary employees in certain respects, as are persons employed as substitute teachers.[467]

The Court of Appeal noted that 9 of 43 employees involved were district interns. The court noted that the Education Code specifically requires school districts to classify district interns as probationary employees.[468]

The Court of Appeal noted that under Education Code section 44911, a teacher with a provisional credential does not accrue credit toward classification as a permanent employee of a school district. While a teacher with a provisional credential does not receive credit toward classification as a permanent employee, the employee is treated as a probationary employee for purposes of dismissal during the school year and the hearing provisions for dismissal for cause or unsatisfactory performance during the school year apply.[469]

In Golden Valley, the Court of Appeal concluded that Section 44915 applies to teachers serving under an emergency permit as well as fully credentialed teachers and that teachers with emergency permits are classified as probationary teachers. The holding in Golden Valley was reaffirmed in Bakersfield Elementary Teachers Association.[470] In Bakersfield, the Court of Appeal held that the school district could not classify employees with emergency permits and provisional credentials as temporary employees for purposes of layoff unless the employees met the statutory requirements for temporary employees.

In Vallejo City Unified School District, the Court of Appeals stated:

> "Just as the District does in this appeal, the school district in Bakersfield conflated the concepts of teacher credentialing with classification, reasoning that since teachers working under a provisional credential do not earn credit toward permanent status (Section 44911), whereas probationary employees generally do earn such credit (Section 44929.21(b)), a person working under a

[465] Bakersfield Elementary Teachers Association v. Bakersfield City School District, 145 Cal.App.4th 1260 (2006); Motevalli v. Los Angeles Unified School District, 122 Cal.App.4th 97, 109 (2004).
[466] See, Education Code sections 44919, 44920, 44921, 44918 and 44986.
[467] See, Education Code sections 44909, 44917.
[468] Education Code section 44885.5; Welch v. Oakland Unified School District, 91 Cal.App.4th 1421 (2001).
[469] See, California Teachers Association v. Governing Board of Golden Valley Unified School District, 98 Cal.App.4th 369 (2002).
[470] 145 Cal.App.4th 1260 (2006).

> provisional credential must by definition be something less than probationary. . . . However, Golden Valley and Bakersfield make it clear that a provisionally credentialed teacher may possess some of the rights of probationary employees, such as protections against mid-year dismissals and layoffs, although she does not possess others, such as progress toward tenure. . . . The Education Code mandates that teachers be classified as probationary employees if they are not permanent and do not fall within one of the narrowly defined classes of temporary employees. . . ."[471]

The Court of Appeal observed that the fact that provisionally credentialed teachers do not accrue credit toward tenure is merely an exception to the general rule that after two years, a probationary teacher obtains permanent status. Nothing in the Education Code suggests that the lesser status of their credentials removes such teachers from probationary classification status.

The Court of Appeal rejected the argument that the No Child Left Behind Act[472] creates a preference for fully credentialed teachers and therefore, teachers without full credentials should not be classified as probationary. The court held that the Education Code does not condition seniority on the type of credential the employee holds and if the Legislature intended that only probationary and permanent employees with a preliminary or clear credential should acquire seniority, the Legislature could have stated so in the Education Code, but it did not. The court noted that under existing provisions in the Education Code, districts conducting layoffs may have the discretion to choose fully credentialed teachers when two teachers have the same seniority date.[473] The court noted that the Education Code allows districts to take into account a teacher's qualifications in making assignments and reassignments as part of a layoff.[474] In addition, the court noted that while teachers are generally rehired on the basis of their level of seniority, districts must take into account whether a probationary or temporary employee is certificated and competent to render the service for which he or she being rehired.[475] Section 44957(a) states in part:

> "Prior to reappointing any employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or is not within the employee's major area of post-secondary study . . . The governing board shall require the employee to pass a subject matter competency test in the appropriate subject."

The Court of Appeal also pointed out that districts could avoid the problem of rehiring less qualified teachers by exercising their discretion to nonreelect probationary employees who lack a full credential. In California Teachers Association v. Mendocino Unified School

[471] Id. at 149-50.
[472] 20 U.S.C. Section 6301 et seq.
[473] See, Education Code section 44955(b).
[474] Education Code section 44955(c).
[475] Education Code section 44957(a).

District,[476] the Court of Appeal held that a school district that laid off a probationary teacher for economic reasons could thereafter validly decide not to reelect the teacher. Based on Mendocino, the court in Vallejo City Unified School District held that if a school district wishes to nonreelect certain probationary employees after a layoff because they lack full credentials, the school district may do so.

In summary, teachers with provisional credentials or emergency permits (including district interns) who are not properly classified as temporary employees, must be considered probationary employees for purposes of layoff and dismissal for cause during the school year.

In Bledsoe v. Biggs Unified School District,[477] the Court of Appeal upheld the certificated layoff procedures utilized by the school district. The Court of Appeal held that the school district properly gave notice to plaintiff Bledsoe, and "skipped" over two more junior certificated employees.

The Court of Appeal interpreted the provisions of Education Code section 44955(d)(1), which states that a school district may deviate from terminating a certificated employee in order of seniority if:

> "The district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess."

The plaintiff, Bledsoe, was senior on the seniority list to two teachers who provided instruction in the district's community day school. The school district gave Bledsoe a layoff notice and skipped the two teachers. The district explained that it skipped the two teachers since the two teachers had experience teaching in community day schools and experience working with students who were expelled or had behavior problems that prevented them from being in a regular classroom.[478]

The district superintendent testified at the layoff hearing that he observed the two teachers in the classroom and saw that they commanded the respect of the students. The district superintendent also testified that he looks for teachers to teach in the community day school who have a background in psychology or sociology, a background in behavior modification, and a temperament for firmly handling difficult students without getting angry. The district superintendent testified the community day school teachers teach all of the academic subjects to their students, they should be credentialed in as many subjects as possible and highly qualified for the purposes of the No Child Left Behind Act in more than one subject.[479]

The Court of Appeal held that Education Code section 44955(d)(1) grants districts some flexibility in the layoff process. The Court of Appeal held that the district presented sufficient

[476] 92 Cal.App.4th 522, 111 Cal.Rptr.2d 879 (2001).
[477] 170 Cal.App.4th 127, 88 Cal.Rptr.3d 13 (2009).
[478] Id. at 130.
[479] Id. at 130-31.

evidence that the two junior teachers who were skipped had special training and experience necessary to teach community day school, and that the district had a specific need for their services. The Court of Appeal concluded:

> "The evidence supports the finding that Gates and Sormano have the 'special training and experience necessary to teach' at the District's community day school…The District could retain Gates and Sormano if 'others with more seniority do not possess [such special training and experience]."[480]

The Court of Appeal went on to state that Bledsoe did not have any course work in psychology or sociology since college, had not received any training in crisis intervention within the last five years, and had not worked in community day school since 1995. The Court of Appeal also noted that Bledsoe did not have any recent experience within the last five years teaching in a self-contained classroom, and that this evidence supports the finding that Bledsoe did not possess the special training and experience that Gates and Sormano possess.[481]

In Hildebrandt v. St. Helena Unified School District,[482] the Court of Appeal held that when a school district lays off certificated employees due to a reduction of services pursuant to Education Code section 44955, part-time employees with greater seniority are not entitled to "bump" full-time employees with lesser seniority. The Court of Appeal held that a school district was not required to divide a full-time position into two part-time positions.

Following the termination of a Memorandum of Understanding under which the St. Helena Unified School District provided special education services to three other school districts, the school district initiated layoff proceedings under Section 44955 to reduce or discontinue five full-time certificated positions, including one full-time equivalent school psychologist position. At the time, the district employed Hildebrandt in a .8 FTE position as a certificated school psychologist and Wood-DeGuilio in a similar .2 FTE position. Both Hildebrandt and Wood-DeGuilio had seniority dates that preceded the seniority date of Ramah Commanday, who is employed by the district as a full-time certificated school psychologist.[483]

The administrative law judge found that it was necessary to eliminate one FTE psychologist position and rejected the part-time psychologists' contention that because of their greater seniority, the district was required to retain them in preference to Commanday. The administrative law judge ruled that the district did not allow the part-time employee to bump a full-time employee because it believed that a full-time psychologist was needed for program continuity. The trial court upheld the decision of the administrative law judge and the Court of Appeal affirmed.[484]

The Court of Appeal reviewed the provisions of Education Code sections 44955 and 44956 and held that the district was within its discretion to determine that a full-time

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[480] Id. at 142.
[481] Id. at 142-44.
[482] 172 Cal.App.4th 334, 90 Cal.Rptr.3d 855 (2009).
[483] Id. at 338.
[484] Ibid.

psychologist position was a different service than a part-time psychologist position. The Court of Appeal noted that in prior cases, the Court of Appeal had upheld decisions by school districts not to reemploy part-time employees in full-time positions. In those cases, when a part-time employee was laid off, the court held that he or she was not entitled to a full-time position which subsequently opened. The Court of Appeal held that Section 44956 only requires that the employee be returned to his or her pre-layoff status.[485]

Based on these prior cases, the Court of Appeal held that Education Code sections 44955 and 44956 should be read together and interpreted in the same manner, and held that school districts have broad discretion in defining positions within the district and establishing requirements for employment within the scope of the school district's discretion. The court held that determining the qualifications necessary to render a person competent to perform a particular assignment falls within the special competence of school district officials, and if the school district concludes that the assignment cannot be performed as well on a part-time basis, that is within the school district's discretion.[486]

The Court of Appeal noted that the administrative record included testimony from the district that a full-time psychologist was needed for the students in the program at all four school sites to provide program continuity and to provide one psychologist with knowledge of the children, their family, and their history.[487]

The Court of Appeal noted that neither Hildebrandt nor Wood-DeGuilio asserted that by virtue of their seniority they were entitled to a full-time psychologist position. As a result, the Court of Appeal did not rule on that issue. Hildebrandt and Wood-DeGuilio's sole contention was that they were entitled to bump Commandy as to a .8 FTE position and a .2 FTE position in effect requiring the district to split Commandy's full-time position into two part-time positions. The Court of Appeal noted that requiring a school district to split a position into two part-time positions could prevent the school district from providing full-time service to students if one of the part-time employees was to leave and the school district could not fill the part-time position.[488]

B. Discrimination

In Wygant v. Jackson Board of Education, in a plurality opinion written by Justice Powell, the United States Supreme Court held that in a layoff, a school district in Michigan could not give preferential treatment to racial minorities and exempt them from a layoff.[489] Justice Powell held that the use of racial classifications must be justified by a compelling state purpose in the context of affirmative action and the means chosen to effectuate that purpose must be narrowly tailored. Justice Powell wrote that societal discrimination alone is insufficient to justify a racial classification. Rather, there must be convincing evidence of prior discrimination by the governmental unit involved before allowing unlimited use of racial classifications to remedy

[485] Id. at 340-41. See, King v. Berkeley Unified School District, 89 Cal.App.3d 1016 (1979); Murray v. Sonoma County Office of Education, 208 Cal.App.3d 456 (1989).
[486] Id. at 342-44.
[487] Id. at 344-45.
[488] Id. at 345-46.
[489] 106 S.Ct. 1842 (1986).

such discrimination. Justice Powell wrote that if the purpose of the layoff provision was to remedy prior discrimination, in order for such purpose to be constitutionally valid, it would require the trial court to make a factual determination that the school district had a strong basis and evidence for its conclusion that remedial action was necessary.[490]

Justice White concurred in the judgment of the plurality as did Justice O'Connor.[491] Justice O'Connor noted that the school district and the school employees' union following an investigation by the Michigan Civil Rights Commission entered voluntarily into an agreement to remedy perceived racial discrimination although formal findings were never made of racial discrimination against the school district.

Justice O'Connor noted that the plurality would discourage employers from voluntarily remedying racial discrimination if formal findings must be made before they engage in affirmative action programs. Justice O'Connor, however, disagreed with the remedy of exempting minority employees from layoff and noted that insufficient findings were made by the trial court to determine the relevant labor pool to determine whether employment discrimination occurred. Justice O'Connor felt the remedy was not narrowly tailored to effectuate its remedial purpose and concurred in the plurality judgment.[492]

As a result of the number of separate opinions written by the United States Supreme Court in Wygant v. Jackson Board of Education, it is unclear what the exact constitutional requirements relating to equal protection of the laws are with respect to the layoff of certificated employees in school districts in California.[493]

C. Class Size Reduction Program

In Zalac v. Governing Board of the Ferndale Unified School District,[494] the Court of Appeal held that the Class Size Reduction (CSR) program is a categorically funded project within the meaning of Education Code section 44909, and that a teacher's layoff was a "particular kind of service" reduction authorized under Education Code section 44955.

Zalac was first employed by the district as a CSR kindergarten teacher for the 1997-1998 school year. Her employment contract specified that she was an employee in a categorically funded program under Education Code section 44909. She entered into identical contracts for the 1998-1999 and 1999-2000 school years. The district lost CSR funding for the 1999-2000 school year. On March 2, 2000, the district served two notices on Zalac. The first was a notice of non-reelection as a temporary employee. The second notice was served pursuant to Education Code sections 44949 and 44955, informing her that her services would not be required for the

[490] Ibid.
[491] Wygant v. Jackson Board of Education, 105 S.Ct. at 1852-1858.
[492] Wygant v. Jackson Board of Education, 106 S.Ct. at 1852-1857.
[493] See, for example, Adarand Construction, Inc. v. Pena, 115 S.Ct. 2097 (1995), in which the United States Supreme Court held unconstitutional a federal statute setting aside a certain percentage of contracts for minority subcontractors. The court applied a strict scrutiny student to all race-based actions by federal agencies as it had in City of Richmond v. J.A. Crason Co., 488 U.S. 469 (1989) with respect to state and local government (i.e., Congress and the state may enact racial classifications only when doing so is necessary to further a compelling interest.
[494] 98 Cal.App.4th, 120 Cal.Rptr.2d 615 (2002).

2000-2001 school year because the district had determined that it was necessary to reduce the number of certificated employees as a result of the discontinuance or reduction of certain particular kinds of services, including the elimination of one full-time equivalent kindergarten CSR position. Zalac filed a petition for a writ of mandate to set aside her termination as a kindergarten teacher. She contended that she was improperly hired under Education Code section 44909, because the CSR program is not a "categorically funded project" within the meaning of that statute. She also contended that she was improperly laid off.[495]

The Court of Appeal reviewed the legislative history of Education Code section 44909 and the CSR program, concluding that the program is a "categorically funded project." Therefore, the court concluded that Zalac was properly employed under Section 44909 for the 1997-1998 and 1998-1999 school years. The court found that she was not properly hired under Section 44909 for the 1999-2000 school year, because the district had lost CSR funding for that year. However, the incorrect classification was irrelevant, because she was properly laid off pursuant to Education Code sections 44949 and 44955. The court found that the employee was terminated by a "particular kind of service" (PKS) layoff, even though there was no reduction in the number of kindergarten classes.[496] In this regard, the court stated:

> "Faced with a shortfall of funds, caused in part by the loss of Class Size Reduction Program funding, the Board determined that it was necessary to reduce the number of teaching positions – a particular kind of service – and thus the number of teachers. While it may be that this reduction did not result in there being fewer kindergarten classes than previously, Zalac's layoff nonetheless resulted in the reduction of the District's teaching staff by one. Whether by larger classes, regrouping of other classes, or otherwise, there was a PKS reduction that authorized the termination under Section 44955."[497]

D. Nonreelection

The Court of Appeal ruled in California Teachers Association v. Mendocino Unified School District,[498] that a school district which has laid off a probationary teacher for economic reasons pursuant to Education Code section 44955 may also subsequently decide not to reelect the teacher under Education Code section 44929.21.

The Mendocino Unified School District hired Amy Johnston as a probationary teacher at Mendocino Middle School. On March 9, 2000, the school district passed a resolution pursuant to Section 44955, in which it decided to lay off the equivalent of 1.9 teachers the following school year for economic reasons due to declining enrollment. Pursuant to Section 44957, a probationary teacher who is laid off has the right to preferential rehiring for a period of 24 months.[499]

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[495] Id. at 840-842.
[496] Id. at 842-854.
[497] Id. at 854.
[498] 92 Cal.App.4th 522 (2001).
[499] Id. at 524-525.

On June 8, 2000, the superintendent of the Mendocino Unified School District met with Johnston and told her that he would recommend that she be "let go" pursuant to Section 44929.21, due to the fact that she was "simply not a good match for the district." On June 22, 2000, the school district decided not to re-elect Johnston for the following school year pursuant to Section 44929.21.[500]

Johnston and the California Teachers Association filed an action in Superior Court challenging the actions of the school district. The Superior Court granted an order compelling the school district to grant Johnston preferential rehiring rights for a period of 24 months pursuant to Education Code section 44957, and declared that the school district's June 22, 2000 decision not to re-elect Johnston was illegal. The school district appealed.[501]

The Court of Appeal reviewed the legislative history of Section 44955 with respect to layoffs for economic reasons and the statutory protections afforded to probationary employees. The Court of Appeal reviewed the legislative history of both statutory schemes and held that the two statutory schemes have different purposes. The court held that Sections 44955 and 45957 recognized that economic considerations may sometimes force school districts to lay off otherwise good and effective teachers. Under those sections, if the economic factors that motivated the layoffs abate, the affected teachers can have their jobs back. In contrast, Section 44929.21 has a different purpose, to ensure that the children of California are instructed by qualified teachers. To carry out this important function, school districts have been given the absolute right to decide not to re-elect probationary teachers, without providing cause or other procedural protections, so long as it is based on a lawful reason.[502]

The Court of Appeal concluded that the two statutory schemes may both be utilized by a school district and a school district which has told a probationary teacher that he or she will be laid off for economic reasons under Section 44955 may thereafter validly determine not to re-elect the teacher under Section 44929.21.[503]

E. Reemployment after Layoff

Education Code section 44956 sets forth the rights of permanent employees who have been laid off. For a period of 39 months from the date of lay off, permanent teachers have the preferred right to reappointment in the order of original employment. For a period of 24 months from the date of layoff, probationary teachers have the preferred right to reappointment in the order of original employment. With respect to any employee who is reemployed, the period of the employee's absence must be treated as a leave of absence and shall not be considered as a break in the continuity of their service. The employee retains the classification in order of employment the employee had when their services were terminated and credit for prior service under any retirement system shall not be affected by the layoff, but the period of the employee's absence shall not count as part of the service required for retirement.

[500] Id. at 525.
[501] Id. at 525
[502] Id. at 526-530.
[503] Id. at 530.

During the period of preferred right to reappointment, any laid off employee shall, in the order of original employment, be offered prior opportunity for substitute service during the absence of any other employee who has been granted a leave of absence or was temporarily absent from duty. The employee's services may be terminated upon return to duty of the other employee and that substitute service shall not affect the retention of the employee's previous classification and rights. If a permanent employee serves as a substitute in any position requiring certification for any 21 days or more within a period of 60 school days, the compensation the employee receives for substitute service in that 60-day period, including the employee's first 21 days of substitute service, shall not be less than the amount the employee would receive if he or she were reappointed.[504]

The 21 days do not have to be served consecutively, nor do they have to be served in the same substitute assignment. In addition, once the teacher has served as a substitute for 21 days, the teacher's rate of pay is adjusted not only going forward, but also retroactively to the first day of substitute service. The following examples illustrate these provisions:

> Example One: A permanent, laid off teacher begins subbing on September 10, 2009 and subs every day until October 8, 2009. The teacher would get her regular rate of pay, not the substitute rate, for that entire time, and for any further time she subs during the period of October 8 – December 7, 2009 (assuming all those days are school days, except Veterans Day, Thanksgiving and the day after Thanksgiving). The pay would have to be adjusted retroactively since the teacher would have started out earning the substitute daily rate.
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> Example Two: The teacher from Example One stops subbing on October 8, 2009. She is paid her regular rate of pay retroactive to September 10, 2009. She begins subbing again on January 4, 2010. Starting January 4, 2010, she would receive the substitute rate because looking backward to the past 60 school days, she has not taught 21 days. If she subs for 21 days in the next 60 school days, she would get her regular rate of pay retroactive to January 4, 2010.

The teachers get their regular rate of pay based on the 2009-10 salary schedule (with step and column advancement, if applicable). These teachers are to be compensated in the amount they would receive if reappointed. It should be noted that Education Code section 44957(d), relating to probationary, laid off teachers, contains no requirement to pay teachers at their regular rate, regardless of how many days they serve as a substitute. Thus, the teacher receives the substitute rate for the entire time.

[504] Education Code section 44956(a)(5).

At any time prior to the completion of one year after the employee's return to service, the employee may continue or make up, with interest, the employee's contributions to any state or district retirement system, for the period of the employee's absence, but the state or district shall not be required to match such contributions.[505]

RETIRED CERTIFICATED EMPLOYEES

A. Earnings Limitations for CalSTRS Retirees

For the 2013-14 fiscal year, the work performed by CalSTRS retirees is subject to the current year's earning limitations which are $39,903. Every dollar earned in excess of this amount will cause an equal reduction in the retiree's pension benefit.[506]

Education Code sections 45134 and 88033 specify that anyone receiving a retirement allowance under any school retirement system cannot be employed in a classified position unless expressly provided for in statute. CalSTRS retirees are only allowed to return as instructional assistants in K-12 educational agencies and only if needed in a class with a high pupil-teacher ratio, needed to provide remedial instruction, or needed to provide instruction for underprivileged students.

CalSTRS members who have received the golden handshake early retirement incentive, pursuant to Education Code section 22714, will forfeit the pension benefit from the golden handshake if they return to work under these conditions:

- If the retiree reinstates to active service.
- If the retiree does not reinstate but returns to work within five years in any job in the local agency from which he or she retired.

Education Code section 24214.5 specifies that every dollar earned by a CalSTRS retiree that has returned to work within the first 180 days of retirement will offset the retiree's pension benefit. If the retiree is age 60 for STRS members before January 1, 2013, or age 62 for new members, and, prior to the work being performed, the employer's governing board has adopted a resolution specifying the nature of employment, that the appointment is needed to fill a critically-needed position before 180 days have passed, that the retiree is eligible for the exception if he or she did not receive any retirement incentive, and the employee's retirement is not the basis for the need to acquire the retiree's services, then there will be no offset. The resolution cannot be placed on the consent calendar and documentation must be provided to CalSTRS before the work can begin.

[505] Education Code section 44956(a)(7).
[506] Education Code section 24214.5.

B. Retirement Benefits Under CalSTRS

Assembly Bill 1381 amends numerous provisions of the Education Code related to retirement under the California State Teachers Retirement System (CalSTRS) effective January 1, 2014.

Education Code section 22119.2, defining creditable compensation, is amended to make clear that salary or wages paid in accordance with a publicly available, written contractual agreement, including, but not limited to, a salary schedule or employment agreement is included as creditable compensation.[507] Payments, including, but not limited to, those for participation in a deferred compensation plan, to purchase an annuity contract, tax deferred retirement plan, or insurance program and for contributions to a plan that meets the requirements of the Internal Revenue Code when the cost is covered by the employer and is not deducted from the member's salary, is not considered creditable compensation.[508]

Severance pay including lump and installment payments and money paid in excess of salary or wages to a member as compensatory damages or as a compromise settlement are not considered creditable compensation.[509] In addition, the definition of creditable compensation was amended to add the phrase "consistent treatment of compensation for the position" and excluding remuneration that is paid to enhance a member's benefit.[510]

The limitation on compensation for retired members of CalSTRS does not apply to the following:

1. A trustee appointed by the Superintendent of Public Instruction.

2. A fiscal advisor or fiscal expert appointed by a county superintendent of schools.

3. A receiver or trustee appointed by the State Board of Education.

4. A special trustee appointed by the board of governors of the California Community Colleges.[511]

If a retired employee violates the limits on compensation for retired members of the California State Teachers Retirement System, the retired employee's annuity under the retirement system will be reduced.[512]

[507] Education Code section 22119.2(a)(1).
[508] Education Code section 22119.2(c)(5).
[509] Education Code section 22119.2(c)(8).
[510] Education Code section 22119.2(f).
[511] Education Code section 24214(h).
[512] Education Code section 26812(d).

C. Authority of CalSTRS to Conduct Audits of School District Internal Contracts

From a review of applicable statutes, it appears that CalSTRS is limited to audits that pertain to service and compensation issues.

Education Code section 22206 (a) states that "As often as the board determines necessary, it may audit or cause to be audited the records of any public agency." While this statement is quite broad, subsection (b) describes audit exceptions and subsection (c) notes that "[t]he board's authority pursuant to subdivision (b) shall extend to service and compensation issues identified through activities outside the audit function that address compliance with the provisions of this part." When read together, the subsections of section 22206 appear to limit the scope of the audit to service and compensation issues.

With regard to STRS authority, Education Code section 22207 asserts that the board shall perform "any other acts necessary for the administration of the system" (the system being the cash benefit program of STRS authorized by Education Code section 26000 *et seq*.) including but not limited to requesting the following information from a member, participant, or beneficiary:

(a) Financial statements, certified copies of state and federal income tax records, or evidence of financial status.

(b) Employment, legal, or medical documentation.

These types of records are not as broad in scope as an audit of internal controls would generally require. In reviewing the statutes as a whole, STRS' statutory authority to conduct audits appears to be limited in scope to service and compensation issues related to STRS.

In support of this interpretation to limit STRS audit authority, independent audits of school district finances and internal controls already have an extensive statutory scheme of requirements separate and apart from any activity of STRS. School districts must conduct independent audits in these areas annually in accordance with legally-required standards and criteria (Education Code section 41020 and following). Audits of internal controls also fall under the purview of the county superintendent (Education Code section 1241.5). Finally, Education Code section 14500 and following expressly authorize financial and compliance audits of school districts by the State Controller. Section 14500 states that it is the intent of the legislature that the Controller has primary responsibility for implementing and overseeing financial and compliance audits of school districts. These sections also set forth standards and criteria for audits and review and monitoring of audit reports performed by independent auditors, which are consistent with the standards required for school district audits that are enunciated in Education Code section 41020 and following. Education Code section 14506 states:

> The Controller shall conduct any additional audits which are necessary to carry out his or her duties and responsibilities under this code and the Government Code. Nothing in this chapter shall be construed to authorize any local educational agency, or any

> subcontractor or subrecipient, to constrain, in any manner, the Controller from carrying out any additional audits. However, to the extent that the required financial and compliance audits provide the Controller with the information necessary to carry out his or her responsibilities, the Controller shall plan additional audits as appropriate to avoid any unnecessary duplication of audit efforts….

In conclusion, by statute the authority to audit school districts' finances and internal controls rests with the State Controller, county superintendents of schools, and school districts. While STRS may need to request similar documentation to audit service and compensation issues, the scope of the STRS audit should not duplicate or be inconsistent with the audits conducted under the specific statutes. If a district is currently in disagreement with a STRS audit on these grounds, there is an administrative appeal process (Title 5, California Code of Regulations, section 27102). A school district may provide a written response to the preliminary audit findings, which is then subject to internal review by a Program Executive or the Director of Audit Services. If a school district disagrees with the final audit determination, the district may request an administrative hearing within ninety days of the date of the final audit determination.

D. CalSTRS Retirement Benefits – Change of Positions

On November 25, 2013, the California State Teachers Retirement System (CalSTRS) issued an Employer Information Circular (Volume 29, Issue 3). The purpose of the circular was to provide guidance to employers in providing the right of retirement system election when a CalSTRS member changes position that requires membership in another public retirement system.

Education Code section 22508 states in part:

> "A member who becomes employed by the same or a different school district or community college district, or county superintendent..., to perform service that requires membership in a different public retirement system, and who is not excluded from membership in that public retirement system, may elect to have that service subject to coverage by the Defined Benefit Program.... The election shall be made in writing on a form prescribed by this system within 60 days from the date of hire in the position requiring membership in the other public retirement system."

In the circular, CalSTRS indicated that members of CalSTRS may not have been provided the retirement system election form when they changed divisions subject to Education Code section 22508, but continued to participate in CalSTRS' Defined Benefit Program as contributing members. CalSTRS indicated that the error is correctable pursuant to Education Code section 22308 and indicated that a completed retirement system election form (ES 372) must be submitted to CalSTRS within 180 days of the circular, which is Friday, May 23, 2014).

The effective date of the election shall be the date of hire in the position requiring membership in the other system.

In the circular, CalSTRS is requesting that, in addition to submitting a completed retirement election form (ES 372), employers submit a justification letter explaining the circumstances of the member's late election. The justification letter must identify the member's name and CalSTRS client identification number or social security number, the employee's previous position, including title, position end date, employer name and report unit code, and current position, including title, position effective date, employer name and report unit code.

Even if there is a question as to whether the employee would be required to be a member of another retirement system, it is advisable to complete the form and justification letter. In addition, the CalSTRS circular was silent as to employees in this situation who have already retired, so districts may also want to offer retirees the option of completing the form and submitting the form and justification letter on their behalf as well.

E. Creditable Compensation

On October 11, 2015, Governor Brown signed Assembly Bill 963[513] amending Education Code sections 22115, 22119.2, 22119.3, 22119.5, 22146, 22164.5, 26113 and 26135.7, and adding Education Code sections 22119.6, 22458.5 and 22508.7, effective January 1, 2016.

Assembly Bill 963 revises the definition of creditable service under the California State Teachers Retirement System, and AB 963 would require employers, upon request, to provide the system with information relating to certification qualifications, minimum standards, or provisions of approved school charters to perform creditable service.

Education Code section 22119.2, as amended, redefines creditable compensation as including remuneration that is paid for the use of sick leave, vacation leave, or an employer-approved compensated leave of absence. Section 22119.3(a)(1) redefines remuneration as sick leave, vacation leave, or an employer-approved compensated leave of absence.

Education Code section 22119.5, as amended, defines creditable service as including the following:

1. The work of teachers, instructors, district interns, and academic employees employed in the instructional program for pupils.

2. Educational or vocational counseling, guidance, and placement services.

3. The work of employees who plan courses of study to be used in California public schools.

[513] Stats. 2015, ch. 782.

4. The selection, collection, preparation, classification, demonstration, or evaluation of instructional materials of any course of study for use in the development of the instructional program in California public schools.

5. The examination, selection, in-service training, mentoring, or assignment of teachers, principals, or other similar personnel involved in the instructional program.

6. The work of nurses, physicians, speech therapists, psychologists, audiometrists, audiologist, and other California public school health professionals.

7. Services as a California public school librarian.

8. Activities connected with the enforcement of laws relating to compulsory education, coordination of child welfare activities involving the school and the home, and the school adjustment of pupils.

Education Code section 22119.5(c) defines 'creditable service" as also including superintendents of California public schools and consulting teachers.

Education Code section 22119.6 states that creditable service shall also include any activities that do not meet the definition of creditable service under section 22119.5 but were performed for any employer on or before December 31, 2015 and were reported as creditable service to the system. Section 22458.5 states that upon request from the system, each employer shall provide the system with information regarding the certification qualifications, minimum standards, or provisions of an approved charter for the operation of a charter school required to perform creditable service.

The STRS regulations define "salary" as compensation that meets all of the following requirements:

1. Paid in cash by an employer to an employee for the performance of creditable service.

2. Explicitly characterized as salary on a contract, salary schedule or employment agreement.

3. Used as a basis for future pay increases with one exception. It is not required that compensation paid to execute duties that are related to, in an outgrowth of, the instructional and guidance program of the school pursuant to Education Code section 22119.5(a)(6) used as the basis of future pay increases.

4. Paid without a requirement by the employer for proof of

expenditure.[514]

The regulations state that the employer must establish a compensation earnable for all assignments for which an employee will earn a salary. If an employer provides additional compensation in exchange for performing activities described in Education Code section 22119.5(a)(6),[515] the additional compensation is for additional service, and the employer must establish a compensation earnable for those activities.[516]

If compensation is restructured into salary, regardless of how it was paid previously, compensation will be considered salary beginning on the effective date of the restructure.[517] Salary includes amounts deducted from the salary at the discretion of the employee.[518]

Remuneration in addition to salary, when paid in cash in accordance with a publicly available written contractual agreement where applicable and required by law, includes the following compensation that is not associated with the performance of additional service, provided that it is paid to all persons who are in a class of employees, in the same dollar amount, same percentage of salary or same percentage of amount being distributed. Compensation that is paid contingent upon availability of funds or for meeting any of the following qualifications or requirements:

1. Possession or attainment of a certificate, license, special credential or advanced degree.

2. Career or service longevity.

3. Hiring, transfer or retirement.

4. Employment in a position that is hazardous or difficult to staff.

5. Employment in an assignment in which the number of students enrolled exceeds the contractual amount.

6. Achievement of a performance benchmark.[519]

If compensation is restructured into remuneration and in addition to salary, regardless of how it was paid previously, the compensation is remuneration in addition to salary beginning on the effective date of the restructure.[520] Remuneration in addition to salary that does not include the following as described in Sections 27501 and 27502 of these regulations:

1. Cash paid by an employer to an employee who receives cash in lieu

[514] California Code of Regulations, Title 5, section 27400(a).
[515] Education Code section 22119.5(a)(b) relates to instructional and guidance programs performed in addition to other activities.
[516] California Code of Regulations, Title 5, section 27400(b).
[517] California Code of Regulations, Title 5, section 27400(c).
[518] California Code of Regulations, Title 5, section 27400(d).
[519] California Code of Regulations, Title 5, section 27401(a).
[520] California Code of Regulations, Title 5, section 27401(b).

of fringe benefit, or cash in lieu of expense paid or reimbursed by the employer.

2. Cash paid by an employer on behalf of an employee for fringe benefit, expense or reimbursement.

3. Cash paid by an employer to an employee that is the remainder from money allocated for fringe benefits or expenses that are paid by the employer.[521]

Compensation paid in addition to salary that is contingent upon the purchase of any of the items described in Education Code section 22119.2(a)(5)[522] is deemed covered by the employer and is not creditable compensation. These items would include deferred compensation plans, deductions to purchase an annuity contract, tax-deferred retirement plans or insurance programs, and contributions to a plan that meets the requirements of Section 125, 401(a), 401(k), 403(b), 457(b) or 457(f) of the Internal Revenue Code.[523] A fringe benefit is any of the following:

1. A good or service for which the cost is paid to a third party or otherwise covered by the employer.

2. Compensation allocated to an employee to cover a person or business expense that could otherwise be provided in the form of a good or service.

3. Cash in lieu of, or cash remaining from, a good or service.[524]

If any part of creditable compensation is restructured into a fringe benefit, that amount will not be considered creditable compensation beginning with the effective date of the restructure.[525] An expense paid by an employer includes any of the following:

1. Compensation allocated to an employee to cover a cost the employee is expected to incur in the course of performing duties for that employer, which could otherwise be covered by the employer or provided in the form of a reimbursement of the cost.

2. Cash paid directly to a third party or a cost that is otherwise covered by the employer.

[521] California Code of Regulations, Title 5, section 27401(c).
[522] Education Code section 22119.2(a)(5) relates to deductions from the employee's salary for participation in a deferred compensation plan.
[523] California Code of Regulations, Title 5, section 27500.
[524] California Code of Regulations, Title 5, section 27501(a).
[525] California Code of Regulations, Title 5, section 27501(b).

3. Cash in lieu of, or cash remaining from, compensation allocated to cover a cost.[526]

An expense reimbursed by an employer is cash paid to the employee that meets all of the following requirements:

1. There is a business connection to the expenditure.

2. The employee is required to provide documentation or accounting of the expenditure to the employer.

3. The employee is required to return excess reimbursements or advances to the employer if actual incurred expenses are less than the amount reimbursed or advanced.[527]

If any part of creditable compensation is restructured into an expense paid or reimbursed by the employer, that amount will not be considered creditable compensation beginning with the effective date of the restructure.[528]

F. Consistent Treatment of Compensation

In assessing the consistency of an increase in compensation that occurs during the period of time specified in subdivision (f) (generally seven years), an increase is consistent if the employer demonstrates that it is due to any of the following:

1. A restructure of compensation that is a permanent change, as indicated by not meeting either of the criteria for inconsistency.

2. A salary deferral due to a reduction in school funds.

3. A commensurate percentage increase in compensation earnable for the majority of members employed by the same employer.

4. A change in duties required of the employee that is incorporated in the first contract for the immediate successor to the position.

5. An increase in responsibility of the employee that is incorporated in the first contract for the immediate successor to the position.

6. Attainment of an educational or performance benchmark.

7. An increase that establishes pay parity as demonstrated by any of the following: commensurate compensation earnable for the same

[526] California Code of Regulation, Title 5, section 27502(a).
[527] California Code of Regulations, Title 5, section 27502(b).
[528] California Code of Regulations, Title 5, section 27502(c).

position in the past, commensurate compensation earnable for other employees performing similar duties for the same employer or other employers.

8. A commensurate compensation earnable for the immediate successor.

9. A commensurate compensation earnable for the immediate predecessor.

10. More education or experience than the immediate predecessor.

11. An increase in compensation that is required to recruit for a position which is directly responding to a specific time-bound financial crisis, not to exceed 150% of the base compensation earnable of the predecessor in the position or the most similar position prior to the crisis. For purposes of this paragraph, a specific time-bound financial crisis is, for school districts, a negative certification of financial obligations pursuant to Education Code section 1240 or for community colleges, a finding of serious hardship of financial condition as defined in subdivision (c) of Section 59204 of subchapter 4, chapter 10, division 6 of this title.[529]

In assessing the consistent treatment of compensation for a position, if the successor's compensation is structured such that the compensation earnable is lower than the members and the reduction in successor pay is attributable to less education or experience, it shall be presumed to be consistent.[530] In assessing the consistency of an increase that occurs during the period of time specified in subdivision (f), an increase that is not due to any of the eleven circumstances listed above is presumed to be inconsistent.[531]

A restructure of compensation is inconsistent if either of the following apply:

1. The restructure is effective on or after January 1, 2016, and is outside of that employer's standard bargaining or employment contract negotiation timeframes.

2. The restructure is implemented for a class of one, and the change is reversed upon hire and negotiation of the first contract of the immediate successor.[532]

If there is determined to be a pattern of assignment of duties or responsibilities by an employer to employees during the final compensation period, the additional compensation for

[529] California Code of Regulations, Title 5, section 27600(a).
[530] California Code of Regulations, Title 5, section 27600(b).
[531] California Code of Regulations, Title 5, section 27600(c).
[532] California Code of Regulations, Title 5, section 27600(d).

those duties is presumed to be inconsistent.[533] For a member whose initial final compensation after his or her most recent retirement is calculated using a period of three consecutive school years or 12 consecutive months pursuant to Education Code sections 22134, 22134.5, or 22135, the period of time is seven years preceding and including the last day used to calculate final compensation. For a member whose initial final compensation after his or her most recent retirement is calculated using any three years due to a reduction in school funds pursuant to Education Code section 22136, the period of time begins four years prior to the first day used to calculate the final compensation and ends on the last day used to calculate the final compensation.[534]

G. Appropriate Crediting of Contributions

Upon determination that compensation was treated inconsistently, except in cases where an adjustment to the crediting of contributions would not result in a change to a member's final compensation, CalSTRS shall limit the amount of contributions that are credited to the defined benefit program during the period of time specified in subdivision (b) (either four or seven years). If the inconsistent treatment of compensation is the result of a restructure of compensation, the employer shall report the amount that was restructured to the member's defined benefit supplement account. If the inconsistent treatment of compensation is not attributable to a restructure, the employer shall report the portion of compensation in excess of thresholds as specified in the regulations.

H. Compensation That is Paid a Limited Number of Times

Compensation is creditable to the defined benefit supplement account if compensation was restructured into salary or remuneration in addition to salary as described in Section 27400(c) (compensation restructured into salary) or Section 27401(b) (compensation restructured into remuneration in addition to salary) and is paid a limited number of times, has a specified end date, or is otherwise not permanent. Contributions for remuneration in addition to salary shall be credited to the member's defined benefit supplement account if the following are met:

1. The compensation is not ongoing, is limited by the number of times specified in law or in a publicly available written contractual agreement or the compensation is not scheduled to continue.

2. The compensation is paid to an individual contingent upon either of the following: availability of funds or meeting any of the following qualifications or requirements: possession or attainment of a certificate, license, special credential or advance degree, career or service longevity, hiring, transfer or retirement, employment in a position that is hazardous or difficult to staff, employment in an assignment in which the class size exceeds the contractual amount or achievement of a performance benchmark.

[533] California Code of Regulations, Title 5, section 27600(e).
[534] California Code of Regulations, Title 5, section 27601(f).

I. Class of Employees

The regulations state that one or more employees constitute a class of employees pursuant to Education Code section 22112.5[535] on the basis of any of the following:

1. Similarity of job duties being performed. Job duties are those activities described as credible service in Education Code section 22119.5(a) and (b).[536] The job duties grouped within each paragraph of Education Code section 22119.5(a) and (b) are deemed similar for the purposes of this subdivision. An employer may establish a class that is comprised of employees whose assignment is a combination of two or more job duties. Employees performing similar job duties were also performing activities described in Education Code section 22119.5(a)(6)[537] belong to the class of employees performing the similar job duties, unless they are placed in a separate class. If an employer establishes a class comprised of one employee pursuant to Education Code section 22112.5(b),[538] the employer must demonstrate that job duties for that class are in common use by at least two other employers.[539]

2. Employment in the same type of program. A program in any educational program established pursuant to federal or state law. One or more employees may be considered a separate class because they work in a separate program from other employees who have similar job duties.

3. The employees share other similarities related to the nature of the work being performed.[540]

An employer may not establish a class of employees that is distinguished by any of the following:

1. The retirement benefit formula or retirement program.

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[535] Education Code section 22112.5 states: "(a) 'Class of employees' means a number of employees considered as a group because they are employed to performs similar duties, are employed in the same type of program, or share other similarities related to the nature of the work being performed; (b) A class of employees may be comprised of one person if no other person employed by the employer performs similar duties, is employed in the same type of program, or shares other similarities related to the nature of the work being performed and that same class is in common use among other employers; (c) the board shall have the right to override the determination by an employer as to whether or not a group or an individual constitutes a 'class of employees' within the meaning of this section; (d) The amendments to this section during the 1995-96 Regular Session of the Legislature shall be deemed to have become operative on July 1, 1996."

[536] Education Code section 22119.5 defines "creditable service" for purposes of retirement.

[537] Education Code section 22119.5(a)(6) relates to providing creditable service for employees who participate in school activities related to instructional and guidance programs of the school when performed in addition to other activities which are creditable for retirement purposes.

[538] Education Code section 22112.5(b) authorizes a class of one person if no other person employed by the employer performs similar duties.

[539] This definition would apply to chancellors or district superintendents.

[540] California Code of Regulations, Title 5, section 27300.

2. A minimum or maximum threshold for age or service credit.

3. The characterization or restructuring of compensation, in the absence of criteria described in Section 27300.[541]

4. An optional requirement for one or more employees who perform similar duties to work a longer or shorter day, or work more or fewer days per year, performing similar job duties, in the absence of the criteria described in Section 27300(a)(2), except as provided in Education Code section 22138.5(c) for the minimum standard for full-time and community colleges.

5. Performing only activities described in Education Code section 22119.5(a)(6) because those activities must be related to, in an outgrowth of, the instructional and guidance program of the school and performed in addition to other activities described in Education Code section 22119.5 in order to be creditable service.[542]

J. STRS Contribution Rates

On June 24, 2014, Governor Brown signed Assembly Bill 1469[543]. AB 1469 increases contribution levels to STRS from employers, employees, and the state to reduce the funding gap in the teachers' retirement program. The legislation took effect on July 1, 2014.

The legislation adds Education Code section 22901.7 which sets forth the new contribution rates. Employer contribution rates over the next seven years will increase from 8.25% to 19.10% of creditable compensation. Beginning in 2021, the STRS board will annually adjust employers' rates to reflect the contributions required to eliminate the remaining unfunded actuarial obligation by June 30, 2046. The STRS board's discretion to adjust rates is limited and cannot be changed by more than 1.00% in any single year, and the total contribution rate cannot exceed 20.25% of creditable compensation.

Employee contribution rates will increase from 8.00% to 10.25% over the next three years. Employees who are subject to PEPRA (newer employees employed on or after January 1, 2013) will see their contribution rates increase from 8.00% to 9.205% over three years.

State contributions will increase over three years from 3.041% to 6.328%. Beginning in 2017, the STRS board will meet annually to adjust the state's rate to reflect the contribution required to eliminate the remaining unfunded actuarial obligation. If a rate increase is required, the adjustment cannot exceed 0.50% of total member creditable compensation in the previous year. If no unfunded actuarial obligation remains, the adjustment is reduced to zero.

[541] Education Code section 27300 relates to the distribution of lump-sum benefits.
[542] California Code of Regulations, Title 5, section 27301.
[543] Stats. 2014, ch. 47.