STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT UNIFIED SCHOOL DISTRICT, Employer, and FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, CTA/NEA, Exclusive Representative.	Case No. SF-UM-721-E PERB Decision No. 2397 November 14, 2014

Appearances: Dannis, Woliver & Kelley by Tami F. Essis Culkar, Attorney, for Fremont Unified School District; California Teachers Association by Diana S. Reddy, Attorney, for Fremont Unified District Teachers Association, CTA/NEA.

Before Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Fremont Unified District Teachers Association, CTA/NEA (Association) to a proposed decision (attached) by a PERB administrative law judge (ALJ) denying the Association's petition to add Behavioral Intervention Specialists (BIS) to the certificated bargaining unit. The ALJ concluded that BIS were not "certificated employees" within the meaning of section 3545(b)(3) of the Educational Employment Relations Act (EERA), and therefore could not be added to the certificated unit.[1]

The Board has reviewed the proposed decision and the record in its consideration of the Association's statement of exceptions and the response thereto by

[1] EERA is codified at Government Code section 3540 et seq. Section 3545(b)(3) provides: "Classified employees and certificated employees shall not be included in the same negotiating unit."

the Fremont Unified School District (District). The factual findings of the proposed decision are supported by the record. Accordingly, the Board adopts the findings of fact and hereby affirms the proposed decision in accordance with the following discussion and consideration of the Association's exceptions.

FACTUAL SUMMARY

The facts of this case are not in dispute and we summarize them briefly for purposes of the following discussion.

Behavior Intervention Specialists

The BIS are trained to assist special education teachers and other educators in developing techniques to discourage disruptive behavior by special needs students. In this District, the BIS act as Behavioral Intervention Case Managers (BICM), specially designated professionals who are authorized to develop behavioral intervention plans.[2]

Prior to 2008, school psychologists performed BICM duties in the District, however, this practice has recently been discontinued in favor of BIS acting as BICM. The Education Code requires that a FAA is performed only by BICM. At present, however, the District permits only the BIS to perform FAAs (and so act as BICM).

BIS indirectly help special education students by devising behavior plans that address disruptive behavior. In some cases, this may mean conducting assessments and creating behavior intervention plans using a process known as functional behavior

[2] A BICM is a designation that was created under the Hughes Bill (Ed. Code, §§ 56520-56525) to identify specific people within a school district who possess training in behavior analysis and are able to complete a functional analysis assessment (FAA) of special needs students. Being designated as a BICM allows an individual to complete FAAs and develop a behavior intervention plan.

analysis.[3] Functional behavior analysis involves observing the student's negative behavior and defining it in concrete terms; identifying why the behavior is occurring, when it occurs and for how long; and attempting to find a positive behavior to replace the negative behavior.

As described in greater detail in the proposed decision, the BIS work in the Special Services (Special Education) Department at the District, and interact primarily with certificated employees (i.e., special education teachers) and classified para-professional classroom aides. The BIS do not work directly with students, except briefly to observe their behavior and to model for teachers the techniques the BIS suggest as part of their behavior improvement plans.

BIS perform a variety of tasks including drafting behavior intervention plans for students, reviewing behavior emergency reports, making phone calls and various other office tasks.

Whether a BIS services are necessary in a particular circumstance depends upon a number of factors. Typically, the BIS is called in to address a behavior that impedes the student's access to the services identified in his or her Individual Education Plan (IEP). The BIS will work with the student's case manager and the school psychologist to develop a behavior support plan (BSP).

When the BIS is first assigned to a case, he or she will conduct an independent evaluation of the student's behavior that includes direct observation of the student, review of previous unsuccessful BSP, and interviews with staff and parents as well as any other specialists assigned to work with the student. In some cases, the BIS may

[3] A functional behavior analysis is the diagnostic tool used when a student's behavior impedes his or her learning under 20 United States Code (U.S.C.) section 1414(d)(3)(i).

determine that a new plan is not needed, but rather, that the staff members need to be re-trained on the implementation of the existing plan. In other cases, a new plan will be developed by the BIS. In either case, the BIS will train staff members who work with the student to implement the chosen plan.

A BIS may also be assigned to a particular case when a student exhibits one of the behaviors identified in the California Education Code as "serious."[4] To address serious behaviors, the District is required to complete an FAA. State law requires specialized training in order to conduct an FAA.[5] Once an employee has been trained in FAA, s/he is qualified under state law to serve as a BICM and to complete a behavior intervention plan. The behavior intervention plan differs from the BSP in length and complexity. While any certificated employee may complete a BSP, only BICM may complete behavior intervention plans. Although there are several certificated bargaining unit members who are qualified to act as BICM, the District currently permits only BIS to work as a BICM on a particular case.

There are three BIS included in the Association's unit modification petition. One of them was formerly a school psychologist and has a Pupil Personnel Services (PPS) credential. The other two do not have any license or credential issued by the California Commission on Teacher Credentialing (CTC). Instead, they are licensed as Board Certified Behavior Analysts (BCBA) by the Behavior Analyst Certification

[4] "Serious behavior problems" are defined as "behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective." (Cal. Code Regs., tit. 5, § 3001(aa).)

[5] See California Code of Regulations (CCR), title 5, section 3052(b).

Board (BACB), which is a professional association for behavior analysts, not associated with or regulated by the State of California.

The District does not require that its BIS have any credential or other license which is issued by the CTC. The District's job description for the BIS lists as "licenses and certificates" required for the job as: certification as a BCBA, Board Certified Associate Behavior Analyst (BCABA) or pupil personnel credential. (Assn. Exh. 1.)

PROPOSED DECISION

The threshold issue considered by the ALJ was whether the BIS is a certificated or classified position under the Education Code. Because EERA does not define either "certificated" or "classified" and because PERB must occasionally interpret the Education Code in order to enforce or effectuate the purposes of EERA, the ALJ turned to the Education Code definitions to guide her analysis.

The ALJ relied on Education Code sections 44001 and 45104[6] to conclude that the default classification for school district employees is "classified service." Thus, based on her reading of PERB precedents, the ALJ concluded that there must be strong evidence of the legislative intent for the position to be considered certificated before PERB will include that position in the certificated bargaining unit. (Proposed Dec., p. 29.)

After reviewing relevant PERB decisions, the ALJ observed that there appeared to be two methods for distinguishing between classified and certificated employees:

[6] Education Code section 44001 defines a certificated position as "every type of service for which certification qualifications are established by or pursuant to Sections 44000 to 44012, inclusive, Section 44065, and Chapter 2 (commencing with Section 44200) of this part." Education Code section 45104 defines as "classified" as "[e]very position not defined by this code as a position requiring certification qualifications and not specifically exempted from the classified service according to the provisions of Section 45103 or 45256 . . . ."

the position could either be certificated as a matter of law "based on the specific identification of the position and its duties by the Education Code; or the position is certificated as a matter of fact because the majority of the duties performed by the incumbent are certificated duties under section 44065." (Proposed Dec., p. 32.)

The ALJ determined that the BIS in this District are not certificated as a matter of law, because the professional license the District prescribes as a qualification for the job, the BCBA, is not a "certificate" or "credential" issued either by the CTC or a county board of education. (Ed. Code, §§ 44001, 44004; Proposed Dec., p. 33.)

The BCBA permits its holders to perform the duties of the BIS in the District, i.e., to perform behavior assessments and intervention services. (Ed. Code, § 56525.) However, as the ALJ noted, Education Code section 56525 does not mandate that those services—behavior intervention and assessments—be provided only by a BCBA holder. For these reasons, the ALJ concluded that there was no basis for finding that the BIS were certificated employees as a matter of law. (Proposed Dec., pp. 32-33.)

The ALJ then turned to an analysis of whether the BIS were certificated as a matter of fact, which required an analysis of whether their duties fell within the definition of Education Code section 44065. That section provides that any school district employee who works in a position in which 50 percent or more of his or her job duties consist of "directing, coordinating, supervising or administering any or all of the following functions shall hold a valid teaching or service credential." Following this paragraph is a list of thirteen functions, including, "the work of instructors and the instructional program for pupils," counseling and placement services, planning courses of study to be used in the public schools, the school health program, school library services, etc. The ALJ analyzed each of the thirteen functions and concluded that the

BIS did not spend 50 percent of their time "directing, coordinating, supervising or administering all of the above-described functions." Therefore, they were not certificated employees as a matter of fact. (Proposed Dec., pp. 34-46.)

Finally, the ALJ noted the Association's claim that because the District established the PPS credential as one of the licenses that would satisfy the minimum eligibility requirements for the BIS position, the BIS are de facto certificated employees. The Association urged that Education Code section 44066 supports its view that even if the law does not require a credential, if the District required it, then BIS are certificated. The ALJ determined that it was unnecessary to decide this issue, as the appropriate unit placement is determined "based on the duties performed by the incumbents in the position." (Proposed Dec., p. 48.)

POSITIONS OF THE PARTIES

The Association's Exceptions

The Association excepts to several legal conclusions, and urges several reasons the Board should overturn the proposed decision. Not included in those reasons is any claim that the BIS are required to hold a certificate, credential, life diploma, permit, certificate of clearance or waiver issued by the CTC.

Instead, the Association argues that the ALJ erred in relying on Education Code section 44065 to determine whether the BIS are certificated as a matter of fact. According to the Association, Education Code section 44065 applies only to managers and supervisors, and its purpose was to determine under what circumstances managers and supervisors needed to be credentialed, not whether rank-and-file employees needed to hold a credential. According to the Association, PERB has previously applied Education Code section 44065 to determine whether the position in question performed

any of the thirteen listed functions, not whether the employee "direct[s], coordinate[s], supervise[s] or administer[s]" the functions. Yet the ALJ applied Education Code section 44065 "exactly as written" and concluded that the BIS did not spend 50 percent or more of their time, "directing, coordinating, supervising or administering" any of the enumerated functions and were therefore not certificated as a matter of fact. The Association asserts that no non-managerial, non-supervisory employee will ever be found to spend 50 percent of their time "directing, coordinating, supervising or administering" the listed functions because rank-and-file employees do not supervise, direct or coordinate. Therefore, according to the Association, the ALJ erred in using Education Code section 44065 to analyze whether the BIS performed certificated functions.

While conceding that the definitions of "certificated" and "classified" are absent from EERA and therefore must be discerned from the Education Code, the Association asserts that in passing the Hughes Bill, the Legislature intended that persons who provide behavior intervention services are to be certificated. For this claim the Association relies on CCR, title 5, section 3001(e), which describes the requirements for the BICM, a position that has been replaced in the District by the BIS.[7]

The Association further argues that the Legislature intended to designate the BCBA as an alternative form of certification. According to the Association, Education Code section 56525, part of the Hughes Act, does not state that no credential is required to provide behavior intervention services, but that the BCBA license qualifies the holders of the license to perform the tasks assigned to the BIS in the District. This, in

[7] The Association and the ALJ cited this as section 3001(f). However, it was subsection (e) that described staffing requirements and qualifications of the BICM. We therefore refer to that regulation, CCR, title 5, section 3001(e) in this decision.

the Association's view, establishes that the BCBA is an alternate form of certification, justifying including the BIS in the certificated bargaining unit. As Education Code section 44006, which defines "certificated person," places no limitation as to the body that issues a certificate, credential or life diploma, the Association asserts that the BCBA should be considered a "certificate" that qualifies the BIS' inclusion in the certificated unit.

Finally, the Association asserts that the District requires BIS to be certificated, and that by operation of Education Code section 44066, they are therefore certificated for purposes under EERA. Because the District's qualifications for the BIS can be satisfied either by a PPS credential or a BCBA, the Association argues that the Board's decision in *Stanislaus County Office of Education* (1993) PERB Decision No. 1022 (*Stanislaus*) commands that positions for which certification is required by the school employer must be deemed certificated. According to the Association, because one of the two ways of meeting the minimum qualifications for the BIS is a PPS credential issued by the CTC, that should be sufficient to consider the position "certificated."

The District's Response

The District urges that the Board uphold the proposed decision, as it correctly concluded that because the CTC does not require a person rendering behavior assessment or behavior intervention services to hold a credential, the position of BIS is not certificated. The ALJ applied the correct tests for determining whether a position is certificated or classified, according to the District, including applying the purported presumption that all positions in public school districts are classified. Moreover, the daily tasks performed by the BIS do not require any credential, so the ALJ's analysis of

those tasks in light of Education Code section 44065 was correct, according to the District.

Neither should the BIS position be considered certificated simply because one of the BIS happens to hold a PPS credential. According to the District, Education Code section 45104 makes clear that a classified position does not convert to certificated merely because an employee in the position happens to be credentialed.

DISCUSSION

Education Code Definitions of Certificated Position or Employee

We agree with the ALJ's conclusions that the BIS are not certificated employees within the meaning of the Education Code and that the BCBA was not intended to substitute for a credential issued by the state.

Education Code section 44006 defines "certificated person" as one who holds "one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents." Education Code section 44002 defines "credential" to include a "credential, certificate, life document, life diploma, permit, certificate of clearance, or waiver issued by the commission."[8] (Emphasis added.) Thus, we join with the ALJ in concluding that in order for a position to be certificated, it must require certification as defined by the Education Code. The BIS position in this District does not require a certificate or credential. The position is therefore not certificated.

We reject the Association's claim that "certificate" is a broader term than "credential." A "certificate" has a precise definition in Education Code section 44004—it is a document issued by a county board of education to license the

[8] "Commission" refers to the CTC. (Ed. Code, § 44001.1.)

holder to perform the service specified in the certificate. A "'life diploma' is a document issued on the basis of a credential upon completion . . . of specified requirements." (Ed. Code, § 44003.) The term "credential" is the broader category, because by definition, it includes credentials, certificates, life documents, life diplomas, permits, certificates of clearance or waivers issued by the CTC. (Ed. Code, § 44002.) The point is that "certificated person" is one who possesses a credential or certificate issued by some arm of the state, not a non-state actor such as the BACB.

Because the BIS position does not require a "credential," the ALJ was correct in concluding that the BIS in the District are not certificated employees.

Licensing Requirements for the BIS

The ALJ concluded that nothing in the Education Code required a BIS to hold a credential. Education Code section 56525, upon which the Association relies for its assertion that the Legislature intended that BIS must be certificated, provides:

> (a) A person recognized by the national Behavior Analyst Certification Board as a Board Certified Behavior Analyst may conduct behavior assessments and provide behavioral intervention services for individuals with exceptional needs.
>
> (b) This section does not require a district, special education local plan area, or county office to use a Board Certified Behavior Analyst to conduct behavior assessments and provide behavioral intervention services for individuals with exceptional needs.

We agree with the ALJ that this section does not require BIS to hold a credential. Nor do we find that this section designates the BCBA as a type of license that would permit its holder to be considered "certificated" within the meaning of the Education Code.

By its plain terms, Education Code section 56525 does not require the BIS to hold a credential or any other type of license. Subsection (a) of 56525 is written

permissively: a BCBA "may conduct behavior assessments and provide behavioral intervention services." (Emphasis added.) But a school district is not required to use a BCBA to provide those services.

Nevertheless, the Association urges consideration of the CCR and all relevant provisions of the Education Code in determining the Legislature's purported intent to deem the BCBA an alternative credential that would bring the BIS within the definition of "certificated." Specifically, the Association points to CCR, title 5, section 3001(e) which defined "Behavioral intervention case manager" as:

> [A] designated certificated school/district/county/ nonpublic school or agency staff member(s) or other qualified personnel pursuant to subdivision (ac) contracted by the school district or county office or nonpublic school or agency who has been trained in behavior analysis with an emphasis on positive behavioral interventions. The "behavioral intervention case manager" is not intended to be a new staffing requirement and does not create any new credentialing or degree requirements. The duties of the "behavioral intervention case manager" may be performed by any existing staff member trained in behavioral analysis with an emphasis on positive behavioral interventions, including, but not limited to, a teacher, resource specialist, school psychologist, or program specialist.

(Emphasis added.)

The Association asserts that this regulation implementing the Hughes Bill "created the first legal requirement that schools designate a specific position, the BICM, to be the point person for [behavior intervention services.]" (Brief in Support of Exceptions, p. 17.) However, CCR, title 5, section 3001(e) was repealed, effective July 1, 2013 by Education Code section 56523(a) which decrees:

> (a) The Superintendent shall repeal those regulations governing the use of behavioral interventions with individuals with exceptional needs receiving special education and related services that are no longer supported by statute, including Section 3052

> and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.

Consequently, we do not find the meaning of this repealed regulation to be helpful to our task of determining whether the BIS is a certificated position.[9]

The Association also asserts that because BIS perform duties that fall within the scope of the PPS credential, that BIS are therefore certificated employees. We disagree with this logic. Simply because a PPS is authorized to "[d]esign strategies and programs to address problems of adjustment" and "coordinate intervention strategies for management of individuals and schoolwide crises," (see FUDTA Ex. 16), does not mean that the PPS-credential holder is the only individual that is qualified or authorized to perform similar duties. We concede that a PPS, or a school psychologist, or a trained teacher may perform the duties of the BIS. It does not follow from that proposition that such behavior intervention duties must be provided only by the PPS, school psychologists or trained teacher. Education Code section 56525 provides compelling support for the ALJ's conclusion here that the behavior intervention and assessment functions may be provided by professionals who do not possess a CTC or county-issued credential or certificate.

The Association points also to several examples in the Education Code in which specific professional licenses are designated as adequate substitutes for the CTC-issued credential. For example, Education Code section 44831 permits a school district to employ an

[9] Even if this regulation were in effect, we disagree with the Association's reading of CCR, title 5, section 3001(e). The plain meaning of that regulation states that the BICM may be a "certificated . . . staff member(s), or other qualified personnel . . . who has been trained in behavior analysis . . . ." (Emphasis added.) The regulation further provides: "The duties of the "behavioral intervention case manager" may be performed by any existing staff member trained in behavioral analysis . . . including, but not limited to, a teacher, resource specialist, school psychologist, or program specialist." (Emphasis added.) Therefore, nothing in this regulation requires that the person performing BICM duties hold a credential within the meaning of the Education Code.

"individual who holds a license issued by the Speech-Language Pathology and Audiology Board" as a speech pathologist. Likewise, Education Code section 44873 permits school districts to hire physicians for less than half time, provided they are licensed by the Medical Board of California. We read these provisions differently than the Association. They specifically exempt certain jobs—speech pathologists and half-time physicians—from any credential requirement. In our view, these provisions are very similar to Education Code section 56525, which states that behavioral intervention/assessment services may be performed by persons holding a license other than a CTC-issued credential. Simply because a school district is given permission to hire such professionals, does not render them "certificated" within the meaning of Education Code section 44006.

The Legislature is quite capable of clearly designating what constitutes a credential or certificate and the types of service for which those credentials are required. If it intended the BCBA to be an adequate substitute for a CTC-issued credential, it could have clearly said so.[10] We agree with the ALJ that the default classification for school employees is "classified," as Education Code section 45104 directs that "[e]very position not defined by this code as a position requiring certification qualifications . . . shall be a part of the classified service." The Association's arguments that service providing behavioral assessment and intervention should be provided only by individuals who have a credential or certificate within the meaning of Education Code section 44001 or 44006 are best addressed to the Legislature.

[10] An example of the Legislature specifically designating a position as one requiring certification is found in Education Code section 8366 which states: "Each person employed by a public . . . agency . . . in a position requiring a child development permit . . . shall be deemed to be employed in a position requiring certification qualifications." (See also *Gilroy Unified School District* (1979) PERB Decision No. 98, pp. 9-10.)

Duties Performed by the BIS Do Not Require a Credential

Having determined that the BIS need not be credentialed by any requirement of the Education Code, we turn now to consider whether the duties they perform require a credential. For this analysis, we turn to Education Code section 44065. (*Modesto City School District* (1991) PERB Decision No. 884, p. 17-18 (*Modesto*).) The Association contends that this provision is irrelevant to this case, because Education Code section 44065 applies only to managers and supervisors, not to rank-and-file educators. As support, it relies on the following language of section 44065: "any person employed . . . in which 50 percent or more of his or her duties . . . consist of rendering service in directing, coordinating, supervising or administering" the stated functions must hold a credential.[11] According to the Association, "directing, coordinating, supervising or administering" are functions performed only by management or supervisory employees, and the statute should therefore not apply for determining the scope of functions for rank-and-file employees.

The Education Code is quite opaque in this regard. The Association correctly points out that section 44065 is found within an article of the Education Code entitled "Interchange Between Certificated and Classified Positions, Exceptions." However, the introductory section 44060, "Purpose of this article," describes the purpose of the article is to "provide a basis of determination as to what constitutes a supervisory or administrative classified position or a position requiring certification qualifications not clearly defined in other sections of this code." (Emphasis added.) The remainder of the article contains sections regarding the retention of rights of classified employees who change to certificated positions and vice versa; a restriction on certification requirements; various "grandfather" provisions; and a section declaring that school district business managers do not have to be credentialed.

[11] The Association misquotes Education Code section 44065 slightly. The statute uses the verb "administering," not "administrating."

The predecessor section to Education Code Section 44065 was enacted in 1961 as Assembly Bill 2471 (Winton) and codified at former Education Code section 13055.[12] The author described the bill as one addressing "the problem of what school positions should be certificated and which should be non-certificated." (June 20, 1961, Ltr. from Gordon Winton to Governor Edmund G. Brown.) While virtually no weight is given to the author's views (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1340-1341), the report on AB 2471 by the Office of Legislative Counsel, July 10, 1961 is more persuasive as to legislative intent. (*Maben v. Superior Court* (1967) 255 Cal.App.2d 708, 713 (digests of bills prepared by the legislative counsel may be relied on to determine legislative intent when those statements are in accord with reasonable interpretation of the statute.) The legislative counsel's report describes AB 2471 thus:

> Redefines the particular administration and supervision positions for which certification documents must be held, specifies that a certification document shall be held by any person, 50 percent or more of whose duties involve activities in such positions, requires person employed in any such position . . . to hold valid teaching credential and a proper supervision or administration credential, . . .

According to a letter from the California Teachers Association (CTA) to Governor Edmund Brown in support of AB 2471, the legislation was necessary because some administrative and supervisory positions were held by certificated employees and others were held by classified employees, and it was important to delineate the difference. (June 27, 1961, Ltr. from CTA to Governor Edmund Brown.)

Education Code section 13055 provided, in pertinent part:

> (a) Any person employed by a school district . . . in a position in which 50 percent or more of his duties

[12] The Education Code was reorganized in 1976, resulting in the re-numbering of this section to the current section 44065.

> regularly performed during the school year consist of rendering service in directing, coordinating, supervising or administering any portion or all of the types of functions listed below in this section shall hold a valid teaching credential issued or renewed pursuant to this code . . . . On and after July 1, 1963, no school district shall employ a person to render such service unless a person holds a valid teaching credential, and also holds a supervision credential or an administration credential authorizing the particular service.

(Emphasis added.)

Amendments to Education Code section 13055 were made in 1967, but the statute continued to require both a teaching credential and an administrative credential. It read: "any person employed . . . of rendering service in directing, coordinating, supervising or administering [the designated functions] shall hold a valid teaching or service credential, and shall hold a supervision or administration credential, whichever is designated in regulations . . . ."

By 1976, when the Education Code was reorganized and re-numbered, the current subsection (a) of newly-numbered Education Code section 44065 appears. This version dropped the requirement that a person performing the enumerated duties hold a supervisor or administrative credential. It reads, in relevant part:

> (a) . . . any person employed . . . in a position in which 50 percent or more of his or her duties performed . . . consist of rendering service in directing, coordinating, supervising or administering [the designated functions] shall hold a valid teaching or service credential as appropriate, whichever is designated in regulations adopted by the Commission on Teacher Credentialing, authorizing the particular service.

Even though the current version of the statute retains the words the Association claims are associated with managing or supervising, we cannot presume the Legislature

engaged in an idle act when it deleted the requirement for a supervisory or administrative credential.

The better reading of Education Code section 44065, in context with other similar provisions that define "certificated" position, is the way that PERB has treated this section in past decisions, and the way the ALJ applied the statute. Education Code section 44065 provides a guidance as to the type of functions the Legislature deems to be "certificated" functions. Whether section 44065 requires an administrative or supervisory credential to render 50 percent or more of duties directing, coordinating, supervising or administering the designated functions is not relevant to the inquiry at hand, i.e., whether the duties the BIS performed fell within what is considered "certificated" duties. The ALJ did not err in analyzing the BIS duties under Education Code section 44065.

PERB has applied Education Code section 44065 in determining whether the duties of a non-managerial, non-supervisory high school auditoriums manager should be in the certificated or classified unit. (*Modesto, supra,* PERB Decision No. 884.) Because the duties of the auditoriums manager did not include and were not related to instructional program activities, the position was not certificated. In *Stanislaus, supra,* PERB Decision No. 1022, PERB again considered Education Code section 44065 in determining whether rank-and-file naturalists occupied a position requiring certification. Because at least half of the naturalists' duties were instructional services, "pursuant to Education Code section 44065, they are in a position requiring certification . . . and are certificated employees." (*Stanislaus,* ALJ Dec. p. 17.)

We decline the Association's invitation to overrule these earlier decisions for the reasons explained above. Education Code section 44065 provides appropriate

guidance in determining whether job functions are to be considered "certificated," an inquiry that we must make when it is unclear whether the Education Code deems the job classification to be one requiring certification.

No exception was taken to the ALJ's factual findings regarding what the BIS actual job duties were. The Association did except to the ALJ's interpretation and application of Education Code section 44065 insofar as the ALJ's inquiry focused on whether the BIS spend 50 percent or more of their time "directing, coordinating, supervising or administering" any of the enumerated functions, an exception we reject for reasons explained above. We agree with the Association that the issue is not whether the BIS duties encompass "directing, coordinating, supervising or administering" the enumerated functions, but whether they actually perform those functions, such as participating in the instructional program, providing vocational counseling, providing school library services, etc. Framed thusly, the record supports the ALJ's conclusion that the BIS did not spend 50 percent or more of their time performing the services enumerated in Education Code section 44065.

The District's Minimum Qualification Requirements for the BIS

The District requires its BIS to have either a PPS credential or a BCBA. The Association argues that because the minimum qualification can be met with the PPS credential, the position must be considered certificated. The Association further asserts that Education Code section 44066 requires that the BIS be considered certificated. The proposed decision did not resolve this claim, as the ALJ viewed PERB's job to determine proper unit placement, not to determine whether the District has violated section 44066 of the Education Code.

We do not view the Association's claim to seek enforcement of Education Code section 44066, but rather an alternative basis for finding that the BIS are certificated employees. We nevertheless reject the Association's assertion. It is premised on a proposition that we have already rejected, namely, that the BCBA is the functional equivalent of a credential within the meaning of the Education Code. We also disagree with the Association's interpretation of Education Code section 44066, which states:

> A . . . school district . . . shall not require an employee or applicant to possess any certification, license, or other credential unless the possession of such a certification, license or other credential is required by statute or is based upon a bona fide occupational qualification.
>
> It is the intent of the Legislature that any person who had served in a position for which certification, license, or other credential not necessitated by statute or bona fide occupational qualification, had been required, and in a position which was designated by the governing board as a position requiring certification qualifications, shall be deemed to be an employee in a position requiring certification qualifications for as long as he or she holds such position and it is further the intent of the Legislature that such position shall be deemed to be a certificated position for as long as such person holds such position.

(Emphasis added.)

The main purpose of this section is to limit the ability of school districts to require credentials for jobs for which the Education Code does not require credentials—in the words of the ALJ, to prevent such classifications as "certificated bus drivers." (Proposed Dec., p. 48.) The second purpose of Education Code section 44066, described in its second paragraph, is to "grandfather" those individuals who occupied jobs for which a district had improperly required credentials. Those individuals are to be considered "certificated" and occupying "certificated

positions" for as long as they hold such positions.[13] Because the District did not require "certifications" within the meaning of the Education Code for the BIS, Education Code section 44066 does not apply to this case.

Education Code section 45104, related to classified employees, supports our reading of section 44066. Education Code 45104 provides, in pertinent part:

> Every position not defined by this code as a position requiring certification . . . shall be part of the classified service. Such positions may not be designated as certificated nor shall the assignment of a title to any such position remove the position from the classified service, nor shall possession of a certification document be made a requirement for employment in any such position.

The second paragraph of Education Code section 45104 answers the Association's argument that because one of the minimum qualifications for the BIS position is a PPS credential, the entire classification of BIS should be considered "certificated." It states:

> Nothing in this section shall be construed to prohibit the employment of any individual in a position described by this section as part of the classified service who is in possession of certification qualifications, nor shall the possession of certification qualifications be grounds for the elimination of an individual for consideration for employment in such a position.

In other words, a school district may hire a person who happens to have a credential into a classified position, but that does not convert the position to certificated. Because the District did not require that the BIS have a credential (it is simply a coincidence that one of the three BIS has a credential), we disagree with the Association's argument that Education Code section 44066 converts the BIS into a certificated position.

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[13] We agree with the ALJ that footnote 22 in *Stanislaus, supra,* PERB Decision No. 1022 offers no guidance in this case because the district in *Stanislaus* required the certificated naturalists to have a teaching credential. As discussed previously, the District in this case did not require the BIS to have any credential.

The question for PERB is whether the position in question, the BIS, is a certificated position within the meaning of the Education Code. We have determined first that the BIS position is not "certificated" because the position does not require any form of certification within the meaning of the Education Code, i.e., a certificate, credential, or life diploma issued by the CTC. Second, nothing in the Education Code requires those who provide behavior intervention and assessment services to hold a credential. Third, the actual duties the BIS perform are not the kind of functions listed in Education Code section 44065, which describes certificated functions such as instruction, counseling, curriculum development, library services, school health programs, and similar functions. Fourth, the District does not require BIS to hold a credential. The fact that one individual happens to have a PPS credential does not convert the entire classification to "certificated." To find otherwise would contravene the provisions of Education Code 45103.

We join with the ALJ in noting that this decision is based on the facts in this District with regard to the BIS position created by this District. The conclusions reached here will not necessarily pertain to similar positions in other districts.

Community of Interest

The Association argues in its brief in support of exceptions that the BIS share a community of interest with the other employees in the certificated unit and therefore, the *Peralta* presumption applies.[14] The ALJ did not rule on community of interest claims, and we comment on the matter here simply to reject the Association's assertion and to clarify the role of the *Peralta* presumption in cases where there is a dispute over certification status. The threshold question in bargaining unit cases under EERA will always be whether the positions

[14] See *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*), creating a rebuttable presumption that all classroom teachers are appropriately placed in the same bargaining unit.

in question are certificated or classified within the definitions of those terms found in the Education Code. The *Peralta* presumption comes into play only after it is determined the positions are certificated. (EERA, § 3545(b)(3).)

ORDER

Based on the foregoing and the entire record in this Case No. SF-UM-721-E, it is hereby ordered that the unit modification petition filed by the Fremont Unified District Teachers Association, CTA/NEA is DENIED.

Members Huguenin and Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT UNIFIED SCHOOL DISTRICT, Employer, and FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, Exclusive Representative.	REPRESENTATION CASE NO. SF-UM-721-E PROPOSED DECISION (11/25/2013)

Appearances: Dannis, Woliver Kelley by Tami Essis Culkar, Attorney, for Fremont Unified School District; Diana S. Reddy, Attorney, for Fremont Unified District Teachers Association, CTA/NEA.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

On August 10, 2012, the Fremont Unified District Teachers Association (FUDTA or Union) file a Unit Modification Petition (Petition) seeking to include the Behavior Intervention Specialists (BISs) in the certificated bargaining unit that is exclusively represented by FUDTA. The Fremont Unified School District (District) filed its opposition on September 5, 2012. An informal settlement conference was held on November 13, 2012, but the parties did not reach a settlement at that time. A formal hearing was held on March 19, 2013, May 9, 2013, and June 3 and 4, 2013.

A. The Motion to Dismiss

On February 25, 2013, before the hearing, the District filed a Motion to Dismiss the petition. The basis for its motion to dismiss was a series of three declarations signed by BISs Anne Tofte, Lisa Dillon, and Eric Plummer. These declarations track the language of Education Code section 44065 and state that the declarant does not spend fifty percent or more

of their work time performing any one of the 13 different types of duties listed in section 44065. The motion was denied and the hearing proceeded as scheduled.

B. The Motion for Summary Adjudication

On the first day of hearing, the Union called three witnesses, none of whom were BISs. The Hearing Officer ordered the parties to produce the BISs for the taking of live testimony regarding their day-to-day job duties. Additional days of hearing were scheduled. Before the second day of testimony, the Union filed a "Letter Motion for Summary Adjudication on PERB Authority." Ostensibly, this motion sought to have PERB "confirm its authority to adjudicate the "classified" or "certificated" status of the Behavior Intervention Specialists in this case."

The District responded to the motion on May 8, 2013. In its response, the District stated that it "recognizes that in Modesto City School District, PERB Decision No. 884, PERB reviewed the job duties of the position at issue to determine that it did not require a credential under Education Code section 44065." The second day of hearing proceeded on May 9, 2013, as noticed to the parties. Additional days of hearing were ordered on June 3 and 4, 2013.

FINDINGS OF FACT[1]

The Special Services/Special Education Department:

Student needs within the Special Services/Special Education[2] Department at the District are provided on a continuum and vary from mild physical, cognitive and emotional disabilities,

[1] The facts in this case are taken from the testimony and evidence presented at hearing. Often, the parties' testimony includes use of terms and phrases commonly used in the field of education, but which may not be familiar outside the profession. For that reason, where a phrase has been defined by applicable law or statute, or a service provided by the parties has been mandated by law, this has been noted by footnote. Some of the services provided by the District which have been testified to by witnesses are unique to this District or have not been mandated by law.

to severe physical, cognitive and emotional disabilities. In order to ensure that all special education students receive the "free and appropriate public education"[3] to which they are entitled, an Individual Education Program (IEP)[4] is created for every Special Education student. An IEP is created by an IEP team that is made up of a number of individuals including the parents of the child, the teacher whose classroom the student will be assigned to, as well as a representative of the local education agency providing the services.[5] Other members of the team may include other District employees who provide "Designated Instructional Services" in non-academic areas where the student has demonstrated need, such as a Speech Pathologist, Program Specialist, or the School Psychologist. The purpose of the IEP is to identify areas where the special needs student may require additional instruction or assistance and to articulate attainable goals for the school year.[6] The IEP may contain a

[2] "'Special education' means specially designed instruction, at no cost to the parents, to meet the unique needs of individuals with exceptional needs whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction." (Cal. Code Regs., tit. 5, § 3001(ac).)

[3] "'Free appropriate public education' means special education and related services that: (1) have been provided at public expense, under public supervision and direction and without charge; (2) meets any of the standards established by state or federal law; (3) include an appropriate preschool, elementary, or secondary school education in California; and (4) are provided in conformity with the IEP required under state and federal law." (Cal. Code Regs., tit. 5, § 3001(p).)

[4] An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the Individuals with Disabilities in Education Act (IDEA), found at section 614(d) of 20 USCS § 1401.

[5] See 20 U.S.C.S. § 1414(d)(1)(B).

[6] See 20 U.S.C.S. §1414(d).

provision for Designated Instructional Services and may also state how and when the student will receive these services to reach the goals that have been identified.[7]

Although all the members of an IEP team share some degree of responsibility for monitoring the student's progress and implementing the IEP, a Case Manager may be assigned to a particular student in order to schedule meetings on behalf of that student and to monitor the student's progress in attaining the goals identified in the IEP. A Case Manager may also make recommendations or requests for additional support for the student to achieve his or her IEP goals. Even where a Case Manager has not been assigned to a particular student, however, members of the IEP team routinely consult with each other to help the student reach the goals outlined in the plan. While the IEP team must be led by a credential-holder, other members of the team may be non-credentialed employees or parent(s) of the student. Any member of an IEP team can request additional services on behalf of a student, a process that will trigger additional evaluations to determine if the additional service is required as part of that student's free appropriate public education.

Some Special Education students are "mainstreamed" in regular classes with non-special needs peers. These students are assigned to a "Resource Specialist." Students assigned to a Resource Specialist have disabilities occupying a wide range of severity. The Resource Specialist typically meets with students in a small group setting, often to address undesirable behavior(s) by the student that impair academic success or progress.

Alternatively, some Special Education students are placed in Special Day Classes comprised only of Special Education Students. Often these students have physical or cognitive deficiencies and may also have behavioral problems that would prohibit them from succeeding or inhibit other students from learning if they were assigned to a mainstream classroom.

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[7] See 20 U.S.C.S. § 1414(d)(1)(A)(i)(VII).

Special Day Teachers must possess a credential to teach students with mild to moderate disabilities or those with moderate to severe disabilities.[8] Special Day classes are self-contained classrooms and, in addition to the Special Day teacher, one or more para-professionals[9] (also referred to by the parties as "para-educators" and simply, "paras"), may be assigned to work in the Special Day Classroom. Paraprofessionals may be assigned to a particular student on a one-to-one basis, or they may be assigned to assist the Special Day teacher in a particular classroom.

Students who have been identified as having some of the most severe disabilities are assigned to the Intensive Instruction program at the District. The District currently has 11 Intensive Instruction classrooms, located throughout the District, that are populated with approximately 90 students. Many of the students have been diagnosed with autism, and many, if not all, of the Intensive Instruction students are non-verbal. Typically, these students are being taught what is referred to as a "life skills" curriculum, rather than a more traditional academic curriculum. The "life skills" curriculum is intended to help students to be as independent as possible when they transition out of school. It is not offered in every district, but it is not unique to the District. "Life skills" for a student identified with severe needs might be picking up a fork and feeding him or herself. "Life skills" for a student defined as having moderate or mild needs might include appropriate interactions in a social setting.

Special Day teachers provide instruction in "functional curriculum." Because the students assigned to a Special Day class typically will not be able to earn a high school

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[8] See California Education Code section 44268.5 and California Code of Regulations, title 5, section 80048.6(b).

[9] A "school paraprofessional" includes the following job classifications: educational aide, instructional aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil services aide, library aide, child development aide, child development assistant, and physical education aide. (Ed. Code § 44392(e).)

diploma, Special Day teachers focus on teaching a blend of life skills and academics to their Special Education students. This may include teaching skills like how to count money, appropriate responses in different social settings, and a variety of vocational skills. Given the highly-individualized nature of the needs of Special Education students, as determined through the IEP process, Special Day teachers are tasked with developing and purchasing the appropriate curriculum and teaching materials needed by and for each student assigned to them. In addition to teaching a highly individualized functional curriculum, Special Day teachers also spend a significant volume of their classroom time providing vocational counseling to students and managing pupil behavior.

As noted above, some para-professionals are provided on a one-to-one basis to assist with students who need a greater amount of support services. The duties provided by these para-professionals may range from simply keeping the student on task to managing very serious behaviors that could cause injury to the student or others. At least one Special Day teacher testified that although she would anticipate that the para-professionals in her classroom would handle much of the behavior management of students, if the conduct in question was physically aggressive or self-injurious, she would handle it herself.

The District has created a separate "moderate" strand for tracking students in the moderate range of the spectrum from mild to severe. This has given the District the flexibility to assign either "Moderate/Severe" or "Mild/Moderate" credential holders to the classrooms populated by students whose needs are in the moderate range.

Behavior Intervention Case Managers (BICMs):[10]

A BICM is a designation that was created under the Hughes Bill[11] to identify specific people within a school district who possess training in behavior analysis and are able to complete the functions or the procedures involved in a functional analysis assessment (FAA).[12] Being designated as a BICM allows an individual to complete FAAs[13] and develop a behavior intervention plan (BIP).[14] Training to become a BICM is offered in some teacher training programs.

Prior to 2008, School Psychologists performed BICM duties in FUSD, however, this practice has recently been discontinued in favor of BISs acting as BICMs. The Education

[10] A "Behavioral Intervention Case Manager" is defined as:

> a designated certificated school/district/county/nonpublic school or agency staff member(s) or other qualified personnel pursuant to subdivision (ac) contracted by the school district or county office or nonpublic school or agency who has been trained in behavior analysis with an emphasis on positive behavioral interventions. The "behavioral intervention case manager" is not intended to be a new staffing requirement and does not create any new credentialing or degree requirements. The duties of the "behavioral intervention case manager" may be performed by any existing staff member trained in behavioral analysis with an emphasis on positive behavioral interventions, including, but not limited to, a teacher, resource specialist, school psychologist, or program specialist.

(Cal. Code Regs., tit. 5, § 3001(f).)

[11] See Education Code sections 56520-56525.

[12] See California Code of Regulations, title 5, section 3052(b).

[13] See California Code of Regulations, title 5, section 3052(b).

[14] A BIP is "a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, § 3001(g).) The BIP should include a number of elements enumerated in the regulation and becomes a part of the IEP. (See also Cal. Code Regs., tit. 5, § 3052(a)(1)-(3).)

Code requires that FAAs are performed only by BICMs. At present, however, the District permits only BISs to perform FAAs (and so act as BICMs).

Board Certified Behavior Analyst (BCBA):[15]

A BCBA is a certification that is conferred by the Behavior Analyst Certification Board (BACB), a professional association for behavior analysts. The BACB requires an applicant for a BCBA to complete certain coursework related to behavior analysis and 1500 hours of field work applying behavior analysis skills in several settings, including schools (though the program for conferring a BCBA does not focus on schools). Of the 1500 hours of field work, 75 hours must be supervised by a BCBA. After completion of coursework and fieldwork, there is an exam. There are additional annual renewal requirements and continuing education requirements after an individual has received a BCBA.

Job Alike Meetings:

In addition to the highly collaborative nature of the work that Special Education Department employees engage in when providing instruction and other educational tools to students, they also engage in a variety of cross-training within and among their classifications. This includes participating in in-service training, as well as "job alike" (JA) meetings that are convened regularly throughout the school year. These meetings are facilitated by a Program Specialist for each group of employees.

The District has instituted a practice of convening meetings for employees with similar jobs to discuss common workplace concerns. Currently, the JA meetings for BISs are comprised of all the BISs with no other classification of employee, though in the past, Inclusion Specialists were included in the JA meetings with BISs. These meetings are convened approximately once a month while school is in session. Meeting topics are focused

[15] See Education Code section 56525.

on work content like high profile cases, legal cases, placement issues, record-keeping issues, corrective actions, and updates from the California Department of Education.

Special Education Local Plan Areas (SELPAs):[16]

The SELPA that the District is in includes all the districts in the Mission Valley area: Newark, New Haven, and Fremont. The New Haven District employs behaviorists, but it is not clear whether the Newark District currently employs behaviorists.

Special Healthcare Para-Educators (Spec Paras):

The District created Spec Paras at a time when there was a shortage of nurses in the District. It was determined that some of the tasks associated with the District's medically fragile Special Education students could be performed by specially trained para-educators. For example, the District has a classroom dedicated to its most medically fragile students. One of these students is confined to a hospital bed and must be turned every 20 minutes. A Spec Para is employed to perform this task. In addition, each BIS has a Spec Para assigned to work with them and there is an additional Spec Para who is a "floater" and is assigned wherever she is most needed.

Behavior Intervention Specialists:

BISs are assigned to the Special Services (Special Education) Department at the District. BISs work 214 days per year, with summers off. The work calendar for a BIS is roughly from one-week prior to the beginning of the academic year until one week after the end of the academic year. BISs attend the Special Services Department meeting that is held at

[16] Each school district must create a plan for the efficient distribution of special education services. Districts may elect to join with other school districts or county offices of education in order to coordinate the provision of services to special needs students. The methods of providing these services as well as the designation of responsibility for the provision of various services is articulated in the special education local plan and updated annually. The SELPA is responsible for administering the local plan and allocation of funds. (See Ed. Code §§ 56195-56195.1; and 56205-56208.)

the beginning of each school year, which is attended by all Special Services Department employees. This is an all-day meeting that includes a general address and several break-out sessions in which employees may choose from several subject matters. BISs may lead training sessions on behavior modification techniques during these break-out sessions, which typically have a duration of an hour.

BISs are assigned cubicles where they perform a variety of tasks including drafting BIPs for students, reviewing Behavior Emergency Reports, making phone calls and various other office tasks. BISs report directly to the Director of Special Services or the Assistant Director of Special Services. BISs' job performance is evaluated semi-annually by the Director of Special Services. Evaluations include the adoption of personal professional goals for the coming school year as well as an assessment of the BIS's progress on previously-designated goals.

The goal of the BIS is to help students gain access to their education as part of their legally mandated free appropriate public education. The methodology used by BISs includes a variety of behavior modification techniques that are applied at the school site in order to discourage undesirable behavior and redirect the student's energy toward more desirable behaviors. The goal is not to change the way the student thinks. Rather, the goal is to change the way the student interacts with the world around them. In some cases, this may mean conducting assessments and creating BIPs using a process known as Functional Behavior Analysis.[17] Functional Behavior Analysis involves observing the negative behavior the student is engaging in and defining it in concrete terms; identifying why the behavior is occurring; when it occurs and for how long; and attempting to find a positive behavior to replace the

[17] A functional behavior analysis is the diagnostic tool used when a student's behavior impedes a child's learning under 20 U.S.C.S. § 1414(d)(3)(i).

negative behavior. Training in the creation of BIPs is included in the credential program for special education teachers.[18]

Whether a BIS's services are necessary in a particular circumstance depends upon a number of factors. Typically, the BIS is called in to address a behavior that impedes the student's access to the services identified in his or her IEP. Once the undesirable behavior is identified, the student's Case Manager writes up a behavior support plan (BSP) and commences implementation of the BSP. If, after a period of time, there is no improvement in the student's behavior, the Case Manager will make a referral to the school psychologist. The school psychologist will make an independent assessment of the student's progress and suggest modifications to the plan. This may result in a second BSP which, along with the first BSP, is attached to the student's file. If there is still no improvement in the student's behavior, the Case Manager will submit a request for the assignment of a BIS.

When the BIS is first assigned to a case, the process begins anew. The BIS will conduct an independent evaluation of the student's behavior that includes direct observation of the student, review of previous unsuccessful BSPs, and interviews with staff and parents as well as any other specialists assigned to work with the student. In some cases, the BIS may determine that a new plan is not needed, rather, that the staff need to be re-trained on the implementation of the existing plan. In other cases, a new plan will be developed by the BIS. In either case, the staff who work with the student will be trained to implement the chosen plan.

Another circumstance when a BIS may be assigned to a particular case is when a student exhibits one of the behaviors identified in the California Education Code as

[18] See Education Code section 56520(b)(5).

"serious."[19] In order to address serious behaviors, the District is required to complete an FAA. State law requires specialized training in order to conduct an FAA.[20] What that training consists of varies in some small degree from SELPA to SELPA.[21] Nevertheless, once an employee has been trained in FAA, s/he is qualified to serve as a BICM and to complete a BIP. The BIP differs from the BSP in length and complexity. While any certificated employee may complete a BSP, BIPs may only be completed by BICMs. Although there are several certificated bargaining unit members who are qualified to act as BICMs, current District policy is such that only BISs are assigned to work as a BICM on a particular case.

At this time, the District employs four BISs, each of whom has a different work assignment. Given the distinct nature of the assignments and tasks associated therewith, the BIS's job duties are described separately, below, with the exception of BIS Gladys Chan, whose position was withdrawn from the Petition. Anne Tofte's assignment includes all the BIPs and FAAs in all of the Intensive Instruction classrooms in the District. Lisa Dillon and Eric Plummer share responsibility for the BIPs and FAAs for the remainder of the student population throughout the District, excepting the infants in the Autism Resource Center (ARC) Program at the Glankler school site. Behavioral supports for the infants in the ARC Program are assigned to Gladys Chan, and outside the scope of this Petition.

Anne Tofte

Tofte is the only BIS that is assigned to work with the Intensive Instruction program, and has been working this assignment for the last two years. Her current case load is

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[19] A "serious behavior problem" is defined as "behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective." (Cal. Code Regs., tit. 5, § 3001(ab).)

[20] See California Code of Regulations, title 5, section 3052(b).

[21] See California Code of Regulations, title 5, section 3052(j).

approximately 35 behavior plans, representing roughly one-third of those students assigned to the Intensive Instruction program. Tofte receives her assignment from the Program Director typically after some other staff member has made a request to the Special Education Program Director for the services of a BIS.

Tofte's primary responsibility is to conduct FAAs on students for whom an existing BSP is not working. Upon receiving her assignment, she begins by reviewing prior behavior plans for the particular student to see what methods have already been applied. Then she will conduct direct observation of the student in the setting where the maladaptive behaviors are occurring. She may speak with other specialists in the process. Then she will determine whether a new behavior plan is needed or if the existing plan is sufficient but not being properly implemented. Once she decides on a behavior plan for the student, she will train the staff on how to implement it. Implementation can be done by BISs, teachers, parents, or paras.

The behavior plan that Tofte develops is intended to be a tool for the staff to use. It is not a tool for the student. Often, the determination of whether a BIP is warranted is based on whether the BSP has produced the desired results or if the student engages in one of the "serious" behaviors identified in the Education Code. If a BIP is not warranted, Tofte may write a new BSP.

Both a BIP and a BSP involve the same basic steps to complete: direct observation without intervening; interviewing staff and parents; then training the staff to collect the data for her, which is considered "indirect observation"; and finally, reviewing the student's records. Once the data is compiled, her analysis consists of quantifying the occurrences and describing the antecedents then giving the staff a breakdown of the antecedents and consequences of the behavior. During this process, her communication is directly with the staff and parents. Most of the students in the Intensive Instruction program are non-verbal, so Tofte directs very little

communication to the students. The ultimate goal of her assessment is to determine why the student is engaging in the behavior and then devising a way to redirect the behavior.

Tofte interacts with students on a daily basis. But the interaction is limited to approximately ten minutes per day, and the focus of the interaction is to model the behavior that the rest of the staff should be engaged in to implement the behavior plan properly. Tofte provided an example of how she might interact with students. She was recently in a classroom observing a student who had been given a structured schedule of work, break, work, break, etc. During one of his timed break periods, the student was sitting in a bean bag chair which he had ripped open, and was proceeding to pull out the Styrofoam pellets. The paraprofessional assigned to this student attempted to make the student stop the behavior by trying to take the beanbag chair away from the student. The result was that the student and the paraprofessional were now engaging in a tug of war over the beanbag chair. The paraprofessional looked up at Tofte and asked, "what do I do?" Tofte intervened by approaching the paraprofessional and the student and modeling the following behavior: she picked up the timer that was used to time the student's breaks, showed it to the student, stated to the student, "twenty more seconds of your break," and walked away from the student. She then explained to the paraprofessional that the student was not engaging in behavior that would hurt himself or anyone else, and she should not get into a physical altercation with the student over Styrofoam pellets. When the student's break was over, the student would go back to work and the staff could clean up the mess. Although Tofte did interact with the student, her primary audience was the paraprofessional. When she is in the classroom, it is common for staff to approach Tofte for assistance.

Tofte acknowledged that she has, at times, suggested to the classroom teacher that modifications be made to a student's curriculum. However, her suggestions do not encroach

on academic goals, rather, she might suggest a change to the work so that the student does not need to engage in particular maladaptive behaviors to get out of doing the work. She would then defer to the teacher to assign a similar task that would address the same academic goal. She may also make or suggest modifications to the way the classroom is arranged or structured, including breaking up the length of time spent on a particular task; rearranging seating; or using visual supports like icons or a posted schedule. Examples of the academic goals of students in the Intensive Instruction program are toileting skills, hand washing, feeding oneself, putting on your jacket, taking off your backpack, etc. She does not teach any of these skills directly—the skills are taught by the classroom teacher and paraprofessional.

Tofte is also involved in circumstances when staff have identified a "behavioral emergency" which occurs when a student engages in serious behavior. When any school staff observe serious behavior constituting a behavior emergency, a staff member is required to complete a "behavior emergency form." Although Tofte never completes the form herself, she is provided a copy in any instance where one has been completed involving an Intensive Instruction student. In those cases, Tofte will review the form and immediately contact the IEP case manager for the student. Working with the case manager, Tofte may schedule an IEP meeting to review the student's behavior plan. If circumstances warrant further action, Tofte may initiate an FAA.

Tofte has a Bachelor of Science in Psychology, a Master of Science in Psychology with a specialization in applied behavior analysis, and a BCBA. She has also received the District's BICM training. Tofte does not have a teaching credential. When asked to define "behavior intervention," Tofte stated that it was a form of problem-solving. She also stated that it could be considered a school of psychology or a type of applied psychology. She did not believe that behavior intervention was a type of mental health service because she defined a mental health

service as trying to change something that was going on within the student's skin. She did not believe that behavior modification changed the student—rather, it changed the way that the student communicates his wants. Behavior modification does not attempt to address or change how the student feels or thinks.

When asked whether the services she provides could be considered counseling, she stated unequivocally that they did not. In her mind, counseling involved talk therapy, and required the recipient of counseling services to be able to identify feelings. Most of her students are not verbal and lack the self-awareness necessary to benefit from those kinds of services. Her function is to address the student's behavior, not their feelings. She also did not believe that her services constituted educational or vocational counseling. If "guidance" is the act of facilitating a person to come to a conclusion, then she again stated that she did not engage in that kind of activity.

When asked whether she engaged in activities involving "placement services," Tofte responded that, as a member of an IEP team, she was involved in discussions about the proper placement of the student on the spectrum of Special Education services. For example, she might have a conversation with other IEP members over whether a particular student should be in the Intensive Instruction program or whether the student should receive a non-public school placement. During the prior school year, she had been involved in two or three of these types of decisions. Her involvement in these decisions is always that of a team member—the ultimate decision is based on the team's consensus.

Tofte works closely with one paraprofessional and is responsible for directing the work of that paraprofessional. She provides feedback to the paraprofessional directly and gives input for the paraprofessional's evaluation. Tofte acknowledged that the level of supervision she exerts over the paraprofessional assigned to work with her is similar to the level of

supervision that teachers exercise over the paraprofessionals assigned to their classrooms. One distinction between the manner in which she works with the paraprofessional assigned to work with her is that she is rarely in the same classroom as the paraprofessional on any given day. The paraprofessional she works with performs many of the same functions Tofte performs while Tofte is in the classroom: conducting observations, collecting data, modeling behavior for other paras, and attending IEPs. Tofte has no authority to hire, fire, discipline or promote the paraprofessional; however, she could recommend that the paraprofessional be transferred away from her current assignment.

Tofte's performance is evaluated by the Program Director. Tofte does not report to the school site principals, and neither teachers nor paraprofessionals provide any input into her evaluation. Tofte does, however, provide "instruction" to other employees in the sense that she tries to manage their behavior.

When asked whether she conducted "in-service" training, Tofte first defined in-service training as broad-scope, for-credit professional development training. In prior years, Tofte has provided this kind of training during the District's annual meeting at the beginning of the school year as well as at other times throughout the school year. She may provide up to 10 hours of this kind of training in a given school year. She did not provide any such training during the 2012-2013 school year, however. Rather, most of the training Tofte conducts consists of teaching specific behavior modification techniques to teachers and paraprofessionals relative to a particular student's IEP and behavior goals.

When asked to describe her day-to-day duties, Tofte stated that she spends approximately 30 percent of her time conducting classroom observation. This is the largest allotment of time spent in any one task. The next largest volume of her time is spent in her cubicle writing reports, compiling data, conducting parent interviews over the phone, emailing

teachers and psychologists and other office tasks. In total, the volume of time spent in her cubicle engaged in these various tasks is approximately 30 percent. The next highest volume of time allotment is spent in meetings, which Tofte estimated at 25 percent. Finally, she spends approximately 10 percent of her time training other staff.

Lisa Dillon

At the time of the hearing, Dillon was in her third year with the District. However, prior to her employment with the District, Dillon had performed behavior analysis services at two other school districts (one in California, one in New York) and for one non-public school for a total of 15 years' experience as a behaviorist. She has both a bachelor's degree and a master's degree in Psychology, a BCBA, and she has completed the District's BICM training. She works directly with two paraprofessionals, whose work she directs on a daily basis. Although she has no authority to discipline either of the paraprofessionals assigned to work with her, she did sit on the hiring panel that hired both of them. When asked to review a provision in the collective bargaining agreement for certificated employees, Dillon acknowledged that the level of supervision she exercises over the paraprofessionals assigned to work with her is comparable to the level of supervision that teachers exercise over paraprofessionals, as described in the certificated contract. Dillon has never held a teaching credential.

Dillon receives her assignments directly from the Program Director. The means by which Dillon receives her assignments is similar to that described by Tofte. First, a teacher identifies a student in need of a BSP and drafts a BSP for that student. If the BSP is not bringing about a change in the maladaptive behavior, the teacher may do one revision of the BSP before requesting the services of a BIS. The request is then granted or denied by the

Program Specialist, who decides whether Dillon is assigned to a particular case. At the time of the hearing, Dillon estimated her case load was between 30 and 50 BSPs.

Once Dillon is assigned a particular BSP, her first step is to talk to the teacher to gain a better understanding of the particular behavior that is impeding the student's access to their education. She usually arranges to meet with the teacher outside of the classroom to have this discussion, but she can also accomplish this through e-mail communications with the teacher. This may involve consulting with the teacher about the student's academic difficulties. However, the focus of these discussions is always the student's behavior, either related to the subject matter or the difficulty level of the subject being taught. She might suggest to the teacher that they modify a lesson that was too difficult, but would not suggest any particular content be used or omitted. She approaches these conversations as brainstorming sessions—she doesn't tell the teacher what to do.

By the time a plan gets to her, the teacher has already consulted with a school psychologist. So if the plan assigned to Dillon is associated with a new student, Dillon might also contact the school psychologist. She may also consult with other specialists who have been active in the student's IEP.

Once she has a better idea of the type of behavior the student is engaging in, she will observe the behavior in the classroom setting. During her classroom observation, she is looking for antecedents and consequences to the behavior as well as the frequency of the behavior. She is also trying to determine what the student is trying to get from the behavior and what kinds of replacement behaviors are feasible to implement in the classroom. Behaviors don't occur in isolation, so Dillon is looking for the system that supports the negative behavior. She takes notes during this process.

Once she has drafted a new BSP, Dillon schedules an IEP meeting to put the BSP in place. Once the new IEP with BSP has been approved by the parent, she can begin training the staff on how to implement the BSP. The initial training might consist of a meeting with just the student and one paraprofessional or the teacher and giving them the written BSP to review. If there are any concepts that the paraprofessional doesn't understand, she will explain them. She might have the paraprofessional work on implementing the basics of the plan for a week. Once the basic plan is understood, she can add additional elements to the plan. Implementation of the plan requires constant adjustment and retraining as the targeted behavior changes. Throughout this process, she provides constant feedback to the staff about what works and what does not work. She also models the plan for the staff in the classroom setting. This process shows the staff what to do to produce the desirable behavior. Dillon estimates that 80 percent of her job is spent developing and implementing BSPs, with implementation consuming the largest proportion of that 80 percent.

When it is evident that the BSP is not working, or in the event that a student exhibits a serious behavior, an FAA might be warranted and provide more information. The IEP team must first determine that an FAA is warranted, however. Dillon generates the FAA and brings it back to the IEP team to approve. Upon the team's approval of an FAA, it is implemented and Dillon begins to train the staff on the elements of the new behavior plan.

Occasionally, an IEP will call for a consultation with a BIS. When this is the case, the consultation is always between the BIS and the teacher rather than the student. Dillon schedules these consultations during the teacher's prep period or on Wednesday afternoons when classes end early. The frequency and duration of consultations is determined by the IEP team. Informally, Dillon also gets emails and phone calls from teachers who want to discuss a particular behavior or concern. These interactions occur periodically and are unscheduled.

Dillon also works directly with students. Usually, the contact Dillon has with students is limited to modeling behavior for the other staff. This is done in the classroom because she needs to observe the behavior in the environment where it occurs if she is going to come up with a plan to address it. There is one student in particular for whom Dillon models replacement behavior directly to the student. She estimated that she spends one or two hours a week with this student.

When asked whether she believes she provides "counseling" services to students, Dillon responded in the negative. In her mind, counseling is talking with someone who has a problem. She doesn't do that. She was unfamiliar with the phrase, "behavioral counseling."

Dillon provides a training session at the beginning of the school year on the topic of Behavior Support Plans. When asked whether this was an "in-service" training, Dillon stated that she did not consider it to be so, as it was informal, attendees didn't take notes, and she doesn't have a practice of keeping track of who attended or other documentation regarding what was taught. She estimates that less than one percent of her time is spent performing this kind of training. This kind of training was differentiated from the training that occurs in the classrooms on a near-daily basis when she is implementing a behavior plan.

Eric Plummer

At the time of the hearing, Plummer was in his eighth year as a BIS. Prior to being hired as the District's first BIS, Plummer was employed by the District as a School Psychologist. Plummer has a Pupil Personnel Services credential with a specialization in psychology that authorizes him to work as a school psychologist. Plummer has a master's degree in psychology with a specialty in behavior. Plummer does not have a BCBA.

While Plummer was employed as a school psychologist, there were no BISs working at the District under that title. When the services of a behaviorist were needed, those services

were provided by Dr. Roche, another District employee who was titled a "Behavior Specialist." When Plummer made the transition from being a school psychologist to being a BIS, it was at the urging of the then-Director of Special Education, and coincided with Dr. Roche's retirement. Because the District had designated the BIS position outside of the certificated bargaining unit of which Plummer had been a member as a School Psychologist, he was required to first resign his position as a School Psychologist and submit to a six month probationary period as a BIS. At the time, he was given the choice of continuing to participate in the State Teachers' Retirement System or changing his retirement benefits to the CalPERS program. Plummer enrolled in CalPERS. Also as a result of the job change, Plummer stopped paying union dues, which he had done as a School Psychologist.

As the only BIS who has also worked as a School Psychologist in the District, Plummer noted a number of similarities between the two jobs. For example, School Psychologists also assist in the development of BSPs and serve on IEP teams. Both positions are evaluated by the Director of Special Services. School Psychologists complete functional behavior analyses (FBAs) when the District is considering expelling or suspending a student for more than 10 days. FBAs are typically completed during an IEP meeting and therefore do not represent any additional work time for the School Psychologist who would likely be present at the IEP meeting in any case. BISs, on the other hand, complete FAAs, which are similar to FBAs but more extensive. Since Plummer has been at the District, he has not known of any FAAs that were completed by School Psychologists.

Plummer also noted differences between the two positions. The primary functions of a School Psychologist are student assessments and report writing. The assessments are in order to determine whether a particular student should be placed in the Special Education program. They may include intelligence testing, testing for visual processing, testing for auditory

processing, testing visual motor skills, testing social emotional measures, and testing to determine if any emotional social issues are interfering with learning. These assessments usually have legal timelines for completion, and so are given priority. Some School Psychologists have time left over after this for student counseling services or behavior support, but they generally don't have time to spend in the classroom. Even though Plummer has performed both jobs, he stated that the demands of the School Psychologist's job were such that even assuming he had the proper skills to perform the work of a BIS, he did not believe one could successfully perform both jobs simultaneously.

As a BIS, Plummer does not provide any counseling or talk therapy to his students. When prompted whether the work of a BIS could be considered "behavioral therapy," Plummer hesitantly agreed to the descriptor, but did not consider the services of a BIS to be a health service. Because the student population he works with lack perspective on how their behavior affects other people and how other people might see them, he does not engage in any talk therapy with these students. When asked whether he would describe his current work as "behavioral counseling," Plummer stated that he had never heard that phrase before. Initially, Plummer stated that he would not describe his work as the "school adjustment of pupils," because he doesn't really help students adjust to the school environment. He reluctantly agreed that one could use the phrase "school adjustment of pupils" to describe the work of a BIS, however. In his estimation, a psychological intervention is a therapeutic intervention through a form of therapy like cognitive behavioral therapy, straight-talk therapy or psychoanalysis. As a BIS, he does not engage in any of these activities.

Plummer's current case load is 26 students and a few "whole class" settings, spread across 17 different campuses throughout the District. When Plummer gets a new assignment, typically the student has already had a BSP drawn up by a teacher and/or a School

Psychologist. The first thing he does is visit the classroom for the purpose of conducting direct observations of the student when and where the behavior is occurring. While observing the student, he collects data about the behavior like frequency and time of occurrence. He also collects narrative data regarding what is occurring in the classroom at the time that the negative behavior manifests. He will identify antecedents and consequences of the behavior and identify other environmental issues like seating arrangements, ambient noise, student-to-student contact, the types of visual displays used in the classroom, and whether the teacher is facing the classroom or the whiteboard. He will then review the student's records and files and his or her current IEP. He interviews the classroom teacher and the primary staff members working with the student. Then he writes the plan. He described the writing process as "fairly straightforward," though acknowledged that it can vary in complexity from case to case.

When implementing the BSP, he will set up an appointment with the teacher at a time when there are no students in the classroom. He may invite other campus employees to the initial meeting. During the initial meeting, he will model the task and role play with the teacher, give feedback to the teacher with regard to both the performance of the task and the rationale for it, then assist the teacher in performing the task in the setting where it will be applied to the student.

There are some IEPs that call for "on-going support training." This could include observation and data collection, or it could include retraining the existing staff or training a new staff member. There are other teachers in the District who will simply contact Plummer to problem solve, either over the phone or by e-mail.

Plummer is tasked with the duty to train other BICMs in the District. Plummer testified that he received his BICM training during his graduate program for school psychology. The District's BICM training program consists of training employees in the difference between

positive and negative reinforcement, punishment, extinction, and some common behavior problems that arise in Special Education classrooms and how to address them. The training is not linked to any particular student and is intended to be broad-based.

Plummer stated that he does not supervise paraprofessionals, although there is one paraprofessional who is assigned to work with him. There are additional paraprofessionals in the classrooms and he may assign them tasks, much in the same way that teachers assign tasks to paraprofessionals. Ultimately, the site administrator is responsible for the supervision of paraprofessionals assigned to the school. He stated that he does not plan courses of study, but that he is assigned to approximately 6 students who use behavior monitoring materials that he creates. These are students who are capable of self-monitoring techniques. He does not participate in any extracurricular activities. He does not consider the work he does to be part of the student health program—he considers the student health program to mean nursing services.

When asked to estimate the amount of time he spends in each task, Plummer stated that he spends approximately 10 hours per week in on-going support; 2-4 hours per week in classroom training; 3-4 hours per week in IEP team meetings; 6-10 hours per year conducting and preparing for in-service training; one hour per month in JA meetings; and 10-12 hour per week on behavior plans. When it was pointed out to Plummer that his estimate accounted for only 27-31 hours per week, Plummer pointed out that the students are in the classroom for only 30 hours per week. Plummer estimates that the remainder of his workweek consists of reviewing emails, managing his schedule and list of tasks, traveling from school to school, returning phone calls, consulting with special services providers, and writing reports.

ISSUE

Whether the position of Behavior Intervention Specialist should be included in the certificated bargaining unit represented by FUDTA.

CONCLUSIONS OF LAW

I. PERB's Jurisdiction To Determine Unit Modification Petitions

The purpose of a unit modification petition is determined by the contents of the petition itself. (*Modesto City School District* (1991) PERB Decision No. 884 (*Modesto*).) This Petition was filed under PERB Regulation 32781(a)(1) to add unrepresented classifications or positions to the unit. Thus, in this case, the question before PERB is whether the BISs should be included in the certificated bargaining unit. And, when unit modification petitions are filed under EERA, as this one was, and the disputed position is newly created, as this one is, PERB must first determine whether the position is certificated or classified under the Education Code before it can determine a proper unit placement. (*Ibid.*) Thus, the Union's "Letter Motion for Summary Adjudication on PERB Authority" seeking to have PERB "confirm its authority to adjudicate the 'classified' or 'certificated' status" of the BISs, is based on an erroneous premise. PERB has authority to determine the proper unit placement of employees covered under the EERA, the question that was raised in the unit modification petition filed by the Union.

It is well-settled law that when enforcing the EERA, PERB must occasionally interpret sections of the California Education Code. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865, accord, *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.) When undertaking the necessary function of interpreting statutes, the intent of the Legislature should be examined in order to effectuate the purpose of the law.

(*Long Beach Community College District* (2003) PERB Decision No. 1564 (overruled in part on other grounds, *Long Beach Community College District* (2009) PERB Decision No. 2002), citing *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230. (*Moyer*).) Where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. (*Noroian v. Department of Administration, Public Employees' Retirement System* (1970) 11 Cal.App.3d 651, 654, hg. den.) However, in determining intent, it is important to examine the language of the statute and to give effect to each word. (*Moyer.*) It is also a fundamental rule of statutory construction that a statute must be construed in context, "keeping in mind the nature and obvious purpose of the statute where they appear." (*Id.*) "[t]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Id.*)

Unit determinations are among the most significant factors in industrial relations. (*Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 832.) PERB's own regulations reflect the importance of unit modification decisions granting broad authority to investigate and resolve unit modifications. PERB regulation 32786(a) states:

> Upon receipt of a petition for unit modification, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary in order to decide the questions raised by the petition and to ensure full compliance with the provisions of the law.

Indeed, a failure to conduct a satisfactory investigation could be deemed an abuse of the Hearing Officer's discretion. (*Jefferson School District* (1980) PERB Order No. Ad-82.) In a unit modification hearing, the importance of live testimony from incumbents in the disputed positions cannot be overstated. PERB has refused to accept parties' stipulations regarding

what the incumbents to a vacant position would do upon hire—instead, deferring a decision until the position was filled and testimony from someone actually performing the position could be taken. (*Mendocino Community College District* (1981) PERB Decision No. 144a.) In another circumstance, PERB has reversed a Board agent's finding that a community of interest exists among positions when the determination was based on findings made in prior decisions rather than upon testimony adduced at the hearing. (*Castaic Union School District* (2010) PERB Order No. Ad-384.) Nor should the Board agent accept parties' stipulated units without scrutiny, which may include conducting a representation hearing and eliciting evidence in support of the stipulated unit. (*Centinela Valley Union High School District* (1978) PERB Decision No. 62.)

At the close of the first day of hearing, the BISs had not been present and had not testified, and there were no facts in the record upon which PERB could base a finding of what job functions the BISs performed on a daily basis. Although the District had presented the declarations of the BISs in its earlier motion to dismiss, these declarations were stated in the negative—they stated what the BISs did not do, rather than what they did. The District's motion for summary judgment prior to the taking of testimony from the BISs for the purpose of eliciting testimony regarding their day-to-day job duties, was premature and any finding based on the dearth of evidence in the record at that time would have been akin to an abuse of discretion.

II. The Test for Whether the Behavior Intervention Specialist Should Be Included In The Certificated Bargaining Unit

When a school district creates a new position, it must assign the position to either the classified service or the certificated service. The EERA does not define "certificated" and "classified" employees. Rather, a definition of these phrases may be found in the Education Code. While PERB does not enforce the Education Code, as noted above, it is well settled that

PERB may interpret the Education Code in determining questions arising under the statutes that it enforces. (*City of Pinole* (2012) PERB Decision No. 2288-M.) The California Education Code defines a certificated position as "every type of service for which certification qualifications are established by or pursuant to sections 44000 to 44012, inclusive, section 44065, and Chapter 2 (commencing with section 44200) of this part." (See Ed. Code, § 44001.) A classified position is "[e]very position not defined by this code as a position requiring certification qualifications and not specifically exempted from the classified service according to the provisions of 45103 or 45256. . . ." (Ed. Code, § 45104.)

As noted above, the only positions which need not be designated part of the classified service are those positions requiring certification and those which are specifically exempted from the classified service. Thus, the default classification for school district employees is the classified service. As an examination of the few PERB decisions confronting this issue demonstrates, there must be strong evidence of a Legislative intent for the position to be certificated in order for PERB to order the position part of the certificated bargaining unit.

In *Gilroy Unified School District* (1979) PERB Decision No. 98 (*Gilroy*), the issue at hearing was whether "permit teachers" at a children's center should be included in the "regular certificated teachers unit." The district had been treating permit teachers as classified employees. In order to address the issue, the Hearing Officer had to first determine whether permit teachers were classified or certificated employees within the meaning of EERA section 3545(b). The Hearing Officer in that case focused on Education Code section 8360 et seq., governing the eligibility requirements for staff in child development programs. That section contains extensive discussion of what the positions require in terms of certification and who should provide that certification. Indeed, the language in this section is so explicit as to leave little doubt which positions in a child development program are certificated or classified, and

that the California Commission on Teacher Credentialing (CTC) shall establish the standards for the issuance of those certificates or permits. (See Ed. Code, §8370.) The Hearing Officer found that the permit teachers were "certificated as a matter of law and therefore may not be included in a negotiating unit with classified employees." In approving the Hearing Officer's analytical approach in that case, the Board stated that there was "ample support" of the Hearing Officer's findings in other sections of the Education Code, citing sections 44006, 44002 and 8360.

In *Modesto*, *supra*, PERB Decision No. 884, the district filed a petition to remove the "Auditoriums Manager" from the certificated unit. Again, the Board turned to the definitions of "certificated" and "classified" in the Education Code to begin its analysis. Unlike with the Board's analysis in *Gilroy*, *supra*, PERB Decision No. 98, in *Modesto*, the Board analyzed the Auditoriums Manager position under Education Code section 44065. After laying out the criteria under section 44065 for a certificated position, the Board proceeded to analyze the actual duties of the Auditoriums Manager against those criteria.

The Union argues that Education Code section 44065 addresses only which managerial and supervisory employees must hold credentials, and that non-managerial, non-supervisory credential issues are resolved in Chapter 2 of Title 2, Division 3, Part 25 of the Education Code. In *California Teachers Association v. Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, the issue was whether a particular employee was properly classified as a probationary employee or if she should be classified as a permanent certificated employee. Both parties acknowledged that a sixth grade math and science teaching position was a position requiring certification. In dispatching this non-issue, the Court stated,

> The phrase "position requiring certification qualifications" is defined in section 44001 to include "every type of service for which certification qualifications are established by or pursuant

> to Section 44000 to 44012, inclusive, Section 44065 and [the chapter on teacher credentialing, sections 44200 to 44374]."

The section of the Education Code identified by the Union as applicable to non-managerial, non-supervisory employees is none other than sections 44200 to 44374. Clearly, these sections apply to classroom teachers. BISs are not classroom teachers, and neither party argues that BISs are classroom teachers. As such, reliance on this particular provision of the Education Code, which applies explicitly to classroom teacher credentialing issues, is misplaced.

PERB has applied Education Code section 44065 to disputes involving non-managerial, non-supervisory positions to determine the proper unit placement of a public school employee. In *Stanislaus County Office of Education* (1993) PERB Decision No. 1022 (*Stanislaus*), the Board upheld a Hearing Officer's decision to grant a unit modification petition seeking to add the classification of "Outdoor Education Naturalist" to the certificated bargaining unit. Historically, the Stanislaus County Office of Education (COE) required all its naturalists to be credentialed employees. However, at some point, the COE realized that its best candidates did not have a teaching credential. In response to the dearth of certificated candidates, the COE created two classifications of naturalists—one with and one without certification. Naturalists that were hired without a teaching credential were assigned to the classified bargaining unit and naturalists that were hired with a teaching credential were assigned to the certificated bargaining unit. The COE even maintained two separate job descriptions—one for naturalists with a credential and one for naturalists without a credential. When a position came available, the COE could then list a position for either a certificated or classified naturalist based on differing levels of knowledge, ability, experience and qualifications, and offer different pay scales to correspond with those different qualifications.

After considering all the evidence of the actual job duties of both certificated and classified naturalists, the Hearing Officer found that at least half the duties of the naturalists

were "instructional services," under Education Code section 44065, subsections (1) and (3), and therefore, the position was one which required certification. These findings were based on the actual job duties of both positions. Thus, once again, the Board's finding rests on the actual job duties of the position, not the title, not the nominal classification given by the employer, and not on a community of interest analysis.

Comparing the Board's approach in *Gilroy*, *supra*, PERB Decision No. 98 on the one hand, with the Board's approach in *Modesto*, *supra*, PERB Decision No. 884 and *Stanislaus*, *supra*, PERB Decision No. 1022 on the other, it appears that there are two methods of determining whether a position should be deemed certificated under EERA: either the position is certificated as a matter of law based on the specific identification of the position and its duties by the Education Code; or the position is certificated as a matter of fact because the majority of the duties performed by the incumbent are certificated duties under section 44065. The analytical approach did not change based on whether the employee was provisionally deemed "supervisory" or "managerial."

A. The BISs are not certificated as a matter of law.

The Union argues that the Hughes Bill, under which the BIS position was created, mandates that BISs are certificated as a matter of law. The Hughes Bill addresses the use of positive behavioral interventions and supports in order to address maladaptive behaviors in school children with exceptional needs. (Ed. Code, § 56520 et seq.) Section 56525 of the Hughes Bill states:

> (a) A person recognized by the national Behavior Analyst Certification Board as a Board Certified Behavior Analyst may conduct behavior assessments and provide behavioral intervention services for individuals with exceptional needs.
>
> (b) This section does not require a district, special education local plan area, or county office to use a Board Certified Behavior

> Analyst to conduct behavior assessments and provide behavioral intervention services for individuals with exceptional needs.

The Union argues that Section 56525 designates a BCBA as "a form of licensure," that permits employment in an "educational position," which is a form of certification and, by extension, a BCBA is a "certificated person" under section 44006.

An "education position" is synonymous with a position requiring certification qualifications under section 44001 of the Education Code. (Ed. Code, § 44001.) The Education Code defines a "certificate" as "the document issued by a county board of education to license the holder to perform the service specified in the certificate." (Ed. Code, § 44004.) A BCBA is not issued by a county board of education, so it cannot be considered a "certificate." A "credential" is defined by the Education Code as "a credential, certificate, life document, life diploma, permit, certificate of clearance or waiver issued by the [Commission on Teacher Credentialing, or 'CTC']." (Ed. Code, § 44002.) A BCBA is not issued by the CTC, and so is not a "credential."

The term "certification document" is defined by the Education Code as including "only certificates [issued by county boards of education], credentials [which are issued by the CTC], and life diplomas [which are issued by the CTC]." If for no other reason than that the BACB is not one of the approved issuing agencies, BCBAs don't fit the definition of a certification under the Education Code.

To be certain, there are other forms of licensure that are required by the Education Code before an individual may be employed in certain certificated positions. For example, a school nurse must simultaneously hold a license issued by the Board of Nurse Examiners authorizing him or her to practice nursing and also a services credential with a specialization in health, issued by the CTC. (See Ed. Code, §§ 44267-44267.5 and 44877.) Likewise, doctors, dentists and dental hygienists all have additional licensure requirements beyond a services

credential issued by the CTC. (See Ed. Code, §§ 44267-44267.5, 44873, 44875, and 44876, respectively.) Nevertheless, what makes these other positions "certificated" as defined under the Education Code is the certificate issued by the CTC or County Board of Education—*not* a professional license issued by another entity. Thus, in order for a position to be certificated, it must require one of the forms of certification defined by the Education Code as such.

Section 56525 authorizes the holder of a BCBA to perform behavior assessments and behavior intervention services but does not mandate that these services are provided only by the holder of a BCBA. Even assuming a BCBA were deemed to be a certificate, Education Code, section 56525, subsection b, states that a BCBA is not necessary in order to perform behavior intervention services. In other words, a BCBA is authorized to perform behavior intervention services, but the provider of those services need not be a BCBA. Thus, regardless of whether a BCBA is a "certificate" under the Education Code, the Hughes Bill does not mandate that a certificate holder perform behavior intervention services. There is no basis for finding, as a matter of law, that BISs are certificated.

B. BISs at FUSD are not certificated as a matter of fact

As noted above, when faced with a classification determination involving a position that is not explicitly required by the Education Code to hold certification, PERB will apply the criteria in section 44065 to determine whether the duties of the position require certification. (*Modesto*, *supra*, PERB Decision No. 884.)

Education Code section 44065 provides that any school district employee who works in a position in which 50 percent or more of their job duties consists of directing, coordinating, supervising or administering any or all of the following functions shall hold a valid teaching or service credential:

> (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.

In its closing brief, the Union argues that the Board should apply " a plain language reading of the statute," rather than "highly technical interpretations" in accordance with the rules of statutory interpretation. Where the language of a statue is clear, there is no need to seek out and apply the "highly technical interpretations" that the Union is concerned about. (*Noroian v. Department of Administration, Public Employees' Retirement System, supra*, 11

Cal.App.3d 651.) The statute should be read in context in order to ascertain the legislative intent of the act. Some of the categories of duties are defined under the California Education Code, and some are not. (*Moyer*, *supra*, 10 Cal.3d 222.) Where the Education Code has defined a particular phrase or term, that definition is applied in the analysis below. Where there is no clear definition of a phrase or term, and the meaning of phrase or term is ambiguous, the rules of statutory construction shall be applied to best ascertain legislative intent.

Each of the thirteen categories of job duties for certificated personnel under Education Code section 44065 are discussed below.

(1) Instructors and the Instructional Program

Neither party offered a definition of the "instructional program" for purposes of defining whether BISs direct, coordinate, supervise or administer any of the work of instructors or the instructional program. In *Modesto*, *supra*, PERB Decision No. 884, the Board agent who analyzed whether the disputed position was certificated or classified defined the relevant "instructional program" as the "drama and music programs" at the high school. Although not made explicit, the definition applied in that case was a broad-based definition that included all courses in the subject areas of music and drama. Adopting the plain language reading of "instructional program," it is clear that BISs do not direct, coordinate, supervise or administer the Special Education instructors or the Special Education instructional program. Although BISs consult with teachers to determine the most effective means of implementing a behavior plan, they have no authority to direct instructors to engage in particular conduct or refrain from particular conduct. Nor do they have authority to determine what instructional materials will be used to achieve educational goals.

It is also clear that simply assisting teachers in the instructional programs does not render an employee "certificated," as classified paraprofessional employees are expected to assist teachers in the instructional program as a primary function of their job. (Cal. Code Regs., tit. 5, § 12069-12070.) Based on the facts presented regarding the nature of the duties performed by BISs in the classroom, they cannot be deemed "certificated" based on the fact that they may assist teachers in the instructional program, even if they do so for a majority of their work time.

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

The Education Code defines "educational counseling" as "specialized services provided by a school counselor possessing a valid credential with a specialization in pupil personnel services who is assigned specific times to directly counsel pupils." (Ed. Code, § 49600.) Educational counseling includes helping students identify and achieve immediate and long-range educational plans as well as career and vocational counseling and personal and social counseling. (*Ibid.*)

As noted by the BISs, most of their students lack the cognitive skills and self-awareness that is necessary for direct counseling services to be of any real benefit. Even assuming the students with behavior plans could benefit from educational or vocational counseling, BISs do not provide this service.

(3) School extracurricular activities

The Education Code defines school extracurricular activities as, among other things, those activities that are "not a part of the regular school curriculum, [are] not graded, [do] not offer credit, and [do] not take place during classroom time." (Ed. Code, § 35160.5.) Indeed, "[a] program that has, as its primary goal, the improvement of academic or educational

achievements of pupils is not an extracurricular or cocurricular activity as defined by this section." (*Ibid.*)

The BISs all testified that the maladaptive behaviors which impede the learning process primarily occur in the classroom during classroom time. On this basis alone, the work of the BISs does not fall within the definition of "extracurricular activities." Although one BIS stated that s/he might, on occasion, accompany the class on an outing, this was not a regular occurrence and did not amount to a quantifiable volume of time spent in this task. None of the BISs' tasks involve directing, coordinating, supervising or administering extracurricular activities.

(4) Planning courses of study

A "course of study" is "the planned content of a series of classes, courses, subjects, studies, or related activities." (Ed. Code, § 51014.) Given the highly individualized nature of the instruction provided to Special Education students, it is clear that, even assuming the BIS had some role in the creation of an individualized instructional program for a particular student, that involvement would not meet the definition of planning a "course of study." None of the duties performed by the BISs appear to fall into this category.

(5) The selection, collection, preparation, classification or demonstration of instructional materials

"Instructional materials" are defined as "all materials that are designed for use by pupils and their teachers as a learning resource and help pupils to acquire facts, skills or opinions or to develop cognitive processes. Instructional materials may be printed or nonprinted, and may include textbooks, technology-based materials, other educational materials, and tests." (Ed. Code, § 60010(h).) None of the work described by the BISs appears to fit neatly into this category. Some of the BISs did report that they created visual aids or icons for use in behavior modification or self-monitoring by students. Even assuming these materials fall within the

definition of "instructional materials," the BISs spend a very small percentage of their time directing, coordinating, supervising or administering the selection, preparation and demonstration of these materials.

(6) Research of the Instructional Program

When BISs conduct research, it is undertaken with regard to a specific behavior plan to address a particular maladaptive behavior. Assuming that the phrase "Instructional Program" refers to an entire category of courses, it is clear that the BIS does not perform research connected with the evaluation and efficiency of the instructional program. Nor can it be said that they direct, coordinate, supervise or administer research connected with the evaluation and efficiency of the instructional program.

(7) The School Health Program

The phrase, "the school health program" is not defined by the Education Code. From context, it appears that the phrase refers to the act of safeguarding the health of school-aged children rather than to the instruction of health education to children. Indeed, the latter possible meaning of the phrase would appear redundant given the understanding of the phrase "instructional program," endorsed above. Assuming "the school health program" is intended to refer to the role of the public schools in safeguarding the health of students, the question of whether BISs serve 50 percent or more of their time directing, coordinating, supervising or administering the school health program is a closer question.

Education Code section 49422 provides for the supervision of health and physical development of pupils. This section states, among other things, that school district employees shall not administer psychological tests or engage in other psychological activities involving the application of psychological principles, methods, or procedures unless they hold a

credential or are a school psychology intern working under the direct supervision of a credentialed employee. (Ed. Code, § 49422(e)(1).) Section 49422(e) also states:

> (2) The application of these principles and methods includes, but is not limited to, procedures on interviewing, psychoeducational assessment, diagnosis of specific learning and behavioral disabilities, and amelioration of learning and behavioral problems of individuals or groups. [Emphasis added.]
>
> (3) The person conducting a test or other assessment shall be qualified in accordance with the requirements established by the producer of the assessment instrument and shall follow all ethical requirements for the use of the test or assessment as prescribed by the appropriate professional organization.

Thus, to the extent that the amelioration of behavioral problems constitutes the supervision of health and physical development of pupils, it would appear that the work of the BISs is part of the school health program. Given the role the BISs play in developing and implementing behavior plans, their role in the school health program could fall within the meaning of the phrases, "directing, coordinating, supervising or administering" one aspect of the school health program. BISs work autonomously to develop and implement a behavior plan for a particular student; they review the prior work of other certificated personnel in doing so; and they coordinate with the other certificated staff and supervise the implementation of the behavior plan once developed. BISs do not decide which students may be in need of behavior modification plans, and do not have the authority to order that a particular behavior plan be adopted.

This does not resolve the issue, however, of whether the authority BISs have over the development and implementation of a particular behavior plan is the equivalent to directing, coordinating, supervising or administering the "school health program." If an "educational program" is "the entire school-sponsored offering for pupils of a district," (see Ed. Code, § 51011), then the "school health program" would appear to be the entire school-sponsored

offerings of health services for pupils of a district. Presumably, this would involve more than just behavior modification services. Based on this definition, the amelioration of behavior problems in individuals or groups would appear to be one part of a larger system of health services offered by public school districts. It is by no means clear that the BISs' involvement in behavior plans constitutes directing, coordinating, supervising or administering the school health program.

The Board resolved a similar argument in *Modesto*, *supra*, PERB Decision No. 884. In *Modesto*, the teacher's association argued that duties of the Auditoriums Manager had both supervisory and instructional elements to it, and that the position should be included among the certificated staff as a result. The Board rejected the argument that a position must be considered certificated simply because it exercised some supervisory or instructional responsibility over students, noting that there were many classified positions that exercised the same kind of responsibility.

Overall, the record reflects that BISs perform a discrete but vital service to a targeted audience of Special Education students. BISs do not select or identify the students in need of their services, and their involvement in a particular case occurs only after a behavior plan from a certificated employee (either the pupil's teacher or the school psychologist) has already been implemented without achieving the desired result. BISs' interaction with the students is limited and occurs, if at all, during instructional time when the pupil is under the supervision of the classroom teacher.

In comparing the duties of the School Psychologist and the BIS, Plummer stated that while School Psychologists are capable of providing behavior intervention services, creating behavior plans and conducting FAAs is time-consuming and not easily accommodated with all the other duties assigned to the School Psychologist. Yet school districts must provide

behavior intervention services if they wish to continue receiving federal funds under the IDEA. Demand for behavior intervention services is not likely to decrease in the future, necessitating a clear understanding of the work these employees perform as well as their proper placement within the school district. (See Ed. Code, §§ 56846-56847, acknowledging that autism is the fastest growing Special Education eligibility category for public education in California and the nation.)

Certainly, the District could have simply hired more School Psychologists to absorb the greater work load created by the increased demand for behavior modification services. It did not do so, however, and instead removed this discrete task from the duties of the School Psychologist and assigned it to a new classification of employee. Even assuming it could be timely raised by the Union, the question of whether this conduct amounts to an unlawful transfer of bargaining unit work is not a concern that may be resolved by a unit modification petition. Clearly the work of BISs was once performed by certificated employees and is still capable of being performed by certificated employees. It does not follow, however, that the work may only be performed by certificated employees.

Finally, when the text of the Hughes Bill is examined, it appears that the Legislature did not intend that only certificated employees conduct behavior assessments and provide behavioral intervention services. As with the job duties of the Auditoriums Manager in *Modesto*, *supra*, PERB Decision No. 884, the fact that the BISs perform tasks that are also performed by certificated employees does not, in itself, determine the status of the BISs. Based on the facts presented here, it appears that the BISs' relationship to the school health program is that of a supporting role, rather than a core component of the school health program. Under the circumstances, it is not clear that the BISs fall within the meaning of Education Code section 44065(7).

(8) Compulsory Education, Child Welfare and School Adjustment of Pupils

The phrase, "school adjustment of pupils" is not defined in the Education Code. The Union has proposed several possible meanings for the phrase, including decisions regarding the appropriate school placement of students as well as assisting the pupil to adjust to the school environment in general. The phrase could refer to the decision of which school a student should attend or it could reference a student's emotional adjustment to a school to which they have been assigned. Lacking a clear definition, application of the rules of statutory construction is appropriate to determine the legislature's intended meaning of the phrase "school adjustment of pupils."

California Education Code, Title 2, Division 4, Part 27 governs the instruction and services for elementary and secondary pupils. Chapter three of Part 27 is titled, "Compulsory Continuing Education," and addresses such issues as the minimum attendance requirements of pupils and any exemptions from compulsory attendance. Chapter four of Part 27 is titled, "Attendance at Adjustment Schools." Chapter four discusses a variety of non-traditional public schools for the education of minor children. Section 48600 states, in relevant part:

> The purpose of this article is to provide for the operation of 24-hour elementary schools . . . for minors. . . and to provide for the attendance, maintenance, care, home supervision, guidance, observation, and education of minors attending the schools, and to provide the minors with that vocational, homemaking, mental, moral, physical, and other training which will tend to strengthen and develop them and enable them to become good and useful citizens. The staff of every 24-hour school shall make adjustment as rapidly as possible in order that the period of time the child is away from ordinary community life may be as brief as possible. . . .

Given the juxtaposition of these concepts—compulsory education, coordination of child welfare activities involving the school and the home, and the school adjustment of pupils—it is likely that the use of the phrase "school adjustment of pupils" in section 44065 is meant to

ensure that individuals providing pupil services at 24-hour elementary schools are certificated under the Education Code. There are no facts demonstrating that any of the BISs provide services to pupils attending 24-hour elementary schools.

(9) School Library Services

School library services are described in detail in Education Code sections 1770-1775. BISs do not perform any duties related to the purchase, care and distribution of supplementary books and other material adopted for the course of study between the school districts. Nor do they direct, coordinate, supervise or administer school library services.

(10) Preparation and Distribution of Instructional Materials

For the same reasons articulated in section (5) above, BISs spend, at most, a mere fraction of their time preparing and distributing "instructional materials."

(11) In-Service Training

The Professional Development and Program Improvement Act of 1968 created a system of "program improvement centers" to provide comprehensive in-service training programs to teachers of students grades 1 through 12. (See Ed. Code, §§ 44630-44643.) The California Code of Regulations defines "in-service training" as:

> the education and training of teachers and other school personnel who are employees of a local educational agency and require no additional training or education to meet state teachers certification qualifications. Exceptions are made for personnel who have intern status and who need additional course work and training to meet state certification requirements for the standard teaching credentials." (Cal. Code Regs., tit. 5, §13025(i).)

Notwithstanding this broad definition of "in-service training," in order to qualify for reimbursement of costs associated with in-service training under the Professional Development and Program Improvement Act of 1968, the training must be provided by certain qualified individuals and under certain conditions, all of which are established under the Education Code

sections 44630 through 44643 and California Code of Regulations sections 13025 through 13044. There are insufficient facts in the record to establish with any certainty whether the training provided by BISs at the beginning of the school year would qualify as in-service training under either the Education Code or the California Code of Regulations. Even assuming the BISs did provide in-service training once or twice per school year, the volume of time spent in this task was admittedly minimal.

Although not dispositive of the definition of "in-service training" under the California Education Code, it is noteworthy that the collective bargaining agreement between the District and the Union includes several references to "in-service training." The parties' collective bargaining agreement treats in-service training similarly to the manner in which in-service training is defined under the Education Code sections cited above, in that only training that is provided while certificated employees have been relieved of their regular duties is considered "in-service" training under the collective bargaining agreement. In other words, on-the-job training in the implementation of a particular behavior plan would not qualify as in-service training under the parties' collective bargaining agreement, but the training led by BISs at department-wide meetings could.

Under the circumstances, the Union's position that "in-service training" is intended to include all training, based on a dictionary definition of the phrase, is not logically supported either in the record or by the Education Code. Even assuming BISs performed some in-service training, it is clear that they do not direct, coordinate, supervise or administer the in-service training of teachers, principals, or other certificated personnel for more than 50 percent of their work time.

(12) Interpretation and Evaluation of Certificated Personnel

There are no facts demonstrating that any of the work performed by BISs includes the interpretation and evaluation of certificated personnel. Although all the BISs acknowledged that they interact with certificated personnel in order to provide direction and guidance with regard to implementation of behavior plans, they do not have any role in the evaluation of the work performance of these certificated persons.

(13) Examination/Selection/Assignment of Certificated Personnel

There are no facts demonstrating that the BISs direct, coordinate, supervise or administer the examination, selection, or assignment of teachers, principals, or other certificated personnel involved in the instructional program.

Finally, even when aggregated, the facts presented establish that less than 50 percent of the BISs' working time is spent directing, coordinating, supervising or administering all of the above-described functions. Accordingly, BISs are not certificated employees as a matter of fact.

C. This Decision Does Not Address Whether The BISs Are De Facto Certificated Employees

The Union argues that the District rendered the BISs de facto certificated employees by virtue of the requirements it established for the position. That is to say, the Union argues that because one of the two alternative "licenses and certificates" that must be held by the applicant in order to meet the minimum eligibility requirements for the position is a pupil personnel credential, the District has thereby made certification one of the requirements of the position. This argument is based on the Union's interpretation of section 44066 of the Education Code. Although the Board has not ruled on the issue of whether section 44066 of the Education Code is a factor to be determined in a unit placement issue, the Union's argument is acknowledged in a footnote in *Stanislaus*, *supra*, PERB Decision No. 1022.

Stanislaus, *supra*, PERB Decision No. 1022 contains the following dicta:

> Although the issue need not be decided in this case, it would appear that even if certificated naturalists were deemed not to require certification qualifications pursuant to Ed. Code section 44065, because the SCOE designated the position as certificated, persons in such positions would be deemed to be certificated pursuant to section 44066. Section 44066 provides, in pertinent part, that any person who had served in a position for which certification not necessitated by statute had been required and which was designated by the governing board as a position requiring certification qualifications shall be deemed to be an employee in a position requiring certification qualifications for as long as he or she holds such position. . . .

In its closing brief, the Union states, "Regardless of whether the law requires such certification, the District has required it, and for this reason alone, the BI Specialists are certificated under Education Code 44066." California Education Code section 44066 states, in its entirety:

> A governing board of any school district or a county board of education or a county superintendent of schools or other appointing authority shall not require an employee or applicant to possess any certification, license, or other credential unless the possession of such a certification, license, or other credential is required by statute or is based upon a bona fide occupational qualification.
>
> It is the intent of the Legislature that any person who had served in a position for which certification, license, or other credential not necessitated by statute or bona fide occupational qualification, had been required, and in a position which was designated by the governing board as a position requiring certification qualifications, shall be deemed to be an employee in a position requiring certification qualifications for as long as he or she holds such position and it is further the intent of the Legislature that such position shall be deemed to be a certificated position for as long as such person holds such position.

Similar language appears in connection with classified employees. The Education Code also states at section 45104:

> Every position not defined by this code as a position requiring certification qualifications and not specifically exempted from the

> classified service according to the provision of Section 45103 or 45256 shall be classified as required by those sections and shall be a part of the classified service. Such positions may not be designated as certificated nor shall the assignment of a title to any such a position remove the position from the classified service, nor shall possession of a certification document be made a requirement for employment in any such position.
>
> Nothing in this section shall be construed to prohibit the employment of any individual in a position described by this section as part of the classified service who is in possession of certification qualifications, nor shall the possession of certification qualifications be grounds for the elimination of an individual for consideration for employment in such a position.

One interpretation of these passages is that the Legislature sought to prevent employers from manipulating the qualifications of a new position in a manner that would defeat the Education Code's distinction between certificated positions and classified positions. Another interpretation is that the Legislature sought only to prevent employers from creating positions like "classified teacher" or "certificated bus driver" in direct contravention of existing job classifications already designated as either certificated or classified under the Education Code.

The District argues that if PERB finds that the BIS is a certificated position at the District, then it must terminate Dillon and Tofte because they do not have pupil personnel credentials. As the district argued in *Stanislaus*, *supra*, PERB Decision No. 1022, FUSD argues here that its most qualified applicants do not have a credential. Thus, if PERB were to grant the petition, it would have an immediate and lasting effect on the District's ability to hire and retain the most qualified applicants for the job.

Fortunately, it is not necessary to decide this issue here. To reiterate, PERB's authority is not to interpret the Education Code per se, but to determine whether a position is properly assigned to a certificated or classified bargaining unit. The proper unit placement of the position must be determined based on the duties performed by the incumbents in the position. PERB's function in this unit modification petition is not to determine if the District has

violated Education Code section 44066, but to determine if the BIS position may be included in the certificated bargaining unit based on the definition of certificated employees under Education Code section 44065.

Finally, it is important to note that this decision addresses only the Behavior Intervention Specialists at the Fremont Unified School District. It is not intended to pronounce judgment on similar positions at other school districts. This decision is based solely on the facts presented at hearing with regard to the position created by and for the Fremont Unified School District.

For all the reasons discussed in section II.A and II.B, above, the Petition is DENIED.

PROPOSED ORDER

Based upon the foregoing and the entire record in this case it is ordered that the unit modification petition filed by the Fremont Unified District Teachers Association is DENIED.