

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



OAKLAND UNIFIED SCHOOL DISTRICT,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1021,

Exclusive Representative,

Case Nos. SF-UM-758-E and  
SF-UM-759-E

PERB Decision No. 2509

December 29, 2016

OAKLAND UNIFIED SCHOOL DISTRICT,

Employer,

and

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES  
LOCAL 257

Exclusive Representative,

Case No. SF-UM-760-E

Appearances: Dannis Woliver Kelley by Marie A. Nakamura, Attorney, for Oakland Unified School District; Weinberg, Roger & Rosenfeld by Anne I. Yen, Attorney, for Service Employees International Union Local 1021; Beeson, Tayer & Bodine by Sarah Sandford-Smith, Attorney, for American Federation of State, County and Municipal Employees Local 257.

Before Winslow, Banks, and Gregersen, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Service Employees International Union Local 1021 (SEIU) to a proposed decision (PD) (attached) by a hearing officer in the Office of the General Counsel (OGC) regarding the above-referenced consolidated cases. When the Oakland

Unified School District (District) created two new classifications, SEIU and American Federation of State, County and Municipal Employees Local 257 (AFSCME) filed two competing unit modification petitions under the Educational Employment Relations Act (EERA).<sup>1</sup> SEIU sought to accrete the two newly-created positions—Instructional Support Specialist (ISS) and Paraeducator—into its White Collar/Paraprofessional unit. AFSCME sought to accrete these two positions into its Custodial/Aides unit.<sup>2</sup> After an administrative hearing, the hearing officer determined that the ISS position should be placed in the SEIU unit and the Paraeducator position should be placed in the AFSCME Custodial/Aides unit. AFSCME does not except to the hearing officer’s determination, but SEIU excepts to the placement of the Paraeducator position in the AFSCME unit, claiming that the Paraeducators belong in SEIU’s White Collar/Paraprofessional unit.

The Board itself has reviewed the record and considered SEIU’s exceptions to the PD and the responses thereto by the District and AFSCME. The record as a whole supports the hearing officer’s factual findings. The PD is well-reasoned and consistent with applicable law. Accordingly, the Board hereby affirms the hearing officer’s rulings, findings and conclusions and adopts the PD as the decision of the Board itself, subject to the following discussion of SEIU’s exceptions.

#### SUMMARY OF FACTS

In early 2015, as part of its strategic plan for special education, the District reexamined four non-certificated job classifications serving special education students. Those positions

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>2</sup> SEIU objects to the OGC’s finding that AFSCME’s petition adequately indicated the petitioned-for unit of inclusion to be its Custodians/Aides unit. That objection is addressed and rejected below.

were: Intervention Specialist (IS) and Instructional Assistant (IA), both of which had been represented by SEIU; and Aides for Special Education (ASE) and Custodial Health Aides, both of which had been represented by AFSCME. In April 2014, the District decided to eliminate those four positions and reclassify the affected employees as one of two newly created positions: ISS and Paraeducator.

SEIU's White Collar/Paraprofessional unit includes a variety of classifications such as clerks, secretaries, budget analysts, computer operators, and translators. It is not a *Sweetwater* unit.<sup>3</sup> The two classifications eliminated from the SEIU unit as a result of the District's reorganization, the IS and the IA, focused on assisting with classroom instruction and did not require physical care of students. The IS was required to have a combination of education and experience equivalent to a four-year degree. The IA was required to meet the "highly qualified" standard prescribed by the federal No Child Left Behind (NCLB) Act.<sup>4</sup> The former ISs were grandfathered into the ISS position.<sup>5</sup>

AFSCME's Custodial/Aides unit formerly included ASEs, all of whom the District reclassified into the newly created Paraeducator position. The former name of ASE was

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<sup>3</sup> PERB established three presumptively appropriate bargaining units for classified school employees in *Sweetwater Union High School District* (1976) EERB Decision No. 4 (*Sweetwater*). Those units are instructional aides; office-technical and business services; and operations-support. (Prior to January 1, 1978 PERB was known as the Educational Employment Relations Board (EERB).)

<sup>4</sup> NCLB (20 U.S.C., § 6301 et seq.) was the 2001 re-authorization of the Elementary and Secondary Education Act of 1965, which provides federal funds to the states, conditioned upon the states taking steps to increase student performance and narrow the achievement gap between racial and ethnic groups. NCLB required that teachers and paraeducators meet more stringent educational requirements such as two years of college education in the case of paraeducators. Meeting those requirements rendered the employees "highly qualified" within the meaning of the NCLB.

<sup>5</sup> The SEIU unit also includes 30 IAs-Special Education who declined to take the Paraeducator position.

“Aides to Handicapped Children.” The ASEs assisted special education students, but historically focused more on attending to the students’ physical needs such as toileting, washing, assisting with wheelchairs and keeping classrooms and school facilities clean. Like the SEIU-represented IAs, the ASEs were required to meet the highly qualified standard of the NCLB.

The job functions of the newly-created Paraeducator classification are very similar to those of the former ASE in that Paraeducators assist students in meeting their Individualized Education Program (IEP)<sup>6</sup> goals and attend to the physical needs of students. Like the ASEs, the Paraeducators assist students with washing, toileting, diapering, and assisting with meals, including feeding and cleaning.

All of the former ASEs (approximately 180 employees) were qualified to be Paraeducators at the beginning of the 2015-2016 school year and were classified as such. The former IAs were offered the Paraeducator position, and the approximately 30 employees who declined to become Paraeducators remained classified as IAs. Approximately 80 IAs became Paraeducators.

AFSCME’s Custodial/Aides unit currently includes custodians. The hearing officer determined that AFSCME’s Custodial/Aides unit also includes Licensed Vocational Nurses (LVN) and Aide Technician, 504 Itinerant, Health Services (504 Aide). The LVNs work under the supervision of a nurse or doctor to provide medical care and treatment to students, such as administering insulin, tubal feedings, toileting and catheterizations. The 504 Aide conducts health screenings and performs physical health care procedures including glucose monitoring,

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<sup>6</sup> An IEP is a written document describing, among other things, annual academic and functional goals for the student, how those goals will be met and how progress toward meeting the goals will be measured. (Individuals with Disabilities Education Act, 20 U.S.C., § 1400 et seq.; 24 Code of Federal Regulations, § 300.320.)

catheterizations and toileting, and maintaining immunization records. Like the SEIU White Collar/Paraprofessional unit, the AFSCME Custodial/Aides unit is not a *Sweetwater* unit.

### PROPOSED DECISION

The hearing officer concluded that where, as here, the existing unit is not a *Sweetwater* unit, the proper inquiry is whether the requested unit configuration is an appropriate unit—not whether it is more appropriate than the existing unit configuration. (*Long Beach Community College District* (1999) PERB Decision No. 1315 (*Long Beach CCD*).)

After reviewing the unit determination factors and the evidence, the hearing officer concluded that the community of interest factors support placement of the Paraeducator in the Custodial/Aides unit represented by AFSCME. In support of this conclusion, the hearing officer relied on the facts that: (1) most Paraeducators who testified are former ASEs who have a history of representation by AFSCME; (2) the intent of the job description was for Paraeducators to be primarily responsible for students' physical care needs; (3) most of the Paraeducators who testified attend primarily to the physical care needs of the students and are aligned in interest with the LVNs and 504 Aides in the AFSCME-represented unit; and (4) the Paraeducators perform some cleaning and sanitizing duties like Custodians.

The hearing officer rejected SEIU's request to split the Paraeducator classification by allowing current and former IAs to remain in the SEIU unit and the former ASEs to remain in the AFSCME unit. According to the hearing officer, the proposed split is unsupported by PERB precedent.

### Proof of Support

Due to an incomplete unit modification petition, there was insufficient information in the record to establish the exact size of the existing bargaining units and the exact numbers of

employees who would accrete to each unit. It was therefore impossible for the OGC to determine the applicability of PERB Regulation 32781, subdivision (e)(1),<sup>7</sup> which provides:

If the petition [for unit modification] requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.

Therefore, the hearing officer remanded this matter to another Board agent to determine whether proof of support is required and if so, to obtain and verify that proof of support pursuant to PERB Regulations.

#### SEIU'S EXCEPTIONS

SEIU excepts to the conclusion of the PD that the Paraeducator classification shall be placed in the Custodial/Aides unit represented by AFSCME, and the attendant findings that representational history and community of interest that the hearing officer relied on for her conclusion. Its exceptions are summarized as follows.

#### Deficiency of AFSCME's Petition

SEIU renews its argument that AFSCME's unit modification petition should be dismissed because it failed to accurately describe the bargaining unit to which the ISS and Paraeducators were to be placed. The petition described the unit as "Aides to Special Education Unit," a unit that SEIU asserts does not exist, rendering the petition fatally flawed.

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<sup>7</sup> PERB Regulations are codified at California Code of Regulations, title 8, sections 31001 et seq.

## Community of Interest

- SEIU asserts that the Paraeducator classification has a community of interest with the White Collar/Paraprofessional unit, but no community of interest with the Custodial/Aides unit, which SEIU asserts is currently comprised of custodians. SEIU claims that the primary function of the Paraeducator classification is instructional assistance, not physical care, noting that the Paraeducator job description defines the role as providing instructional assistance, and the first six essential functions of the position are duties related to instructional assistance. Therefore, according to SEIU, the Paraeducator position has a community of interest with other classifications in the White Collar/Paraprofessional unit that provide instructional assistance in the classroom, including IAs, Academic Mentors, and Transitional Kindergarten Reading Tutors, but not with the AFSCME Custodial/Aides unit.
- SEIU further excepts to the finding that the LVN classification and the 504 Aide classification, both created in 2014, are appropriately part of the Custodial/Aides unit. According to SEIU, the District has recognized AFSCME as the representative for these classifications, but these classifications have not been accreted to the Custodial/Aides unit, nor have the District and AFSCME defined the bargaining unit to which these classifications belong. Therefore, according to SEIU, the hearing officer erred in comparing the LVN and 504 Aide job duties with the Paraeducators if the former classifications were not necessarily in the Custodial/Aides unit.

- SEIU excepts to the finding that the AFSCME Custodial/Aides unit currently includes the ASE classification, because that classification was eliminated on May 13, 2015, and all former ASE incumbents who remained employed with the District were reclassified as Paraeducators. SEIU maintains that the Custodial/Aides unit therefore does not presently include classifications sharing the function of instructional assistance in the classroom. According to SEIU, the PD erroneously confused community of interest—a present analysis which examines present common interests—with past representational history, which is a different consideration. SEIU argues that the hearing officer misplaced community of interest with the Custodial/Aide unit by comparing the Paraeducator classification with the eliminated ASE classification.
- SEIU contends that since the ASE classification was eliminated, all of the classifications that the District brought into compliance with the NCLB Highly Qualified standard are in the White Collar/Paraprofessional unit, except the Paraeducator position. SEIU also notes that, apart from the eliminated ASE position, no other positions in the AFSCME Custodial/Aides unit are required to meet the NCLB Highly Qualified standard.

#### Representational History

- SEIU asserts that the Paraeducator classification has partial representational history with both the SEIU White Collar/Paraprofessional unit and with the AFSCME Custodial/Aides unit, since the District has decided to merge the IA and ASE classifications into the new Paraeducator position. SEIU claims that employees in the White Collar/Paraprofessional unit have been the staff customarily providing

instructional assistance service in general, as well as instructional assistance in relevant Special Education services in particular, and that such ongoing instructional assistance is bargaining unit work traditionally performed by the White Collar/Paraprofessional unit. According to SEIU, IAs and ISs (represented by SEIU) have customarily supported the “less restrictive environments” of Special Education that must be used whenever possible under the federal Individuals with Disabilities Education Act. (20 U.S.C., § 1400, et seq.)

- SEIU argues that it has always represented paraprofessional classifications, and the establishment of the Paraprofessional unit was in fact litigated, so according to SEIU, that history is relevant. In contrast, inclusion of the Aides for Handicapped Children in the Custodial/Aides unit was never litigated, according to SEIU, and therefore no deference is due the ASE representational history. To the extent ASE representational history was relevant, SEIU argues that the ASE’s emphasis was more upon the students’ physical and health needs, with instruction only “as-needed,” and that the ASEs had cleaning responsibilities which do not exist in the Paraeducator job description.

#### Splitting the Classification Between Units

SEIU excepts to the hearing officer’s conclusion that splitting the classification is not appropriate. SEIU argues that in this situation, the classification should be split, with the former ISs being placed in the White Collar/Paraprofessional unit, rather than taking the former IAs and their bargaining work away from the SEIU unit.

## RESPONSES OF AFSCME AND THE DISTRICT

Both AFSCME and the District urge that the hearing officer properly found community of interest factors support placement of the Paraeducator classification in the Custodial/Aides unit represented by AFSCME, and that representational history supports placement in the AFSCME unit. AFSCME also argues that the hearing officer was correct in not splitting the Paraeducator classification between the SEIU and AFSCME units, since PERB precedent evinces a clear disdain for splitting classifications when the employees in the classification are performing the same work under virtually similar working conditions, as is the case with the employees in the Paraeducator position.

### DISCUSSION

#### Sufficiency of AFSCME's petition

As a preliminary matter, we first address SEIU's argument that AFSCME's unit modification petition should be dismissed because it failed to accurately identify AFSCME's own bargaining unit and the number of employees in the unit under PERB Regulation 32781, subdivision (d)(3) and (4). SEIU notes that AFSCME's initial petition left blank a section calling for the description of the existing unit. SEIU also notes that AFSCME's amended petition dated October 22, 2015, erroneously described its unit as "Aides to Special Education Unit," and stated that there were 220 employees in that unit, despite the fact that the District has not recognized a separate Aides to Special Education unit.

SEIU raises a legitimate issue of the need for parties petitioning for a unit modification to provide proper notice to both PERB and other parties of the correct bargaining unit at issue, as well as the number of employees in the unit. This information is vital for a determination of proper unit placement of disputed classifications and for a determination of the need for a

proof of support, as we discuss, *infra*. However, in this case, we do not believe that the defects in AFSCME’s amended petition deprived either SEIU or the District of notice regarding the AFSCME bargaining unit to which the petition sought to accrete the Paraeducators.

Since 1977 AFSCME has represented two bargaining units in the District, the Custodial/Aides unit and the Food Service unit. The former unit included Aides to Handicapped Children and Custodians.<sup>8</sup> Beginning in 1999, the District and AFSCME negotiated collective bargaining agreements that covered both bargaining units, but no severance or unit modification petition was ever filed to separate the Aides to Handicapped Children from the Custodial/Aides unit. In 2005 the job title of Aide to Handicapped Children was changed to “Paraprofessional-Exceptional Children,” and the position remained in the Custodial/Aides unit. The job title changed again in 2008 to “Aides for Special Education—Programs for Exceptional Children (ASE).”

Despite the imprecise description of the unit on AFSCME’s amended petition, all parties knew that AFSCME sought to accrete the Paraeducators to its Custodial/Aides unit, not to its Food Service unit. The focus of parties’ witnesses and arguments before the hearing officer was whether the newly-created positions shared a community of interest with the AFSCME-represented Custodial/Aides unit or with the SEIU-represented White Collar/Paraprofessional unit. No one was confused about which bargaining unit AFSCME wanted the Paraeducators to be placed in or about which job classifications AFSCME was comparing the newly-created positions to.

Therefore, we do not believe the purposes of the Act would be served by dismissing the unit modification petition under the circumstances of this case. With the exception discussed

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<sup>8</sup> See PD at p. 3, quoting PERB Case No. SF-R-258-A.

below, the record established sufficient facts from which a determination concerning appropriate unit placement can be made, and the parties had ample opportunity to litigate the merits of the respective petitions. Given that a complete record was made on the merits of the unit determination issues, and that there was never a question that AFSCME and the District contended that the Paraeducators belonged in AFSCME's Custodial/Aides unit, as opposed to its Food Service unit, it would be a waste of PERB's and the parties' resources to dismiss AFSCME's petition for the technical defect in the unit description. Dismissal would only invite a re-filing of the petition and another hearing would presumably result in the same record we have before us now. This would cause an unwarranted delay in this representation matter. For all of these reasons, it does not make sense to dismiss AFSCME's petition. Moreover, AFSCME's failure to indicate the precise number of employees in the unit was adequately addressed by the hearing officer's remand order.

In light of a lack of demonstrated prejudice to SEIU or the District by AFSCME's inaccurate description of the unit (subject to our analysis below of which AFSCME bargaining unit the LVNs and 504 Aides belong to), we excuse those inaccuracies and consider the petition to be filed and at issue before us.

#### Appropriate Bargaining Unit

Because the existing unit in this case is not a *Sweetwater* unit, the proper inquiry is whether the requested unit configuration is an appropriate unit, not whether it is more appropriate than the existing configuration. (*Long Beach Community College District, supra*, PERB Decision No. 1315, PD at p. 10 (where existing unit is not a *Sweetwater* unit, the standard against which the proposed unit is judged is whether it is an appropriate unit).) Therefore, the hearing officer applied the factors identified in EERA section 3545, subdivision

(a) to determine the appropriate placement of the positions in question. Such an approach is also justified by *Trustees of the California State University* (2007) PERB Decision No. 1881-H, p. 10, which holds that the rebuttable presumption test is not properly used when placing a new classification into a unit because there is no presumption to rebut. (See also *Center Unified School District* (2014) PERB Decision No. 2379, pp. 2-3.) Thus, the hearing officer correctly applied the criteria set forth in EERA section 3545, subdivision (a) to determine the appropriate unit placement. Where there are two possible unit placements for disputed job classifications, the hearing officer correctly determined which unit the Paraeducators had the greater community of interest with. (See *San Diego Community College District* (2001) PERB Decision No. 1445, p. 10: “[c]onsidering the ‘totality of circumstances’ . . . the Board finds that the continuing education counselors share a greater community of interest with the college counselors than with the continuing education faculty, therefore inclusion in the same unit as the college counselors is appropriate.”)

Before addressing SEIU’s exceptions concerning community of interest factors under EERA section 3545, subdivision (a), we first address its exception concerning whether the hearing officer erred in finding that the LVNs and 504 Aides were part of the Custodial/Aides unit.

#### LVNs and 504 Aides

SEIU excepts to the finding that LVNs and 504 Aides are part of the Custodial/Aides unit.<sup>9</sup> It is not disputed that AFSCME represents only two units in the District, Custodial/Aides and Food Service, and SEIU admits that AFSCME represents the LVNs and 504 Aides, but asserts that “it is more accurate to say that the District has recognized AFSCME

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<sup>9</sup> The hearing officer determined that these positions created in 2014 were placed in the Custodial/Aides unit.

as the representative of the LVN and 504 Aide classifications, but the bargaining unit is undetermined.” (SEIU Exceptions, p. 4.) We deny this exception.

The record supports the hearing officer’s conclusion that these classifications were properly considered as being in the Custodial/Aides unit as opposed to the Food Service unit. The basic functions of the LVNs are to: (1) provide specialized physical healthcare services as required, (2) assess and administer student healthcare within the LVN Practice Act, (3) assist nursing personnel in managing the physical health conditions of students, and (4) maintain student health records. The basic functions of the 504 Aides are to: (1) work with school nurses to support students with 504 accommodations, (2) administer first aid, and (3) screen students (well and/or sick or injured) to promote health and well-being. The “504” designation refers to students with special health needs but who do not otherwise qualify for “special education.”

These facts support the hearing officer’s conclusion that the LVN and 504 Aides positions with these duties reasonably belong in AFSCME’s Custodial/Aides unit. No one suggests that these classifications are in AFSCME’s Food Service unit.

More importantly, the hearing officer’s conclusion that the Paraeducators had a closer representational history with the Custodial/Aides unit did not turn solely on the comparing Paraeducator duties with those of the LVNs and 504 Aides. As stated in the PD:

On balance, the established practices of the employer and representational history weigh in favor of placing the Paraeducator position in the Custodial/Aides unit. Seven of the nine Paraeducators who testified stated that they perform the same job in the current school year, as Paraeducators, as they did in the previous school year, as ASEs. . . . [T]he job description for the Paraeducator position is more aligned with the former ASE position, in that the primary focus of the position is on the physical care needs of the students. The former ASE position performed this physical care work.

[¶ . . . ¶]

Overall, the community of interest factors support placement of the Paraeducator in the Custodial/Aides unit represented by AFSCME. Most Paraeducators . . . are former ASEs who have a history of representation by AFSCME. The intent of the job description was for Paraeducators to be primarily responsible for students' physical care needs. Most of the Paraeducators who testified attend primarily to the physical care needs of the students and are aligned in interest with the LVNs and 504 Aides in the AFSCME-represented unit. The Paraeducators perform some cleaning and sanitizing duties like Custodians.

(PD at pp. 32-34.)

Even if the aligned interest with the LVNs and 504 Aides were removed from the hearing officer's analysis, the other community of interest factors and history of representation all support the hearing officer's conclusion that the Paraeducators are appropriately placed in the Custodial/Aides unit. We therefore reject SEIU's exception regarding the unit placement of LVNs and 504 Aides.

#### Community of Interest

EERA section 3545, subdivision (a) directs:

In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

In defining "community of interest," PERB has considered such factors as job functions, qualifications, training, skills, supervision, frequency of contact with other employees, integration of work functions of other employees, method of wage payment, hours of work, etc. (*Los Angeles Unified School District* (1998) PERB Decision No. 1267; *San Francisco Community College District* (1994) PERB Decision No. 1068; *Center Unified*

*School District, supra*, PERB Decision No. 2379.) Because different factors may be more important in different factual situations, PERB has eschewed a rigid application of these factors in any “check-list” fashion. Instead, it assesses the community of interest factors based on the totality of circumstances. (*Monterey Peninsula Community College* (1978) PERB Decision No. 76 (*Monterey*)).) Not all employee duties or concerns need be identical to establish a community of interest and not all factors will be equally significant, depending on the facts. As PERB concluded in *Monterey*, the point of comparing the community of interest factors is “to reveal the interests of employees and [to] ascertain whether they share substantial mutual interests in matters subject to meeting and negotiating.” (*Id.* at p. 13.)

Also relevant to a unit determination is the “established practices including, among other things, the extent to which such employees belong to the same employee organization. . . .” (EERA, § 3545, subd. (a).) Such “established practices” include negotiating history. (*Redondo Beach City School District* (1980) PERB Decision No. 114.)

SEIU is generally correct that the community of interest comparison should be on present, not past, classifications and duties. PERB applies such a general principal when determining the appropriateness of bargaining units involving long-established job classifications. (See *Hemet Unified School District* (1990) PERB Decision No. 820; *Lincoln Unified School District* (1997) PERB Decision No. 1194.)

However, under the facts of the present case, in which the District eliminated four classifications and created two new classifications—ISS and Paraeducator—the hearing officer correctly took into account the striking similarity between the actual duties of the former ASE position and the actual duties of the new Paraeducator position in the analysis of representational history. The term “representational history” encompasses the factor of EERA

section 3545, subdivision (a): “established practices including, among other things, the extent to which such employees belong to the same employee organization. . . .” This is an additional factor or set of factors that may be considered in addition to “community of interest between and among the employees . . .” (*Id.*), when determining the appropriateness of a proposed bargaining unit. By comparing the job duties of the former ASEs with the new Paraeducator duties, the hearing officer determined that the two classifications performed the same job functions. Because the ASE was in the Custodial/Aides unit, the relevant “representational history” of the ASE classification supports the conclusion that the Paraeducators, the successor class, belongs in the same unit that previously represented the ASEs.

The fact that Paraeducators inherited the ASEs’ duties involving student instruction, student physical care, and classroom custodial duties, and that AFSCME represented the ASEs, provides sufficient representational history that AFSCME will continue to adequately represent Paraeducators’ interest involving all three aspects of their job duties.<sup>10</sup> (See *Long Beach Community College District* (1989) PERB Decision No. 765, PD at pp. 12-13: “In the case at hand, the record establishes over ten years of labor relations history within the District. This evidence must therefore be taken into consideration and balanced along with traditional community of interest criteria in determining the appropriate unit.”)

For purposes of determining representational history under the specific facts of this case, the hearing officer correctly compared the Paraeducator classification with the eliminated ASE classification, and was justified in giving controlling weight to this representational history.

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<sup>10</sup> There was no contention that AFSCME did not adequately represent the ASEs.

SEIU contends the community of interest factors favor of placing the Paraeducators in the SEIU unit because the education and training requirements of the Paraeducators are more like those of the ISS classification. SEIU also notes that the Paraeducator job description does not include cleaning classrooms.<sup>11</sup>

As the hearing officer correctly noted, PERB will consider the actual job duties, not merely the job description. (*Regents of the University of California* (2015) PERB Decision No. 2422-H, adopting PD at p. 20; *State of California, Department of Personnel Administration* (1991) PERB Decision No. 871-S, p. 8.) The evidence supports the hearing officer's conclusion that what distinguished the job of the Paraeducators from the job of the ISS was the fact Paraeducators tended to the physical needs of students in addition to assisting with some instructional functions. ISS did not attend to the physical needs of the special education students that they assisted.

SEIU urges that we consider the representational history of the SEIU-represented IAs who transitioned to Paraeducators in support of its position that it should represent the Paraeducators. There is evidence that the former IAs had few to no duties involving caring for students' physical needs or traditional custodial duties. However, there is ample evidence that “[o]verall, the community of interest factors support placement of the Paraeducator in the

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<sup>11</sup> The Paraeducator job description reads:

This position is distinguished from other student support roles in that, in addition to providing instructional support to students with disabilities under the guidance of a certificated teacher, employees in these positions are primarily responsible for attendant physical duties to enable students with disabilities to have equal educational opportunities, assisting with basic health needs of students with disabilities, as trained, and assisting the classroom teacher in creating with setting up and maintaining engaging academic environments.

Custodial/Aides unit represented by AFSCME” for the reasons given by the hearing officer. (PD at p. 34.)

We also reject SEIU’s argument that we cannot take into consideration the job duties of ASEs or their predecessor Aides for Handicapped Children classification because inclusion of the Aides for Handicapped Children in the Custodial/Aides unit was never litigated. Regardless of whether Aides for Handicapped Children or ASEs were certified as part of the Custodial/Aides unit, SEIU points to no evidence contradicting the District’s historical recognition of the inclusion of the successive positions in the Custodial Aides unit, evidence indicating that SEIU ever objected to such inclusion, or evidence that such inclusion was not appropriate. The hearing officer therefore properly took into account the job duties of ASEs and all predecessor positions.

#### Splitting The Paraeducator Classification Between Bargaining Units

We reject SEIU’s request to split the Paraeducator position between the SEIU and AFSCME units. Besides the reasons given in the PD for refusing to split the classification, we agree with AFSCME’s argument that the Board has interpreted EERA to disfavor splitting a single classification across multiple units when the employees within the classification perform the same work under virtually identical conditions of employment. (See, e.g., *San Diego Unified School District* (1981) PERB Decision No. 170 at p. 4.) The Board has justified its approach in order to prevent the unacceptable burden on employers of managing employees doing the same work under different sets of personnel programs. (*Id.* at p. 6.) The Board has also noted that placing an employer in the position of negotiating over employees doing the same work with two different collective bargaining representatives presents the potential for “whipsawing” the employer by competing organizations or the filing of unfair practice charges

against an employer who seeks a single set of employee policies for both groups of employees. (*Ibid.*) The Board has further noted that excessive fragmentation of negotiating units could detrimentally affect an employer's operations. (*Ibid.*; *Sweetwater, supra*, EERB Decision No. 4 at p. 11.)

We agree with the hearing officer that the splitting of classifications in *Unit Determination for Technical Employees of the University of California* (1982) PERB Decision No. 241-H was justified by circumstances not present in this case and does not support SEIU's position that the Paraeducator classification should be split between the AFSCME and the SEIU units.

#### Proof of Support

The hearing officer noted that under PERB Regulation 32781, subdivision (e)(1), concerning petitions for unit modification:

If the petition [for unit modification] requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.

We agree with the hearing officer that insufficient information exists in the record to establish the exact size of the existing bargaining units and the exact numbers of employees who will be added to each unit. Therefore, the Board's order includes remanding this matter to another Board agent to make a determination regarding whether proof of support is required and, if so, to obtain and verify that proof of support pursuant to PERB Regulations.

ORDER

For the above reasons and based upon the entire record in this case:

1. The Instructional Support Specialist (ISS) position is appropriately included in the White Collar/ Paraprofessional bargaining unit represented by Service Employees International Union Local 1021 (SEIU);

2. The Paraeducator position is appropriately included in the Custodial/Aides bargaining unit represented by American Federation of State, County and Municipal Employees Local 257 (AFSCME); and

3. The matter will be remanded to the Office of the General Counsel to determine whether proof of support is required for either position and, if so, to obtain and verify the proof of support and, if appropriate, to issue a certification in accordance with this decision.

Members Banks and Gregersen joined in this Decision.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1021,

Exclusive Representative.

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OAKLAND UNIFIED SCHOOL DISTRICT,

Employer,

and

AFSCME LOCAL 257,

Exclusive Representative.

**(Consolidated)**

**Case No. SF-UM-758-E**

**Case No. SF-UM-759-E**

**Case No. SF-UM-760-E**

**PROPOSED DECISION**

**June 20, 2016**

Appearances: Marie A. Nakamura, Dannis Woliver Kelley, for Respondent Oakland Unified School District; Anne I. Yen, Weinberg, Roger & Rosenfeld, for Petitioner Service Employees International Union Local 1021; Sarah Sandford-Smith, Beeson, Tayer & Bodine, for Petitioner American Federation of State, County and Municipal Employees Local 257.

Before Laura Ziegler Davis, Hearing Officer.

PROCEDURAL HISTORY

These consolidated cases arise from a dispute over bargaining unit placement of employees of the Oakland Unified School District (District). On May 4, 2015, the Service Employees International Union, Local 1021 (SEIU) filed a petition for unit modification, case number SF-UM-758-E, requesting that the new position of Paraeducator be included in the bargaining unit represented by SEIU (the White Collar/Paraprofessional unit). Also on May 4, 2015, SEIU filed a second petition for unit modification, case number SF-UM-759-E,

requesting that the new position of Instructional Support Specialist (ISS) be included in the same SEIU bargaining unit. On June 1, 2015, the American Federation of State, County and Municipal Employees, Local 257 (AFSCME) filed a petition for unit modification, case number SF-UM-760-E, requesting that both new positions—Paraeducator and ISS—be included in the bargaining unit represented by AFSCME (the Custodians/Aides unit.)<sup>1</sup>

A settlement conference was conducted on August 13, 2015, but the matter was not resolved. The cases were consolidated for hearing, and a formal hearing was conducted on November 4, 5, 6 and 16, 2015. Post-hearing briefs were filed by all parties on February 9, 2016. The issue to be resolved by the hearing officer is whether the Paraeducator and ISS positions are properly included in the AFSCME unit or the SEIU unit.

#### FINDINGS OF FACT

##### **A. The SEIU Bargaining Unit<sup>2</sup>**

The District formally recognized the White Collar bargaining unit (or “C” unit) in March 1977.<sup>3</sup> The unit was represented by the Oakland School Employees Association (OSEA). (PERB Case No. SF-R-258-C.) It included security, clerical, secretarial, fiscal, data processing, and technical/professional classifications in certain job codes.

PERB certified a separate Paraprofessional bargaining unit (or “H” unit) on November 10, 1978, also with OSEA certified as the exclusive representative. (PERB Case No. SF-R-

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<sup>1</sup> As will be discussed below, there was some confusion at the time of filing regarding the correct identity of the AFSCME bargaining unit.

<sup>2</sup> Administrative notice has been taken of PERB’s archived representational files.

<sup>3</sup> The recognition date on the document in PERB’s official file is March 1977, but the exact date within March is illegible.

258-H.) This bargaining unit was comprised of regular school instructional assistants, community assistants and health assistants.

On September 6, 2005, PERB updated its records to reflect the merger of the White Collar and Paraprofessional units (Unit C/H). The exclusive representative for both units at that time was OSEA/SEIU Local 790. SEIU Local 1021 is presently the exclusive representative for the White Collar/Paraprofessional unit.<sup>4</sup> The unit includes a variety of classifications such as clerks, secretaries, budget analysts, computer operators, and translators. The unit also includes Instructional Assistants-Special Education (IA) and Intervention Specialists (IS).

**B. The AFSCME Bargaining Unit**

On November 3, 1977, in PERB Case Number SF-R-258-A, the District recognized AFSCME as the exclusive representative for a bargaining unit of “custodial” employees, described as follows:

. . . the representation unit comprised of Aides to Handicapped Children, Custodians through and including Supervising Custodians I, and specifically excluding Supervising Custodians II, II, IV and V; and further excluding confidential, management and supervisory employees . . .

In April 1977, the District also recognized AFSCME as the exclusive representative of a Food Service unit, which is separate from the Custodial/Aides unit. (PERB Case No. SF-R-258-B.)

In 1982, AFSCME filed a unit modification petition to place the position of Instructional Assistant-Special Education (Interpreter/Tutor for the Deaf) in the AFSCME-represented Custodial/Aides unit. In a settlement agreement facilitated by PERB, AFSCME

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<sup>4</sup> Under the current CBA, “OSEA/SEIU Local 1021” is recognized as the exclusive representative for the White Collar/Paraprofessional unit.

agreed that the position would instead go into the Paraprofessional unit, then represented by OSEA. A condition of the agreement was that the District will delete the duty of “. . . cleans and organizes classroom or learning facility . . .” from the job description.

Starting in approximately 1999, the District and AFSCME entered into collective bargaining agreements (CBAs) that covered both units—Custodial/Aides and Food Service. However, the units were never officially combined. The Aides to Handicapped Students employees remained in the Custodial/Aides unit. No severance or unit modification petition was ever filed with PERB to separate the Aides from the other employees in this unit.<sup>5</sup>

In approximately 2005, the job title of Aide to Handicapped Children was changed to Paraprofessional-Exceptional Children. This position remained in the AFSCME-represented Custodial/Aides unit. In approximately 2008, the job title was changed again, to Aides for Special Education—Programs for Exceptional Children (ASE). In the 2008-2011 CBA, a separate classification of Custodial Health Aide, Special Education was also identified.

In May 2014, the District created a new job description for Licensed Vocational Nurse (LVN). This position was placed in the Custodial/Aides unit represented by AFSCME. An LVN works under the supervision of a nurse or doctor to provide medical care and treatment to students, including tasks such as administering insulin, tubal feedings, toileting and catheterizations. Around the same time, the District created a new job description for an Aide Technician, 504 Itinerant, Health Services (504 Aide).<sup>6</sup> This position was also placed in the

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<sup>5</sup> The District’s former Director of Labor Management and Employee Relations, Troy Christmas, testified that he believed AFSCME represented a single unit, but PERB’s records confirm that this testimony is incorrect. AFSCME Business Agent Jo Bates testified that she thought there were three separate units, also incorrect as established by PERB records.

<sup>6</sup> A “504 plan” refers to a Federal anti-discrimination law that requires schools to appropriately accommodate disabled students. This differs from an IEP, which is an

AFSCME-represented Custodial/Aides unit. This position conducts health screenings, performs physical health care procedures including glucose monitoring, catheterization and toileting, and maintains immunization records.

In summary, according to PERB's records, AFSCME represents two bargaining units: the Food Service unit and the Custodial/Aides unit. The Custodial/Aides unit includes the position originally known as Aides to the Handicapped and most recently known as ASE. The bargaining unit also includes LVNs, the 504 Aide, and Custodians.

### **C. The District's Decision to Create Two New Positions**

In early 2015, as part of its strategic plan for special education, the District reexamined four job classifications serving special education students. Those positions were: (1) Intervention Specialist (IS), represented by SEIU; (2) Instructional Assistant (IA), represented by SEIU; (3) Aides for Special Education (ASE), represented by AFSCME; and (4) Custodial Health Aides, represented by AFSCME.

The AFSCME-represented positions of ASE and Custodial Health Aides historically focused more on the physical care needs of special education students. In particular, the work of these positions included assisting students with toileting and washing, restraining or controlling students, and assisting students in wheelchairs with transportation and mobility. The job description for ASE and its predecessor positions list these items as job functions. The Custodial Health Aides performed the same general work as the ASEs, except the Custodial Health Aides lacked certain educational qualifications under the No Child Left Behind (NCLB) legislation, and thus required a different job title.

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individualized plan to address a student's particular disability with respect to classroom learning.

The SEIU-represented IS and IA positions focused on classroom instruction and did not require physical care of students. The job description for the IS position includes supporting the instructional program by providing information and expertise in a specialized area. The job description for the IS position does not identify any responsibilities for physical care needs of students. The job description for the IA position includes assisting special education students with meeting their Individual Education Plan (IEP) objectives and adapting instructional materials for students. The job description for IA does not identify any specific responsibilities for physical care of students such as toileting or washing. The job functions for IAs do include pushing students in wheelchairs when needed, performing first aid and “assisting with medical or health-related problems as needed.”

The educational requirements for these positions differed. An ASE was required to meet the “highly qualified” requirement of the NCLB—either an Associate of Arts (AA) degree, 48 or more college units, or a passing score on a qualifying examination. Custodial Health Aides were not subject to this educational requirement. An IA was required to meet the same “highly qualified” NCLB educational standard as the ASE, with an AA degree or equivalent. An IS was required to have a combination of education and experience equivalent to a four-year degree.

The head of the District’s Special Education program, Sheilagh Andujar, testified about the history and development of these job titles. The AFSCME-represented positions were originally intended to work in special day classes (i.e., separate classrooms from mainstream general students) with students who had moderate to severe disabilities. They provided students with physical care and support and attended to their health care needs. While they were also responsible for assisting with instruction, the primary duty of the position was to

provide physical care. The SEIU-represented positions were initially created to support students in general education classes.<sup>7</sup> These positions focused on instruction.

On April 22, 2015, the District approved two new job descriptions for ISS and for Paraeducator. The District planned for these two new classifications to replace the four positions of IA, IS, ASE and Custodial Health Aide.

The job description for ISS provides that an ISS, under the guidance of a teacher, provides instruction and behavior intervention to students with disabilities, and supports students in meeting their IEP goals. The job description states: “although providing physical and health support services to students with disabilities may be directed on an as needed and case by case basis, it is not anticipated to be a daily task.” Listed job functions include: may assist with transportation of students, wheelchairs, and medical equipment as needed; and may assist students with washing, toileting, diapering and dressing as needed. An ISS must have a bachelor’s degree in Education, Psychology, Sociology, Social Work, or related behavioral science.

The job description for Paraeducator states that Paraeducators assist students in meeting their IEP goals and attend to the physical needs of students. The job description states: “this position is distinguished from other student support roles in that, in addition to providing instructional support to students with disabilities . . . employees in these positions are primarily responsible for attendant physical duties . . . assisting with basic health needs of students with disabilities, as trained, and assisting the classroom teacher in creating with setting up and

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<sup>7</sup> A General Education class is a regular mainstream class serving all students. A Special Day class is a classroom focused on special education students. Students with cognitive, emotional, or behavioral disabilities may spend all or part of their day in a Special Day class. The District tries to include special education students in General Education classes to the extent possible. A student whose disability is purely physical—for example, being in a wheelchair—would typically be in General Education classes.

maintaining engaging academic environments.” Job functions include: assisting students with washing, toileting, diapering, and dressing; assisting with meals, including feeding and cleaning; carrying out positive reinforcement techniques to control student behavior; and helping keep classrooms and school facilities clean. A Paraeducator must meet the “highly qualified” NCLB standard with an AA degree or equivalent. The Paraeducator job description includes subcategories for Deaf and Hard of Hearing Paraeducator and Visual Impairment Paraeducator.

The District believed that the ISS position should be placed in the SEIU unit, which SEIU agrees with. However, AFSCME contends that the ISS position should be in the AFSCME unit.

The District believed that the Paraeducator position should be placed in the ASFCME-represented unit. In May 2015, the District and AFSCME negotiated and agreed upon a salary schedule for the Paraeducators. However, SEIU contends that the Paraeducator position should be in the SEIU unit.

For the 2015-2016 school year, the District offered employees of the four former positions— IA, IS, ASE and Custodial Health Aide—the opportunity to take either a Paraeducator or ISS position, depending upon the employee’s qualifications. All of the ASEs (approximately 180) were qualified to be Paraeducators, and those ASEs who returned for the 2015-2016 year were classified as Paraeducators. The ISs were “grandfathered in” and offered the ISS position, even if they did not meet the educational requirement. The IAs were offered the Paraeducator position. Approximately 30 of the IAs declined to take the Paraeducator position and they remain classified as IAs. The remainder of the IAs—

approximately 80—moved into the Paraeducator position.<sup>8</sup> There are only two Custodial Health Aides currently employed by the District, and it is uncertain whether the District will eliminate that position.

#### **D. Testimony of Instructional Support Specialist (ISS) Employees**

##### **Teresa Hunt**

Hunt has worked for the District for approximately ten years as an IS. For the 2014-2015 school year she was an IS. In August 2015, she received a letter from the District offering her the position of ISS. Hunt applied to be an ISS and was accepted; she worked as an ISS for the 2015-2016 school year.

Hunt works at Montero Middle School. She works a six-hour day for ten months of the year. Her hours as an ISS this year are the same as they were last year when she was an IS. She is paid on the same salary schedule as last year, except this year she is a range 32 whereas last year she was a range 30. The Principal is her supervisor. She generally interacts with other school employees including teachers, office staff, and security officers.

Hunt works with high-functioning autistic and Asperger's syndrome students. She shadows students in their General Education classes and also assists students in Special Day Classes for part of the day. She assists up to five students at a time, and up to 15 students during the school day. She helps students understand lessons from the teacher, and modifies their materials according to need. For example, she might increase the font size on a student's worksheet; reduce the number of written problems the student is assigned; read a question out loud to a student; have the student dictate his/her answer to a question; and assist the student with organizing a project such as writing a paper. She also intervenes when a student displays

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<sup>8</sup> IAs generally did not qualify for the ISS position because they did not meet the higher educational requirements

inappropriate behavior such as an emotional outburst. She will take the student aside and utilize behavior modification techniques to assist the student in calming down and controlling his/her behavior. She will also escort students to and from the bus at the start and end of the day. Her job duties as an ISS this year are the same as they were last year when she was an IS.

Hunt has a bachelor's degree from San Francisco State University in liberal studies, with an emphasis in behavioral and social studies. She has received trainings from the District, and from a former employer, regarding behavioral modification and crisis intervention techniques. None of the students she works with have physical disabilities, such as being in a wheelchair. She has never been asked to attend to a student's physical needs. She testified that Aides to the Handicapped, now known as Paraeducators, work with the severely handicapped students and assist them with their physical needs, such as feeding them and pushing their wheelchairs.

### **Antonio Calvin Brooks**

Brooks has worked for the District off and on since 1993. Six years ago he returned to work at the District after working with a non-profit organization. For the 2015-2016 school year, Brooks is an ISS. In previous years he was an IS. His job title was changed following a meeting several months prior to his hearing testimony in November 2015.

Brooks works at Martin Luther King Elementary School. His work day is six and a half hours and he works ten months a year. The Principal of the school is his supervisor, although the teacher he supports in the classroom also acts as a supervisor in some ways. He generally interacts with all other members of the school community, including teachers, office staff, and custodians.

Brooks is in a Counseling Enriched Program classroom of ten students, in the third and fourth grades. He works closely, as a team, with the teacher he supports. The students in this program have serious behavior, social, and/or emotional problems. Many of the students come from troubled home environments where they have experienced abuse; some students had drug-addicted mothers and so were born dependent on drugs; and other students reside in group homes. The goal of the program is to get these students to the point where they can be placed in a mainstream, general education classroom. Throughout the day, Brooks helps these students stay focused on their school work, intervenes when a student acts out, and works with the students to anticipate and resolve conflicts. He gets to know each student individually, and serves as a positive male role model for the students. He assists the students with their academic work to allow the teacher to focus on smaller groups within the classroom. He will, for example, read a problem to a student and assist students who are working at different levels of ability in math. He also escorts students to and from the bus. His work for the 2015-2016 school year is the same as it was the previous year.

Brooks has a bachelor's degree from California State University, Hayward, in Physical Education and Kinesiology. None of his students have physical needs, such as being in a wheelchair or needing toileting assistance. He has never had a student with these types of physical needs and he has never had the job duty of having to assist a student with physical needs. There are other students at the school who have physical disabilities, including needing help toileting, and they receive assistance from Aides to the Handicapped. If a student were to throw up, he would call the custodian to clean it up. If a student were to bleed, he would help clean the student up. He has had training in behavior management and in how to safely restrain students. In the past he has had to frequently restrain students whose behavior became

unmanageable. For the past two years, however, he has been able to avoid needing to restrain students.

**Sally Bonini**

Bonini is presently (for the 2015-2016 school year) a Reading Tutor for the Transitional Kindergarten (TK) program at Thornhill Elementary. She is an Instructional Support Specialist (ISS) in the SEIU bargaining unit. She works three hours per day as an ISS and also three hours per day as a noon duty aide.

She has worked for the District for 27 years, and up until the 2015-2016 school year, was an Aide to the Handicapped. She worked with severely handicapped students at Thornhill and then, starting in approximately 2007, worked in a special classroom program for students with autism. In caring for the severely handicapped students, she had numerous duties taking care of their physical needs, including assisting with tubal feedings, helping them in and out of their wheelchairs and changing diapers. She assisted the students with whatever education tasks were on their IEPs, such as helping them develop their motor skills by moving blocks and having them trace letters on sandpaper. The students in the autism program were all mobile but they were severely disabled. Many had one-on-one aides<sup>9</sup> to assist them; many had extreme behaviors and were violent. Bonini's job was to keep the students focused on their educational objectives, to intervene if a student became violent, and to teach them social skills so they could interact with others and function in a community. She also had custodial duties, including cleaning the classroom.

Prior to the start of the 2015-2016 school year, she learned that the District intended to transfer the classroom for autistic students to a different school site. Bonini's position was also

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<sup>9</sup> Bonini testified that the one-on-one Aides were outside contractors hired by the District, and she believed their title was Intervention Specialist.

renamed as a Paraeducator. For a variety of personal reasons, primarily because she wished to continue working at Thornhill Elementary, Bonini decided to transition out of special education and accepted her current position as an ISS, TK reading tutor. As an ISS, Bonini assists the TK students with learning to read. She re-reads stories the teacher has read in class, and helps the students expand their vocabularies. She helps students practice writing their names. She escorts students to and from recess and to and from the bathroom, and helps them prepare their snacks and lunches. She has a high school diploma and received additional training from the Alameda County Office of Education to meet higher standards set by the No Child Left Behind legislation.

### **Demarco Mixon**

Mixon is presently (for the 2015-2016 school year) an ISS. He was hired into this position in June 2015.<sup>10</sup> He works in the Community Immersion Program based at Alameda College, a community college. This program works with developmentally disabled students who are transitioning from high school into college-level classes. A District teacher acts as a coordinator for the program, and the students attend classes at Alameda College and at Laney College. Mixon supports the teacher and the students. He assists the students in figuring out how to navigate the community and function independently. For example, he helps them figure out how to take a bus from home to their college class and back. He sits in on their classes and explains their assignments to them, for example, by helping a student write an essay. He helps students plan trips, such as to the museum or to a shopping mall. His work hours are 8 a.m. to 2 p.m.

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<sup>10</sup> Initially the position was titled as an IS, but then the District changed the name of the classification to ISS, shortly after Mixon was hired.

Mixon has three Associate's degrees, plus additional college credits. He has taken and passed the CBEST<sup>11</sup> exam to become a credentialed teacher, and is in the process of taking the CSET<sup>12</sup> exam. He accepted the ISS position because he views it as a pathway to becoming a teacher, which is his career goal.

Prior to his current position, Mixon worked for five years as an Aide to the Handicapped. He was assigned to a class for moderate to severely disabled students at Korematsu Elementary School. The students were in Kindergarten through Second grade. He assisted these students with academic work, for example, he worked with a non-verbal student and got her to learn to say the letter "A." He would show students how to count using their fingers or manipulatives.<sup>13</sup> He also assisted the students with their physical needs. For example, he gave students tubal feedings (through a tube in the stomach), monitored another student's epileptic seizures, and assisted students with toileting and diapering. He also cleaned the classroom.

#### **E. Testimony of Paraeducator Employees**

The current Paraeducators generally testified that their duties for the 2015-2016 school year (the current year) are the same as their duties the previous year, 2014-2015. The only thing that changed was the job title, and that the student population changes every year so they are assigned different students this year than last.<sup>14</sup>

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<sup>11</sup> California Basic Education Skills Test

<sup>12</sup> California Subject Exams for Teachers

<sup>13</sup> Manipulatives are small objects such as beads or coins that can be used for counting and teaching math concepts.

<sup>14</sup> The exception is Mysti Knight, who changed job locations.

## **Ofelia Jimenez**

Jimenez is a Paraeducator at Howard Elementary school, in a Special Day Classroom. She works with students with autism in grades Kindergarten through Second grade. She has worked for the district for 41 years. Her previous title was Paraprofessional, and before that, Aide to the Handicapped. Last school year (2014-2015) she worked in the same K-2 autism classroom.

Jimenez has previously worked in a number of assignments for the District. She began her career working with severely handicapped students, such as students with mobility problems and students with seizures. She has also worked with adult students who were transitioning from school into the community. She assisted these students with learning daily activities such as preparing food, doing laundry, and cleaning. Many of her students have needed help toileting, changing and dressing. Many have also needed help with eating. Custodial duties such as keeping the classroom clean and sanitized have always been part of her job, this is to protect the health of the students. For many years she had one dedicated hour of custodial work per day, to clean and prepare the classroom for the next day.<sup>15</sup>

Jimenez began working with the autistic students in approximately 2001. She initially worked at Tilden school and then transferred to Howard Elementary. She has received training from the District on working with autistic students and how to modify educational materials for autistic students. This year she works with two other Paraeducators and a substitute teacher (the school has been unable to retain a permanent teacher for this class this year). She assists students in small groups to meet their IEP goals, and modifies curriculum and materials to help

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<sup>15</sup> Several witnesses testified that this hour devoted to custodial work was eliminated at some point in the past decade, however the ASEs were expected to continue to perform custodial work as part of their regular duties.

them. For example, she uses objects and picture cards to teach students the names of things, such as “apple” and “banana.” She creates matching and memory games for the students using fabric and Velcro. She prepares cards and manipulatives to use for counting. She also helps the students adhere to a predictable schedule, which helps autistic students to feel more comfortable in the classroom.

Many of the students wear diapers. During the school year she works on habit training the students to use the bathroom. She also intervenes if a child is acting out, or becomes violent, by shielding the student with a blanket and removing other children from the area. She helps some of the students with eating and drinking, including one student who needs his food to be pureed. She also cleans and sanitizes the classroom. Aside from having different students this year, her job duties this year are the same as they were last year.

Her supervisor is the school principal. Her hours this year are the same as they were last year: 8:30 a.m. to 3:00 p.m. Last year she worked with an IS. He agreed to assist her with changing students when they wet their clothes, even though these duties were not part of his job. She previously worked with a different IS who would not help with changing; his job was to work more closely with the teacher.

### **Susan Jung**

Jung is a Paraeducator and has worked for the District for 33 years. She has an AA degree. She works at Fruitvale Elementary School in a Special Day Class for students in Kindergarten and First Grade. Last year, she had the same assignment. This year there are 14 students in the class; last year there were 12. In past years, she has also worked with Fourth and Fifth grade students in a different Special Day Class at Fruitvale.

The students in the class are non-severely handicapped; they have developmental disabilities and moderate forms of autism. The students are walking and talking. They do not generally need help with eating. However, she does need to assist several children with toileting and changing their diapers. Last year, she also assisted a student who was in General Education classes, but had a catheter. When the student needed help with her catheter, she would come to see Jung and Jung would assist her. Her job duties have been essentially the same year to year.

Jung works from 8:00 a.m. to 3:00 p.m. She escorts the students from the bus in the morning. She generally assists the students in the classroom in whatever ways the teacher assigns. For example, the teacher might divide the students into small groups and Jung will work with one group on a particular task, such as completing a workbook lesson in phonics. Jung will assist the students in figuring out the answer, or spell words for the students. In addition to Jung and the teacher, there is also an ISS in the class. The ISS does mostly the same work as does Jung, except the ISS does not usually change diapers. If Jung is going to be absent, the ISS will change diapers while she is out.

### **Mysti Knight**

Knight is a Paraeducator in the Young Adult Program. This year (2015-2016) she is based at Laney College. She assists ten older students who take classes at Laney College, and who also may have jobs in the community. The goal of the program is for these students to be able to study and work independently. Knight attends classes with the students, and assists them with getting notes and understanding assignments. She assists them with transportation, for example how to take a bus or a train, and travels with them to and from classes or

worksites. For those who have jobs, she will make sure that the student gets to the worksite and is doing his/her work at the job.

Knight's working hours this year are 8:00 a.m. to 2:00 pm. She has been trained in Crisis Prevention Intervention. Her supervisor this year is the teacher. The students have a meeting place at the Laney College Student Center. They eat, socialize, and do homework there, and are responsible for keeping the space clean. She has a student in a wheelchair who needs assistance getting on and off the toilet. Knight has two years of community college, but does not have a degree.

Last year (2014-2015) Knight's job title was Aide. Last year Knight also worked in the Young Adult Program, but she was based at the Marcus Foster building. These students were aged 18-22. Knight assisted students who were receiving vocational training. For example, the students created a restaurant each week and would take orders for food, and prepare and distribute the meals. She would also assist students in class, for instance, there were several non-verbal students whose classroom materials had to be modified. One student had a speaking device, and Knight would program the device with words or phrases he might need. There was a student in a wheelchair who Knight had to lift on and off the toilet. She had to keep the classroom sanitized. She would also take the students out in the community. Her supervisor was the Assistant Principal.

### **Shandle Shaw-McCormick**

This school year (2015-2016), Shaw-McCormick is a Paraeducator. Last year she had the same job duties, but her job title was Aide to the Handicapped. She has worked for the District since December 2013. She works in a Special Education inclusion program at

Montera Middle School. She is responsible for 4-6 students for each period (more at the lunch hour) during the six-period school day. She has different students for different periods.

Shaw-McCormick has one student in a wheelchair; she meets this student at the bus in the morning and assists her in getting down the wheelchair lift and into the building. During the day, she attends several classes with this student and assists her in using adaptive devices to take notes and turn in assignments; the student dictates and Shaw-McCormick types for her. She assists her with changing classes and using the wheelchair lift. She takes her to the bathroom twice a day and assists her with toileting and changing clothes. She also assists this student with maintaining respectful behavior towards others. She sanitizes the classroom areas and this student's equipment throughout the day. Another Paraeducator also assists this student for part of the day.

During lunch she assists several students; one student needs to have her diet monitored, and another student has to be watched so that she does not wander away from the lunch area. Another student needs help with toileting once per day. She also helps students who have behavioral problems by encouraging them, for example, to listen to the teacher, follow directions, and be prepared for class. She assists another wheelchair-bound student for part of the day.

The teacher in her classroom is her supervisor, then the principal. She works with several other paraeducators and an employee who is an IS or an IA. She has an Associate of Arts degree and has a California teaching credential to teach cosmetology. She taught cosmetology at a private school for over 17 years prior to her current job with the District.

## **Maureen Madsen**

Madsen is a Paraeducator, her previous title was ASE, and she has been employed with the District since January 2011. She is assigned to the Technology and Augmentative Communication for Learning Enhancement (TACLE) program at Oakland High School. The program allows physically handicapped students to study and communicate using adaptive technology such as iPads. This year she supports eight students, five of whom are in wheelchairs. Students have conditions such as cerebral palsy, brain injuries, or autism. Her job duties are the same this year (2015-2016) as they were last year (2014-2015). Her work hours are 8:00 a.m. to 2:30 p.m.; the Paraeducators work slightly staggered shifts to provide coverage for the entire school day.

She is responsible for the physical needs of the students, for example, some need spoon feeding, and some have a gastric tube (G-tube). Some students wear diapers and need to be changed and lifted out of their wheelchairs. Some students have behavioral issues, for example, one autistic student she assisted in the past would have violent episodes and need to be redirected or restrained. Once a week, they take the students out in the community to learn to use public transportation and develop other life skills such as going to a restaurant. She escorts students to and from the busses.

She assists students with the various adaptive devices they use, and has to be able to program them for the students. For example, some devices allow the student to choose a word by selecting a picture. One student's device used eye-gaze technology, allowing him to move his eyes and blink to move a cursor around a screen.

She has three years of college but no degree. She has had CPR training, training on the use of the G-tube, and training on seizures and diabetes.

## **Sharif Patterson-Pratt**

Patterson-Pratt has worked for eight years in the Full Inclusion Department at Oakland Technical High School. She assists students with special needs who attend general education classes. She works from 9:00 a.m. to 3:30 p.m. She assists different students during different periods of the school day. For example, for one period she assists two students in an 11th Grade English class; one student has Downs Syndrome. To assist the students in English class she will, for example, help them understand a book the class is reading, and discuss with them ideas they can use to write an essay based on the book. Different students in the class have different levels of understanding, so she modifies the classroom work to their academic level. For another period, she assists four students in a drama class; two of the students have behavioral issues. She assists multiple students in a study skills class by, for example, preparing a chart for them so they can track their assignments.

She also assists students with their physical needs. She assists one student who is in a wheelchair, and is nonverbal, who needs toileting. She also assists a student who is visually impaired, and another student who needs toileting. She also cleans up after the students and sanitizes classroom areas and materials. Her supervisor is a classroom teacher and case manager. Her duties and work hours this year are the same as they were last year. Her education level is that she completed high school and took some college coursework.

Prior to her current assignment, Patterson-Pratt worked 13 years as a one-on-one aide to a student with dwarfism syndrome. She followed this student from preschool through his graduation from high school.<sup>16</sup> This student was in general education classes and did not have

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<sup>16</sup> Patterson-Pratt proudly testified that this young man, who had stayed in touch with her following his graduation, subsequently graduated from college, and at the time of the hearing was engaged to be married.

any cognitive impairment. However, he was in a wheelchair, and had numerous physical needs that Patterson-Pratt attended to, including catheterization, feeding him with a G-tube, assisting him with an oxygen tank, and keeping his tracheotomy breathing tube clear and suctioned.

### **Melisha Linzie**

Linzie has been employed with the District for approximately 24 years. She is now a Paraeducator, her previous titles were Aide to the Handicapped and Aide to Special Education. She is currently assigned to the Young Adult Program at Laney Community College, and she has been in the Young Adult Program for approximately nine years. The students take classes at Laney College. There are four paraeducators assigned to 15 students.

Linzie attends classes with the students, takes them to the gym to get exercise, and does job coaching for the students who have jobs for a few hours per day. She assists them with navigating public transportation. She works with the teacher to ensure that classwork is adapted or modified, and to make sure that the student completes his/her assignments. Currently none of her students have physical needs except for one student who is in a wheelchair. She will assist students in using the restroom. She is trained in crisis/behavioral intervention. She is a lead Aide so she helps orient new Paraeducators and assists with ensuring staff coverage.

Her work hours are 8:00 a.m. to 2:30 p.m. and are the same this year as they were in previous years with the Young Adult Program. Her supervisor this year is Sheilagh Andujar, the Young Adult principal. Last year, her supervisor was Barbara Boyd, who is a coordinator. Linzie has some college education, but has not completed her BA degree.

Prior to her work with the Young Adult Program, Linzie assisted students in elementary school who had severe physical disabilities, including using wheelchairs, needing feeding, and

needing toileting and diapering. For five years, she provided one-on-one assistance to a student with Downs Syndrome who had seizures.

**Anastasia Woods**

Woods submitted a declaration following the hearing. She states in the declaration that she was hired in 2011 as an ASE, to work in the Visually Impaired classroom at Glenview Elementary School. During the 2015-2016 school year, her job title changed from ASE to Paraeducator. Her job duties have remained the same.

**Vernon Hays**

Last year Hays was an IA. This year she received a letter saying she is an IA. However, her union dues are being paid to AFSCME, not SEIU, so she believes that the District considers her to be a Paraeducator. She assists the teacher in a Special Day Class at Lafayette Elementary School for mild to moderately disabled students. The students are slow learners, but do not have medical needs or behavior problems. She works with the students in small groups and assists them with academics as directed by the teacher. Her job duties are the same this year as they were last year. She does not need to assist students with physical care needs such as giving them medication or diapering. She has a BS degree and meets the NCLB educational requirements. She has not applied for, or been offered the opportunity to apply for, an ISS position.

**Sharon Julius**

Last year Julius was an IA. In May 2015, she received a letter telling her that her job title was being changed to Paraeducator and asking her to sign it. Julius understood this to mean that, if she did not sign the letter, she would lose her job. She signed the letter stating that she did so “under duress.”

This year her job duties are the same as they were last year. She works with high school students in a Special Day Class. The students are slow academically and have some mild behavior problems. However, the students do not have physical care needs and do not have violent behaviors. She assists the students with academics. For example, she helps the students understand math concepts by using manipulatives. Julius has an AS degree in science. Her supervisor is the principal and she works 8:10 a.m. to 2:40 p.m. Julius has never had to assist students with physical care needs such as toileting or pushing wheelchairs. She understood that Paraeducators perform some of these duties, however Julius did not apply for a job performing these types of duties.

**F. Testimony of Instructional Assistant (IA) Employees**

As noted above, approximately 30 IAs were offered the Paraeducator position and objected. Those employees remained IAs for the 2015-2016 school year. Several of the IAs testified.

**Ardean Mondy**

Mondy is an IA in the SEIU bargaining unit. She works with elementary school students in the Resource Specialist Program. A teacher will determine a student's IEP goals, and Mondy works with the students in small groups to meet those goals. She does not do any physical care work with the students, such as pushing wheelchairs or changing diapers. In Spring 2015, the District sent her a letter saying that she was being transferred to a Paraeducator position in the AFSCME bargaining unit, however the District later withdrew this. Mondy understood the Paraeducator position to include physical care duties and these were not job responsibilities she wanted.

### **Deborah Britt**

Britt is an IA, in the SEIU bargaining unit. Her job this year is the same as it was last year. She assists special education students in their general education classrooms. The students have learning disabilities. Britt has an AA degree. She received a letter offering her a Paraeducator position in the AFSCME bargaining unit, however she did not want to move into that position because she did not have enough information about it. She has not had to perform physical care duties, such as using wheelchairs or changing diapers, for her students. She indicated that she does not wish to perform these duties.

### **Dora Hopson**

Hopson is an IA in the SEIU bargaining unit. This is her job title for both the previous school year (2014-2015) and the current year (2015-2016.) She has an AA degree in special education. She started with the District in approximately 1990. The person interviewing her for the job determined that Hopson was qualified to be an IA, rather than an Aide to the Handicapped. The Aide position required only a high school diploma and the Aide job duties were “under a custodial plan. It was the toileting, mopping, feeding, tube feeding.” Hopson chose to be an IA. She initially worked in a classroom with severely handicapped students. There were Aides in the classroom who attended to the physical needs of the students. As an IA, Hopson assisted the teacher with academic instruction. She has never needed to assist students with physical care needs.

Hopson currently works at Oakland Technical High School in a class of severely emotionally disturbed high school students. Many of these students are on medication and have been patients in psychiatric facilities. A social worker in the classroom administers medication if needed. Hopson assists the students with their academic work, attempts to keep

them focused on school work, and intervenes if there is a behavior problem by isolating and redirecting the student. None of the students have physical care needs, such as toileting or feeding.

On an unspecified date during the 2014-2015 school year, Hopson received a letter saying that her position was changing and she could apply for a Paraeducator position. She was not interested in this position, and testified, “when I was hired, I was hired to assist academic subjects, not the custodial types of services that aides to the handicapped provided and provide for students.”

### **Bettie Reed Smith**

Reed Smith has been an IA for over 42 years. She presently is assigned to the Resource Specialist Program at Markham Elementary School. She assists students with their academics in a small group setting, under the direction of a certificated teacher.

### **ISSUE**

The questions presented here are: (1) whether the ISS position is appropriately placed in the SEIU (White Collar/Paraprofessional) unit or the AFSCME (Custodial/Aides) unit, and (2) whether the Paraeducator position is appropriately placed in the SEIU unit or the AFSCME unit.

### **CONCLUSIONS OF LAW**

Where, as here, the existing unit is not a *Sweetwater* unit,<sup>17</sup> the proper inquiry is whether the requested unit configuration is an appropriate unit—not whether it is more

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<sup>17</sup> In *Sweetwater Union High School District* (1976) EERB Decision No. 4, PERB established three presumptively appropriate bargaining units for classified employees of school districts. Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB). Neither the SEIU White Collar/Paraprofessional unit nor the AFSCME Custodial/Aide units are *Sweetwater* units.

appropriate than the existing unit configuration. (*Long Beach Community College District* (1999) PERB Decision No. 1315 (*Long Beach CCD*).

EERA section 3545(a) provides:

In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

In determining whether there is a community of interest, PERB considers multiple factors, including the extent to which employees share: education and qualifications; training and skills; job functions; method of wages or pay schedule; hours of work; fringe benefits; supervision; frequency of contact with other employees; integration with work functions of other employees; interchange with other employees; and other related factors. (See, e.g., *Elk Grove Unified School District* (2004) PERB Decision No. 1688.) The overriding consideration is whether the employees share substantial mutual interests in matters subject to meeting and negotiating. (*San Diego Community College District* (2001) PERB Decision No. 1445.) In assessing appropriateness of unit placement, PERB must look at the actual nature of the work performed by the incumbents in the position, rather the work specified in the job description. (*Hemet Unified School District* (1990) PERB Decision No. 820; *Lincoln Unified School District* (1997) PERB Decision No. 1194.) Here, therefore, PERB must consider the actual work performed by the incumbent ISS and Paraeducator positions.

### **Appropriate Placement of the ISS Position**

The ISS position focuses on the academic, classroom and learning needs of special education students. The ISSs testified that they do not perform any physical care work of

students, even though the possibility of that work is included in the job description. Rather, they exclusively perform supportive instructional work, including assisting students with behaviors, modifying classwork, and helping students to function independently. For example, ISS Brooks testified that he assists students with their academics so that the teacher can focus on other students. ISS Hunt testified that she assists autistic students with their classroom work. ISS Mixon assists students with attending college-level classes, taking notes, and completing homework.

The SEIU-represented White Collar/Paraprofessional unit includes several classifications who also provide in-classroom instructional support. For example, the unit includes Academic Mentors, who assist students who are working below grade level. The unit also includes several categories of Instructional Assistants (non-special education) who provide general instructional assistance in the classroom, such as bilingual language assistance. The classifications in the Custodian/Aides unit (apart from the disputed Paraeducator position) represented by AFSCME do not perform instructional support work.

The ISS position requires a bachelor's degree. Several other positions in the White Collar/Paraprofessional unit also require a bachelor's degree (e.g., Case Manager and Community School Coordinator, among others). None of the positions in the Custodian/Aides unit require this level of education.

The ISS employees testify that their supervisor is the school principal or, to some extent, the teacher that they support. Some positions in the White Collar/Paraprofessional unit also are supervised by a principal (e.g., non-special education Instructional Assistants and Academic Mentor) however it appears that other positions in this unit may be supervised by division heads or other managers. For example, the SEIU-represented Program Specialist,

Health Education reports to the Manager of Curricular Programs. Thus, this factor is not determinative.

ISS employees are now receiving pay and benefits pursuant to the SEIU salary schedule and contract. However, since the correctness of this unit placement is at issue, this factor also is not determinative in this situation.

The established practices of the employer, on the other hand, is a significant factor. According to two of the four ISS employees who testified, the ISS position essentially replaces the former position of IS. Hunt was an IS for the 2014-2015 school year, and she is an ISS for the 2015-2016 school year. She performs the same duties this year as she did last year. Likewise, Brooks was an IS last year, and became an ISS this year, and his job duties have not changed.<sup>18</sup> The IS position was always in the SEIU-represented bargaining unit, and this representational history supports including the ISS employees in the same bargaining unit they were in previously.

Little information was provided regarding the size of the relevant bargaining units. It does not appear that the size of the bargaining units would be changed such that there would be an impact upon efficient operation of the District, therefore this factor is not helpful.

By contrast, examining these same factors, it does not appear that the ISS position has a community of interest with the Custodial/Aides unit represented by AFSCME. Positions in the Custodial/Aides unit include Custodians, Custodial Health Aides, LVNs, 504 Aides, and the former ASE position. These positions have a lower educational level than the ISS. They also

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<sup>18</sup> The other two ISS employees who testified changed jobs between the two years. Bonini is an ISS this year, but last year she was an ASE. She chose to change jobs and work with the TK program in a non-special education capacity. Mixon also changed jobs. He was an ASE last year and is an ISS this year; he now has an entirely different job at a different school.

perform hands-on physical work of cleaning facilities and attending to the physical needs of students. While the former ASE position performs some classroom assistance work, the primary focus of the position was on students' physical needs and adaptive devices and technology. This is different work from the specialized instructional support work performed by ISSs. The representational history does not support moving the ISS position to the AFSCME unit.

From these facts, it is determined that the ISS position is appropriately placed in the White Collar/Paraprofessional unit, represented by SEIU.

### **Appropriate Placement of the Paraeducator Position**

Nine of the employees who testified are currently classified as Paraeducators.<sup>19</sup> Seven of those were ASEs in the previous school year, and became Paraeducators for the current school year. These seven testified that their job duties are the same this year as they were in the previous year. All seven testified to assisting students with their physical care needs, although the type and severity of those needs varied. For example, Madsen works with students who have serious physical handicaps, who are in wheelchairs and need feeding and diapering. Shaw-McCormick works with two students in wheelchairs who need assistance with toileting and changing clothes. Knight and Linzie assist students with various disabilities, including those in wheelchairs, who need help with toileting and transportation. Jimenez assists students with changing diapers and toileting. Patterson-Pratt assists a nonverbal student in a wheelchair.

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<sup>19</sup> Four employees who are IA employees for the current school year also testified. The issue before PERB in this case is the appropriate placement of the Paraeducator position. The placement of the IA is not at issue. The focus of PERB's inquiry is the work actually performed by the incumbents in the position of Paraeducator. (*Hemet Unified School District, supra*, PERB Decision No. 820.)

These seven Paraeducators also assist students with their academic work. Most of their instructional work focuses on adapting classroom materials and technology as opposed to direct instruction, but it appears that many perform some degree of academic assistance as well. For example, Jimenez works in small groups with autistic students, using math manipulatives and phonics cards. Jung helps students with phonics. Shaw-McCormick assists a student by typing notes that the student dictates to her. Madsen helps a student use a speaking device.

Two employees who testified were IAs last year, but are considered Paraeducators this year (Vernon Hays and Sharon Julius).<sup>20</sup> These employees also testified that they perform the same job this year as they did last year, only this year they are in a different bargaining unit. These two Paraeducators do not perform any physical care work for their students, and both testify that they have never performed such work as IAs. Both assist students with academic work. Hays works with mild to moderately disabled students who are slow learners but do not have physical care needs. Hays also has a bachelor's degree, unlike others in the Paraeducator classification. Julius similarly works with students who are slow learners and have mild behavior problems. She assists the students with learning math, science, and language arts.

The other classifications in the AFSCME Custodial/Aides Unit include LVNs, 504 Aides and Custodians. Custodians clean, maintain and repair the school building and grounds. LVNs provide medical care and treatment to students such as administering medicine and tubal feedings. 504 Aides also perform physical care procedures and health screenings. The job duties of most of the Paraeducators also focus on physical care needs of students with

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<sup>20</sup> Hays was told she is an IA for the 2015-2016 school year, but her union dues deductions have been going to AFSCME, indicating that she is considered a Paraeducator. Julius signed the agreement to become a Paraeducator "under duress" because she feared losing her job.

disabilities, including feeding and toileting. Paraeducators also testified to performing cleaning and sanitizing work—which would also be performed by Custodians as part of their duties. Thus, it appears that Paraeducators perform work similar to other positions in the AFSCME unit.

Paraeducators must meet the NCLB “highly qualified” standard, and have an AA degree or equivalent. An LVN must have similar post-high school education, however the 504 Aide needs only a high school diploma. The educational qualification for custodians is not specified. The classifications in the SEIU-represented unit cover a broad range of positions with varying educational requirements. Broadly speaking, it seems that the employees in the SEIU unit generally need more education than those in the AFSCME unit. However, due to the wide variety of educational requirements for both units, this factor is not particularly helpful in determining community of interest for Paraeducators.

The Paraeducators testified that their supervisor was the school principal or, in some cases, a classroom teacher. The lines of supervision for the other positions in the AFSCME-represented unit are unclear. As noted above, positions in the SEIU-represented unit also may have differing lines of supervision. Accordingly, this factor is not determinative.

Paraeducators are now receiving pay and benefits pursuant to the AFSCME salary schedule and contract. However, since the correctness of this unit placement is at issue, this factor also is not determinative in this situation.

On balance, the established practices of the employer and representational history weigh in favor of placing the Paraeducator position in the Custodial/Aides unit. Seven of the nine Paraeducators who testified stated that they perform the same job in the current school year, as Paraeducators, as they did in the previous school year, as ASEs. Confusingly, the two

former IAs who are now Paraeducators—Hays and Julius—testified that they, too, perform the same job as last year as IAs. Therefore, they are performing different duties than the Paraeducators who were previously ASEs, and they are not performing the physical care duties as enumerated in the job description. It appears that the District intended the Paraeducator to be a merger of the IA and ASE positions, but incumbents in the Paraeducator position are not all performing the same job.<sup>21</sup> However, the job description for the Paraeducator position is more aligned with the former ASE position, in that the primary focus of the position is on the physical care needs of students. The former ASE position performed this physical care work.

The Paraeducator job description includes subcategories for Paraeducators who work with deaf students and visually impaired students. However, there was no testimony from any employee who actually performed any of this work and it is unclear whether these positions are currently being utilized. AFSCME provided a declaration from a Paraeducator who works in a Visually Impaired classroom at an elementary school, but her job duties are not described. The SEIU White Collar/Paraprofessional unit includes a classification of Interpreter for the Deaf, which suggests that work with deaf students might be more appropriately placed in the SEIU unit. However, these facts are too speculative to be helpful to the community of interest analysis.

As noted above, little information was provided regarding the size of the unit, and no party contended that there would be an impact upon the efficient operation of the District, therefore this factor is not useful to the determination.

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<sup>21</sup> It is noted that the wisdom or correctness of the District's classification decision is not at issue in the instant case. SEIU has separately filed an unfair practice charge against the District (Case No. SF-CE-3115-E) alleging various unilateral changes and other violations arising out of the District's creation of the new classifications.

Overall, the community of interest factors support placement of the Paraeducator in the Custodial/Aides unit represented by AFSCME. Most Paraeducators who testified are former ASEs who have a history of representation by AFSCME. The intent of the job description was for Paraeducators to be primarily responsible for students' physical care needs. Most of the Paraeducators who testified attend primarily to the physical care needs of the students and are aligned in interest with the LVNs and 504 Aides in the AFSCME-represented unit. The Paraeducators perform some cleaning and sanitizing duties like Custodians.

From these facts, it is determined that the Paraeducator position shall be placed in the Custodial/Aides unit represented by AFSCME.

### **Splitting the Classification**

SEIU contends that, as an alternative to placing the Paraeducators in the AFSCME unit, PERB may split the classification: the current and former IAs would remain in the SEIU unit and the former ASEs would remain in the AFSCME unit. While this result may make some practical sense, it is unsupported by precedent. In *Unit Determination for Technical Employees of the University of California* (1982) PERB Decision No. 241-H, PERB established three bargaining units of technical employees for the University of California—a Lawrence Livermore National Lab unit, a patient care unit, and a residual statewide unit working in an academic setting. The Board noted that dividing employee groups based upon work location required it, in a few cases, to split classifications. However, the Board explained, this splitting was justified by the significant differences between, for example, working in an academic setting as opposed to working in a hospital. In the instant case, such a basis for splitting classifications does not exist.

## **Proof of Support**

PERB Regulation 32781, subdivision (e)(1), concerning petitions for unit modification, provides:

If the petition [for unit modification] requests the addition of classifications or positions to an established unit, and the proposed addition could increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.

In *Trustees of the California State University* (2007) PERB Decision No. 1881-H, the California State University (CSU) abolished two librarian classifications, each of which had been in a different bargaining unit, represented by a different union. CSU created a new position that essentially combined the functions of the two abolished positions. Both unions petitioned to include the new position in their bargaining unit. The Board did not resolve the appropriate placement of the new position, rather, it held that the ALJ had misapplied a rebuttable presumption test, and remanded for further proceedings.<sup>22</sup> The Board also noted that, under the ALJ's proposed decision, 502 employees in one of the abolished classifications would have been moved into a new bargaining unit, increasing the size of that unit by nearly 25%.

At the end of the 2014-2015 school year, the District employed approximately 111 IAs and approximately 180 ASEs. Of the 111 IAs, approximately 30 remained IAs for the 2015-2016 school year, and approximately 81 were classified as Paraeducators in the AFSCME unit. It is determined herein that the Paraeducator classification shall be placed in the AFSCME Custodial/Aides unit, and the ISS classification shall be placed in the SEIU White

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<sup>22</sup> The rebuttable presumption test (which presupposes the correctness of a unit originally configured by PERB) is not properly used when placing a new classification into a unit. This test is not at issue in the instant case.

Collar/Paraprofessional unit. However, insufficient information exists in the record to establish the exact size of the existing bargaining units and the exact numbers of employees who will be added to each unit. Therefore, the proposed order includes remanding this matter to another Board agent to make a determination regarding whether proof of support is required and, if so, to obtain and verify that proof of support pursuant to PERB Regulations.<sup>23</sup>

#### PROPOSED ORDER

For the above reasons and based upon the entire record in this case:

1. The ISS position is appropriately included in the White Collar/Paraprofessional bargaining unit represented by SEIU;
2. The Paraeducator position is appropriately included in the Custodial/Aides bargaining unit represented by AFSCME; and
3. The matter will be referred back to a Regional Attorney in the Office of the General Counsel to determine whether proof of support is required for either position, and, if so, to obtain and verify the proof of support and, if appropriate, to issue a certification in accordance with this decision.

#### RIGHT TO APPEAL

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public

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<sup>23</sup> PERB Regulations are codified at California Code of Regulations, title 8, sections 31001 et seq.

Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95811-4124  
(916) 322-8231  
FAX: (916) 327-7960  
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

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Laura Ziegler Davis  
Hearing Officer