

BEFORE THE  
GOVERNING BOARD OF THE  
VINELAND SCHOOL DISTRICT  
COUNTY OF KERN  
STATE OF CALIFORNIA

In The Matter Of The Lay Offs Of:

OAH No. 2009031201

Veronica Escobedo, Angelica Jimenez, and  
Donna K. Kehl,

Respondents.

**PROPOSED DECISION**

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings, State of California, on April 27, 2009, in Bakersfield, California.

Christopher W. Hine, Attorney at Law, represented the Vineland School District (District). Paul A. Welchans, Attorney at Law, represented Veronica Escobedo (Escobedo), Angelica Jimenez (Jimenez), and Donna K. Kehl (Kehl) (collectively, Respondents).

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated District employees notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

Oral and documentary evidence was received. The matter was submitted for decision on April 27, 2009.

**FACTUAL FINDINGS**

1. The District operates two schools (Grades K-4 and 5-8). Sixty-one percent of its 854 students are English learners. Ninety-seven to ninety-eight percent of its students are of Hispanic descent.

2a. Adolph Wirth is the Superintendent of the District, and filed the Accusation in his official capacity.

2b. Respondents are certificated employees of the District.

3. The Governing Board of the District (Governing Board) adopted Resolution No. 6:2008/2009 on February 17, 2009, reducing or eliminating the following services for the 2009-2010 school year:

PARTICULAR KINDS OF SERVICES	NO. OF FULL TIME EQUIVALENT (FTE) POSITIONS
Self-Contained Classroom Instruction, Grades K-6	5
<u>Departmentalized Instruction</u>	
Math	0
Science	0
History/s.s.	1
Physical Education	1
<u>Total Net FTE Reduction</u>	7

4. On February 17, 2009, the Superintendent notified the Governing Board that he recommended that notice be provided to six certificated employees of the District, including Respondents, that their services would not be required for the next school year because of the elimination or reduction of particular kinds of services.

5. On March 3, 2009, the District served a written “reduction in force” notice (RIF notice) on six certificated employees, including Respondents, that their services would not be required for the 2009-2010 school year due to the elimination or reduction of particular kinds of services.

6. Respondents requested a hearing to determine if there was cause for not reemploying them for the 2009-2010 school year.

7. On March 29, 2009, the District issued the Accusation and served it on each of the Respondents. Respondents filed their notices of defense in a timely manner.

8. All prehearing jurisdictional requirements have been met.

9. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code (the Code) section 44955.<sup>1</sup>

10. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of the uncertainty surrounding State funding. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

11. The reduction or discontinuance of services set forth in factual finding number 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

12. On January 26, 2009, the Governing Board adopted criteria for determining order of seniority of those employees with the same date of first paid service (tie-breaking criteria).<sup>2</sup> These tie-breaking criteria included: credentialing; experience; extracurricular activities; training; special education needs; competence; evaluations; No Child Left Behind (NCLB) highly qualified teacher status; and BCLAD/CLAD/Bilingual Credential needs.<sup>3</sup> The Governing Board's resolution adopting these tie-breaking criteria does not specify any order of importance to be given to the criteria.

13. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments, and credentials. The District used the seniority list to develop a proposed lay-off list of the least senior employees currently assigned to the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether these employees held credentials in another area and were entitled to "bump" other employees. At least one Respondent suggested that the District should have allowed her to bump a junior employee, Alison Abrams (Abrams), as set forth in more detail in factual finding number 18, *post*.

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<sup>1</sup> All further statutory references are to the Education Code.

<sup>2</sup> The Code provides, in relevant part, that: "As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof." (§ 44955, subd. (b).)

<sup>3</sup> BCLAD stands for Bilingual-Crosscultural Language Acquisition and Development. CLAD authorizes the holder to provide instructional services to English learners, but lacks the bilingual component.

*Respondents' Contentions and other Relevant Evidence*

14. Respondents, along with five other teachers, are identified on the seniority list as probationary employees holding multiple subject credentials, with the same seniority dates of August 7, 2007. Two of these teachers, who also received the RIF notices, did not request a hearing, and therefore, they have waived their right to a hearing to contest their terminations. Three of these probationary teachers, Celeste Quinonez, Margarito Madueno, and Lupita Lopez, did not receive the RIF notices. The District has applied its tie-breaking criteria in a manner so as to retain these three probationary teachers because they hold BCLAD certifications, and to discharge others, such as Respondents, who each hold a CLAD or similar certification, but do not hold the BCLAD certification. Respondents assert that the District's application of the tie-breaking criteria is arbitrary and that retaining teachers based solely on their bilingual skills is an abuse of discretion under the Code.

15. Jimenez is a first grade teacher. She has a preliminary multi-subject credential and an R242 certificate (authorizing her to provide instructional services to English learners, similar to CLAD). The District assigned a seniority date based on the date of her first contract with the District for the 2007-2008 school year. Jimenez disputes this because she taught summer school for half-days approximately three weeks in 2007, at the request of a District resource specialist who suggested the experience would be similar her classroom that fall. The District paid Jimenez \$30 per hour for teaching summer school, a rate substantially less than her contractual salary as a probationary employee with the District. Also that summer, Jimenez attended open "Court Reading Training" for one week, offered by a publisher whose reading curriculum is used by the District. She received a \$600 stipend from the District for attending this voluntary training. Jimenez also thinks the District has misapplied the tie-breaker criteria, since she has received little or no credit for her many extracurricular involvements, including service on the library and Halloween carnival committees, as well as being a highly qualified teacher under NCLB. Further, Jimenez has recently obtained a reading certificate and completed the requirements for her Masters degree in education. She will receive her diploma in two weeks.

16. Escobedo has been teaching sixth grade, as well as intensive algebra during a block that is two periods, pursuant to a credential waiver authorized by the Superintendent. She has a preliminary multiple subject credential and an R242 certificate. She engages in many extracurricular activities, including the carnival committee, the Caesar Chavez club, and school fundraisers. She also works in the extended program after school.

17. Kehl currently teaches fifth grade, but she also has taught drama, English language development for grades five through eight. She has a clear multiple subject credential, CLAD certification, and is an NCLB highly qualified teacher. She volunteered three days per week, one hour per day, to develop the Homework Club. She also organized and conducted the Oral Language Festival for fifth and sixth graders. She has taken hundreds of hours of professional development courses, expects to receive her single subject credential in English on May 31, 2009. She anticipates she will complete her Masters degree in education by the end of the summer.

18. Abrams' first date of employment is August 7, 2008, and she is the least senior teacher on the District's seniority list. She did not receive a RIF notice. She holds a clear multiple subject credential and a supplementary authorization in mathematics, which authorizes Abrams to teach departmentalized courses in mathematics in grades nine and below. She currently teaches eighth grade mathematics.

19. The District did not retain any certificated employee junior to Respondents Escobedo, Jimenez, and Kehl to render a service which these Respondents are certificated and competent to render.

### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 8.

2. The services listed in factual finding number 3 are particular kinds of services that could be reduced or discontinued under section 44955.

3. Cause exists for the District to reduce or discontinue the particular kinds of services listed in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils within the meaning of section 44949, as set forth in factual finding numbers 1 through 11.

4. Respondents have not established that the District improperly applied its tie-breaking criteria in relation to employees who have the same first date of paid service, in order to retain the probationary teachers holding a BCLAD certification. It has been long recognized that, when employees have the same beginning date of paid service, a district may establish bilingualism as one of the criteria for determining which employees best meet the needs of the district and its students. (*Ozsogomonyan, Teacher Layoffs in California: An Update* (1979) 30 *Hastings L.J.*, 1727, 1749.) Respondents have not demonstrated that the District acted unreasonably when it used bilingualism as an exclusive criterion. Although Respondents have demonstrated many competencies and strengths as teachers, the District is authorized to use a very broad standard when making tie-breaking determinations.

5. Respondent Jimenez has not established that the District-assigned seniority date for her is incorrect. Although she was employed to teach summer school half-days for a few weeks in 2007, at an hourly pay rate of \$30, she has not demonstrated that this constitutes "paid service in a probationary position." (See § 44848.) This was not a normal classroom assignment. Jimenez did not work full days. This assignment did not occur in the regular school year or as part of Jimenez's annual contract with the District, which she later signed. Jimenez did not receive the same rate of pay she received when she later taught as a probationary employee. Also, there is no basis for characterizing her paid attendance at a voluntary training course as paid service in a probationary position.

6. Respondent Escobedo has not established that she may bump Abrams, because she has not demonstrated that she has either a credential or competency to perform the duties currently performed by Abrams, who is teaching departmentalized eight grade math classes.

7. Cause exists to terminate the services of Respondents, Veronica Escobedo, Angelica Jimenez, and Donna K. Kehl, for the 2009-2010 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 19, and legal conclusion numbers 1 through 6.

ORDER

The Accusation is sustained and the District may notify Respondents, Veronica Escobedo, Angelica Jimenez, and Donna K. Kehl, that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

Dated: \_\_\_\_\_

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MARK E. HARMAN  
Administrative Law Judge  
Office of Administrative Hearings