

BEFORE THE
GOVERNING BOARD OF THE
NORTHERN HUMBOLDT UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

JEFFREY GONZALEZ, KELLY HELMS,
ALLAN SCHMIDT, NORMA WATSON,
MARILYN THIBEAU, and JOSH KIESELHORST,

Respondents.

OAH No. 2009040069

PROPOSED DECISION

On April 21, 2009, in Eureka, Humboldt County, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Stephen L. Hartsell, General Counsel, North Coast Schools Legal Consortium, 901 Myrtle Avenue, Eureka, California 95501, represented Kenny Richards, Ed.D., Superintendent, Northern Humboldt Union High School District.

Paul Hagen, Attorney at Law, of Bragg, Perlman, Russ, Stunich & Eads, LLP, 1036 Fifth Street, Suite E, Eureka, California 94025, represented Respondents Jeffrey Gonzalez, Kelly Helms, Allan Schmidt, and Norma Watson.

Respondent Marilyn Thibeau represented herself.

Respondent Josh Kieselhorst failed to file a Request for Hearing. The Superintendent's motion was granted to determine that Respondent Josh Kieselhorst was in default under the provision of Government Code section 11520.

On April 21, 2009, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On April 6, 2009, Kenny Richards, Ed.D., Superintendent (the Superintendent) for the Northern Humboldt Union High School District (the District), made and filed the Accusation against respondents in his official capacity.

2. Respondents Jeffrey Gonzalez, Kelly Helms, Allan Schmidt, Norma Watson and Marilyn Thibeau are either probationary or permanent certificated employees of the District.

3. On or before March 10, 2009, the Superintendent presented the District's Governing Board a recommendation in the form of written memorandum that the District give notice that particular kinds of services, then offered through the District, be eliminated by the District for the ensuing school year (that is, the term of 2009-2010).

4. On March 10, 2009, the District's Governing Board adopted Resolution No. 11/2008-09. The resolution recites that it has become necessary for the District to reduce and/or to discontinue, no later than the beginning of the 2009-2010 school year, particular kinds of services in the form of an array of four distinct categories in the sum of 19.20 FTE (full-time equivalent) certificated positions as follows:

0.60	FTE	Agriculture;
0.80	FTE	Art;
1.00	FTE	Business
1.40	FTE	Counseling
2.80	FTE	Language Arts
2.00	FTE	Foreign Language
0.40	FTE	Home Economics
0.40	FTE	Industrial Arts
0.40	FTE	Leadership
0.40	FTE	Library
2.80	FTE	Math
0.40	FTE	Music
0.40	FTE	Nurse
0.80	FTE	Physical Education
1.00	FTE	Psychologist
0.60	FTE	RSP
0.60	FTE	Science
1.00	FTE	SDC
1.00	FTE	Social Science
0.40	FTE	Athletic Director

5. The District's Board directed its superintendent or his designee to issue the preliminary notices¹ as set out in individual letters, dated March 11, 2009, to a number of FTE position holders, including each respondent, who had status as a permanent or probationary employee. Each letter was served by personal delivery.

The letter stated that the District's Governing Board had an intention to reduce or to discontinue the particular service provided by each person who received the notice. Hence, due to the prospective elimination of the particular kind of service now rendered to the District, each of the recipient respondents learned the District would not reemploy the named individuals in the certificated positions each had worked.

The letter, dated March 11, 2009, which had attached to it the District's resolution and other pertinent documents,² also conveyed to each respondent that no certificated employee of the District having less seniority than each respective respondent would be retained for the 2009-2010 school year to render a service that each respondent was then credentialed and competent to render to students under the District's competency criteria.

6. The written preliminary notices to each respondent, as issued from the District's Superintendent along with the governing board's resolution set out legally sufficient reasons of the District's governing board's intent to eliminate the positions occupied by each affected respondent and affected person for the ensuing school year of 2009-2010.

7. Each respondent timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent, or affected person, for the ensuing school year.

8. The District's Superintendent caused to be timely served upon each respondent the Accusation, dated April 6, 2009, and related documents. Each respondent, except for Respondent Kieselhorst, filed a timely notice of defense.

9. All pre-hearing jurisdictional requirements were met.

10. At the hearing of this matter, the District withdrew the Accusation filed against Respondent Norma Watson. By its withdrawal of the Accusation, the District will retain the services of Norma Watson.

11. The District Superintendent appeared at the hearing of this matter to provide credible and persuasive evidence.

¹ "Reduction in Services."

² Resolution No. 11/2008-09, Request for Hearing form, Proof of Service document, copies of Education Code sections 44949 and 44955.

The Superintendent is vested with knowledge, expertise, and experience to offer competent and reliable evidence regarding the basis for the proposed layoff action that will take effect for the ensuing school term.

The Superintendent was reasonable in the exercise of discretion in executing the procedures associated with the layoff action as required by the Board's resolution.

Respondents' Contentions

12. Through their counsel, respondents, other than Respondent Thibeau, contend that the District's layoff action will deprive students of devoted teachers who provide valuable services to the District students. Respondents aver that the proposed District layoff action purportedly may result in impermissible cuts in District personnel that are arbitrary and unreasonable.

Regarding nursing services, Respondent Thibeau avers that by the District's layoff action the District's administration has made assumptions regarding the provision of nursing services that are erroneous and that the proposed layoff action will thrust the District below state mandated levels for staffing ratios of nurses to students for the effective delivery of necessary nursing services.

Respondents' various and respective contentions are without merit and are rejected.

Claims and Evidence of Individual Certificated Employees at the Hearing of this Matter

a. Respondent Jeffrey Gonzalez

13. Respondent Jeffrey Gonzalez (Respondent Gonzalez) appeared at the hearing to offer evidence under oath.

Respondent Gonzalez occupies the status of a probationary certificated employee with the District. He holds a single-subject credential in English and single-subject credential in Social Sciences.

Respondent Gonzalez splits time under his 0.8 FTE position between "CDS/MHS" with a 0.6 FTE position and at "CDC" with a 0.2 FTE position. Respondent Gonzalez is assigned to teach freshmen and sophomore students. He teaches a group of 15 to 24 students at any given time. Respondent Gonzalez performs teaching functions and duties that serve a student population that may be characterized as being "high risk youth," who are enrolled in the District's Community School setting. Over the past school year Respondent Gonzalez has developed strong ties with his assigned students so that a number have gained renewed interest and engagement in high school studies. He teaches both language arts and social

sciences to the students, who are viewed as a group of pupils with the highest need for teacher assistance in the District's high schools.

But Respondent Gonzalez points to no statutorily or regulatory authority that requires the District to provide services at the optimum level at the Community School as argued by respondents. No authority is offered to show that the Governing Board's decision to eliminate services at the Community Day School violates a requirement for mandated services to students served by Respondent Gonzalez.

Respondent Gonzalez offers no competent evidence that the District will be unable to provide the Community Day School services for the ensuing school year by reducing the 0.8 FTE position held by him.

Moreover Respondent Gonzalez provides no competent evidence that the District has retained any faculty member junior to him for which Mr. Gonzalez possesses a credential and is competent to teach or to provide service to the District's students.

14. The Superintendent did not refute Respondent Gonzalez's credible testimony that his first date of paid service to the District is August 30, 2007. During his first full year of service to the District, Respondent Gonzalez taught students at Continuation School.

Respondent Kelly Helms

15. Respondent Kelly Wolfe Helms (Respondent Helms) appeared at the hearing to offer evidence under oath.

Respondent Helms has a first date of paid service to the District as August 24, 2000. She holds a single subject credential in Business. Also, Respondent Helms possesses a supplement credential in physical education and a CLAD certificate.

Respondent Helms teaches in a full-time equivalent position as a Business course instructor with an emphasis in computer technology. The teaching responsibilities performed by her have been in the subject area that she has provided services to District students over the entire nine-year length of her employment with the District.

Respondent Helms notes that the 194 freshmen students at Arcata High School receive instruction from her. She also instructs 27 students in the 10th grade through 12th grade who must repeat the class taught by her or who otherwise have not met the District's curriculum requirements. Using current pupil enrollment numbers, Respondent Helms calculates that a class of 30 students would result in her having an assignment that encompassed, at least, four classes. Additionally, Respondent Helms teaches a computer programming class, which has a combined enrollment of 22 students.

Respondent Helms avers that the prospective layoff action should not reduce her from any portion of a full 1.0 FTE position.

But Respondent Helms provides no competent evidence that the District has retained any teacher junior to her to perform services for which Ms. Helms possesses a credential and is competent to provide that service to the District's students.

Respondent Marilyn Thibeau

16. Respondent Marilyn Thibeau (Respondent Thibeau) appeared at the hearing to offer evidence under oath, and she made arguments on her own behalf.

During the current school year, Respondent Thibeau works for the District as a school nurse. She is a registered nurse and she holds a master's degree in nursing. In addition to the nursing credential, Respondent Thibeau holds a special teaching authorization in health.

Her first date of paid service to the District was March 5, 2001. Respondent Thibeau occupies the status of a permanent certificated employee with the District.

During the current school year, Respondent Thibeau occupied a 0.5 FTE position with the District.

Respondent Thibeau has taught a one-semester class of four sections in health classes during the previous school years. But during the current year she has not taught any classes as the "teacher of record," rather, she only has been a guest teacher for a health education course during the current school year.

17. Respondent Thibeau is a compelling witness who projects superb commitment to excellence and devotion to the provision of services to students of the District. But, Respondent Thibeau does not show that she possesses the training, skill and experience of a statistician or accountant so as to offer reliable and trustworthy evidence on the extent and scope of the District's prospective delivery of nursing or medical-oriented services to District students. Nor, did Ms Thibeau show that she possesses an ability to offer competent evidence regarding claims that the District's contemplated layoff action will violate state or federal law for the provision of mandated health care services to students of the District.

18. Respondent Thibeau provides no competent evidence that the District has retained any nurse junior to her for which Ms Thibeau possesses a credential and is competent to provide service to the District's students.

Respondents Generally

19. Respondents do not offer competent evidence that the District did not treat respondents fairly. Evidence is not offered to support respondents' general argument that the

District failed to engage in an intelligent and rational process in deciding which employees to retain and which employees to layoff. No competent evidence shows the District knowingly set out to distort data or statistical information to reach the preliminary decision in this matter. The District Superintendent's findings and conclusions are not so inaccurate as to render as fatally flawed this layoff action.

The District's Reasonable Basis to Proceed

20. The Superintendent offered credible and persuasive evidence in support of the prospective reduction or elimination of services as described above.

The Superintendent is directly involved with and is knowledgeable regarding the details of many administrative matters pertaining to certificated employees. The Superintendent provided persuasive and compelling evidence regarding the District policies and practices of matter, including but not limited to: credential standing of employees; seniority dates for permanent and probationary teachers; as well as the array of services, academic offerings and programs by the District for its students.

Upon learning that the District was required to initiate layoff proceedings for teacher employees of the District, the Superintendent effected reasonable and lawful steps to develop the District's seniority list for the District's teachers.

21. The instruction of physical education is a mandated service, which is being reduced; however, the District has sufficient teaching resources to meet the state requirements for the ensuing year. The District's contemplated use of teachers, who will be retained for the coming year, will enable the District to provide the mandated number of minutes of physical education instruction for benefit of the District's students.

22. Other than physical education, the only services, as mandated by law, that the District must provide is in the realm of school nurse. The nurse services involve: (i) the supervision of individual health care plans developed for students under Section 504 of the Rehabilitation Act of 1973, and (ii) performing or supervising the performance of specialized health care services for (special education) students identified with exceptional needs under the Individuals with Disabilities Education Act (IDEA).

School nurses are one of the authorized providers for other health care services for which the District is required by law to provide, including vision and hearing testing, scoliosis screening, and assistance with administering students' prescribed medications.

23. All other services that have been provided by the District's nurses or could be provided by the nurses may be delivered at the District's discretion, and the District may exercise its discretion to eliminate them or not provide such services in the first place. These discretionary services, include, but are not limited to:

- Conduct immunization programs and ensure that every pupil's immunization status is in compliance with the law. (Ed. Code § 49425);
- Assess and evaluate the health and developmental status of pupils to identify specific physical disorders and other factors relating to the learning process, communicate with the primary care provider. (Ed. Code § 49425);
- Design and implement a health maintenance plan to meet the individual health needs of the students. (Ed. Code § 49425);
- Refer the pupil and his or her parent or guardian to appropriate community resources for necessary services. (Ed. Code § 49425);
- Maintain communication with parents and all involved community practitioners and agencies to promote needed treatment. (Ed. Code § 49425);
- Interpret medical and nursing findings appropriate to the student's individual educational plan and make recommendations to professional personnel. (Ed. Code § 49425);
- Consult with, conduct in-service training to, and serve as a resource person to teachers and administrators. (Ed. Code § 49425);
- Counsel pupils and parents. (Ed. Code § 49425);
- Provide dental health programs for students. (See Health & Safety Code § 104775);
- Provide sexual health education instruction. (Ed. Code § 51933);
- Provide CPR training to employees and/or students. (Ed. Code § 49413);
- Provide emergency epinephrine auto-injectors to trained personnel who may use them to provide emergency medical aid to persons suffering from an anaphylactic reaction. (Ed. Code § 49414); and,
- In the absence of a credentialed school nurse, provide school personnel with voluntary emergency medical training or provide emergency medical assistance to pupils with diabetes suffering from severe hypoglycemia. (Ed. Code § 49414.5).

Regardless of the inherent value of the school nurse services that may be offered to some of the District's students, the discretionary services are not mandated by law. The District's delivers the bulk of such school nursing services for its students at its discretion; so that the District may eliminate or reduce such services.

24. The Superintendent indicated that the District will retain for the ensuing school year a sufficient force of nursing personnel who will be able to perform the minimum mandated services, as well as additional mandated nurse services or discretionary services that the District may choose to provide.

Ultimate Findings

25. The evidence in this matter does not show that mandated services in the District for the ensuing school year are in jeopardy of being reduced below the level required

by law. (*California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32, 34-35; *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167; *Degner v. Governing Board* (1977) 67 Cal.App.3d 689.)

26. The recommendation of the District's Superintendent and the governing board's preliminary decision to eliminate or discontinue 19.20 FTE positions, including the positions held by each respondent, were neither arbitrary, fraudulent nor capricious. Rather, the Superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

27. The District's proposed elimination or discontinuation of a number of FTE positions, including the positions respectively held by respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

28. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Board lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

29. No competent and credible evidence establishes that as a result of the proposed elimination of the full-time equivalent positions respectively held by respondents herein, the District will retain any certificated employee who is junior to such respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non-reemployment of respondents.

4. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.) The District stipulates to withdraw the Accusation against the certificated employee named in Factual Finding 10. The stipulation is binding on the parties.

5. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford vs. Board of Trustees, supra*, 64 Cal.App.3d 167, 178-179.)

As to Respondent Thibeau

6. The District will eliminate or reduce other particular kinds of services by changing the method by which it provides nurse services. A particular kind of service may be eliminated or reduced even though a service continues to be performed or provided in a different manner. The California Supreme Court established this principle in 1935. *Davis v. Berkeley School District*³ held that a school district could layoff traveling art teachers, and instead assign regular classroom teachers to teach art to students. (*Fuller v. Berkeley School District* (1935) 2 Cal.2d 152, 159.)

This principle has been repeatedly reaffirmed by courts over the years. For example, *Campbell Elementary Teachers Association v. Abbott*⁴ upheld the district’s layoff of nurses, counselors, psychologists, and other specialists, explaining:

. . . a district may not dismiss an employee . . . and yet continue the identical kind of service and position held by the terminated employee. [Citation omitted.] But the *particular kind* of service of the employee may be eliminated even though a service continues to be performed or provided in a different manner by the district. [Citing *Davis, supra, Fuller, supra*, and other cases.] . . . Where, as here, the district apparently contemplated a change in the method of teaching or in the particular kind of service in teaching a subject, there was a discontinuance of the former particular kind of service.⁵

Even though a service must continue to be performed in a school district, the particular kind of service provided by the employee may be eliminated.

Rutherford v. Board of Trustees, in upholding a school district’s decision to reduce nursing services, stated, “even though a service must continue to be performed in a school

³ *Davis v. Berkeley School District* (1935) 2 Cal.2d 770.

⁴ *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796.

⁵ *Campbell Elementary Teachers Association, Inc. v. Abbott, supra*; see also *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853.

district, the particular kind of service of the employee may be eliminated.”⁶ The court explained that districts may reduce services by eliminating the service entirely, or “may ‘reduce services’ by determining that preferred services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.”⁷

The District plans to reduce the total amount of services currently provided by nurses, and also will change the method and manner in which it provides the remaining services. The District’s planned elimination and changed methods of providing nursing services are reasonable.

7. Regarding her position as a nurse, Respondent Thibeau is not persuasive when she alluded to Education Code section 49400 to support an argument that the District cannot reduce nursing services. Education Code section 49400 states, in its entirety: “[t]he governing board of any school district shall give diligent care to the health and physical development of pupils, and may employ properly certified persons to do the work.” This language or substantially similar language has been in California law since approximately 1907.⁸ In the more than 100 years of its existence, this statutory language apparently has been cited in only two school district cases and a very few Attorney General opinions. In all but one instance, this language was cited solely as a source of authority for a school district governing board to take some action not specifically authorized elsewhere in statutes.⁹ Respondent Thibeau has not, and cannot, point to any case interpreting section 49400 as defining a particular level of required “diligent care to the health” of pupils. On its face, section 49400 neither requires nor recommends any specific services a school district should or may provide to “give diligent care to the health and physical development of pupils.” More specific and more recent statutes provide the only framework for defining the health care services a school district is required to provide for students and the additional levels of health care a school district may choose, solely in its discretion, to provide.

8. Respondent Thibeau contends that, as a nurse, she is obligated to comply with unspecified Nursing Practices Act¹⁰ standards that sometimes conflict with also unspecified

⁶ *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 177.

⁷ *Id.*, 64 Cal.App.3d at pp. 178-179.

⁸ And note the discussion of precursor to the subject statute in *Beard v. Webb* (1917) 35 Cal.App. 332.

⁹ *Beard v. Webb, supra* (authority to employ and pay an optometrist); *Kern County Union School District v. McDonald* (1919) 180 Cal. 7 (authority to condemn land and build a gymnasium); 31 Ops.Atty.Gen. 27 (1958) (authority to approve and pay for preventive inoculations for employees or pupils); 62 Ops.Atty.Gen. 344 (1979) (authority to require random drug tests for student athletes); and 67 Ops.Atty.Gen. 55 (1984) (basis for determining that leased facilities meet the Field Act test of being used “for elementary or secondary school purposes”).

¹⁰ Business and Professions Code section 2700, et seq.

Education Code standards. But the Nursing Practices Act provides a code of ethics for nurses. The Nursing Practices Act does not address mandated student health care services, or the responsibilities of school districts in any way, and there are no provisions in the Act that even remotely address the responsibilities of school districts and school nurses. Consequently, the Nursing Practices Act does not restrict the District's ability to reduce or eliminate discretionary services.

As to All Affected Respondents

9. The services being reduced or discontinued by the District are particular kinds of services within the meaning of Education Code section 44955 (*Degner v. Governing Board, supra*, 67 Cal.App.3d 689).

Ultimate Conclusions

10. Cause exists under Education Code sections 44949 and 44955 for the Northern Humboldt Union High School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

No employee with less seniority than any respondent is being retained to render a service which any Respondent is certificated and competent to render.

11. The District's layoff action is necessary. The District's proposed action is consistent with the law. And, the District's contemplated layoff action is reasonable in its execution.

RECOMMENDED ORDER

1. The Accusations served on Respondents Jeffrey Gonzalez, Kelly Helms, Josh Kieselhorst, Allan Schmidt, and Marilyn Thibeau are sustained, except that the Accusation is dismissed as to Respondent Norma Watson.

2. Notice may be given to Respondents Jeffrey Gonzalez, Kelly Helms, Josh Kieselhorst, Allan Schmidt, and Marilyn Thibeau, before May 15, 2009, that their services will not be required for the 2009-10 school year because of the reduction or discontinuance of particular kinds of services as indicated in Resolution No. 11/2008-09.

DATED: April 30, 2009

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings