

BEFORE THE  
BOARD OF EDUCATION OF THE  
SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Carolina Barba-Ortiz, and Other  
Certificated Employees of the  
Santa Monica-Malibu Unified School District,  
  
Respondents.

OAH Case No. 2010030576

**PROPOSED DECISION**

Amy C. Lahr, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 15, 2010, in Santa Monica, California.

James Baca and Elizabeth Zamora-Mejia, of Atkinson, Andelson, Loya, Ruud & Romo, P.C., represented Tim Cuneo (Cuneo), Superintendent of the Santa Monica-Malibu School District (District).

Lawrence B. Trygstad, of Trygstad, Schwab & Trgystad, Inc., represented the 45 certificated employees as set forth in the District's Exhibit 10, which is incorporated by reference as if fully set forth herein, as well as the following five certificated employees: Kathryn Dehope, Tracy Kooy, Laura Meschel, Hong Le, and Henry Wadsworth (Respondents).

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2010-2011 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

At the hearing, the District withdrew the Accusation against Laura Check and Maribel Pulido.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

**FACTUAL FINDINGS**

1. Superintendent Cuneo filed the Accusation in his official capacity.
2. Respondents are certificated employees of the District.

3. On February 18, 2010, the Board of Education of the District (Board) adopted Resolution number 09-22, reducing or discontinuing the following services for the 2010-2011 school year:

	<u>Service</u>	<u>Full-Time-Equivalent Positions</u>
1.	Nursing Services	3.0
2.	Middle School Counseling Services	4.0
3.	High School Counseling Services	3.0
4.	Student Support Advisor Services	2.0
5.	Elementary Music Instruction	10.0
6.	Elementary Teaching Services	42.0
7.	Secondary English Teaching Services	4.0
8.	Secondary Mathematics Teaching Services	5.0
9.	Secondary Physical Science Teaching Services	2.0
10.	Secondary Life Science Teaching Services	1.0
11.	Secondary Social Studies Teaching Services	4.0
12.	Secondary Humanities Teaching Services	3.0
13.	Secondary Art Teaching Services	1.0
14.	Secondary Physical Education Teaching Services	2.0
15.	Secondary Music Teaching Services	0.2
16.	Child Development Lead Teaching Services	2.0
17.	Child Development Teaching Services	<u>4.0</u>
Total		92.2

4. Superintendent Cuneo thereafter notified the Board that he recommended that notice be provided to Respondents that their services will not be required for the 2010-2011 school year due to the reduction or discontinuance of particular kinds of services.

5. By March 12, 2010, Assistant Superintendent Michael D. Matthews (Dr. Matthews) provided notice to Respondents that their services will not be required for the 2010-2011 school year due to the reduction or discontinuance of particular kinds of services.

6. Respondents timely requested a hearing to determine if there is cause for not reemploying them for the 2010-2011 school year.

7. On or about March 23, 2010, the District issued the Accusations, and served them on Respondents.

8. Respondents thereafter filed timely notices of defense.

9. All prehearing jurisdictional requirements have been met.

10. 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 section 44955.<sup>1</sup>

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

12. The reduction 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 Board.

13. The Board properly considered all known attrition in determining the actual number of necessary layoff notices to be delivered to its employees.

14. Resolution number 09-22, adopted at the Board's meeting on February 18, 2010, established that the "Board is authorized by Education Code section 44955 to deviate from terminating certificated employees in order of seniority where the district demonstrates a specific need for personnel to teach a specific course or course of study." In addition, the resolution provides that "the Superintendent, or designee, is delegated the authority to take all actions necessary and proper to the accomplishment of the purposes of this Resolution." Contrary to Respondents' counsel's argument, the resolution language provides the District with authority to retain, or "skip" employees with less seniority, provided the District demonstrates the requisite criteria.

15. Dr. Matthews has served as the Assistant Superintendent for Human Resources at the District for six years. Dr. Matthews stated that the District seeks to "skip" from the layoff order the following certificated employees: Judith Miller, a mental health counselor; Michael Corrigan, a band director; and two elementary school teachers from the bilingual dual immersion school, Carlos Morales and Judith Rodriguez. With regard to the mental health counselor, he explained that the District has a need for experienced personnel in the area of acute trauma and crises, and the need for therapeutic services to be provided to students and families. Regarding the band director, Dr. Matthews proudly stated that the District is renown for its music programs; it has one of the best high school marching bands in the country, and that it requires a the band director with a great deal of experience, especially with marching bands, to maintain its reputation. As for the bilingual dual immersion school, Dr. Matthews explained that there are very few of these programs in the state or nation, and he emphasized that the teaching positions

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

require a BCLAD certificate, as well as special skills and training. After consulting with the respective department heads to gather information, the District determined that the employees retained possessed the special skills and experience necessary to fill the corresponding need.

The District has demonstrated its specific needs for personnel to teach specific courses. It has also shown that employees Judi Miller, Michael Corrigan, Carlos Morales, and Judith Rodriguez have the special training and experience necessary to provide the needed services; and that no employees with higher seniority dates possess the same special training and experience.

16. Resolution number 09-21, adopted at the Board's meeting on February 18, 2010, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. In the tie-breaking process, number four states that an employee holding a currently valid and properly filed, non-emergency Bilingual, Crosscultural, Language and Academic Development (BCLAD) Certificate, or equivalent, wins the tie-breaker.

17. Respondent Joanna Orozco is a full-time kindergarten teacher at Edison Language Academy (Edison), with a seniority date of August 31, 2007. She shares this date with another teacher, Carlos Morales, who is a fifth grade teacher at Edison. The District retained Mr. Morales because he possesses a BCLAD certificate. Ms. Orozco does not currently have a BCLAD Certificate. She has taken the necessary examinations and is awaiting the results. Ms. Orozco claims that she did not know that she had to take additional examinations in order to obtain her BCLAD certificate until March 2010. She blames the District for not informing her of the requirements sooner. Her argument is without merit. Ms. Orozco agreed that it is her responsibility to know the requirements of obtaining a BCLAD. Because Ms. Orozco does not yet possess her BCLAD certificate, the District was not required to consider this credential when determining the layoff order. (*Degener v. Governing Bd.* (1977) 67 Cal. App. 3d 689, 698; *Campbell Elementary Teachers Ass'n v. Abbott* (1978) 76 Cal. App. 3d 796, 814-15.) The District appropriately applied its tie-break criteria. The evidence did not establish that the criteria, or its application, were arbitrary or capricious, or in violation of the Education Code.

18. Respondent Monica Micale is a full-time kindergarten teacher at Franklin Elementary, also with a seniority date of August 31, 2007. Ms. Micale claims that she has fulfilled all of the requirements necessary to obtain her BCLAD; however, she does not currently possess the certificate because it is being processed by the Commission on Teacher Credentialing (CTC). Although Ms. Micale successfully passed the BCLAD examination requirements in June 2007, she chose to wait until February 2010 to file for her certificate because she thought her present teaching position did not require it. Ms. Micale chose to file for the certificate through the District, as opposed to filing directly with the CTC. As of the hearing date, the CTC had not yet issued Ms. Micale's credential. Ms. Micale acknowledged that she does not know if having the BCLAD certificate would have saved her position. Ms. Micale

cannot blame the District for her delay, from June 2007 through February 2010, in filing to obtain her BCLAD certificate. As stated above, the District is not required to consider a credential that an employee does not currently possess. Thus, the District properly determined the layoff order with respect to Ms. Micale.

19. Respondent Jennifer Matthews is a school counselor at Lincoln Middle School, and her seniority date is August 1, 2007. She holds a Masters degree in Social Welfare and is a Licensed Clinical Social Worker. Respondent Matthews testified that she can perform the duties of the mental health counselor that Judi Miller, a less senior employee, was retained to perform. Ms. Miller, whose seniority date is April 14, 2008, holds a certification in Peer Negotiation, and a certification from the Office of Criminal Justice Crisis Intervention. Ms. Miller has had post-graduate training in trauma and substance abuse, and school crisis management. In addition, Ms. Miller has experience supervising therapists; and is able to supervise interns who can provide free counseling services. The evidence showed that these special skills and experience are necessary to fill the District's specific need. Respondent Matthews does not hold certifications in Peer Negotiations or from the Office of Criminal Justice. She has not had any formal training in crisis management, and no post-masters coursework. Although Respondent Matthews has supervised interns, she has not had any experience supervising other therapists. Therefore, Respondent Matthews does not possess the special training and experience necessary to perform the duties of the mental health counselor. (See *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 142.)

20. Respondent Kevin McKeown is an elementary music school teacher, with a seniority date of May 22, 2006. He holds a Bachelor's degree in Music Education, and a Master's degree in Music Conducting. He has served as the Band Director at Santa Monica College since 2002, and in other band director positions; none were marching bands. Respondent McKeown thinks that he can fulfill the band director position requirements that Michael Corrigan, a less senior employee, was retained to execute. Mr. Corrigan, whose seniority date is September 4, 2009, has more than 40 years experience as a band director, including many years working with marching bands. He has personally received numerous awards for his band direction, and he has also led marching bands to receive first place awards in various competitions. Mr. Corrigan has taken the District's marching band to new heights in the 2009-2010 school year. The evidence showed that that these special skills and experience are necessary to fill the District's specific need. Respondent McKeown acknowledged that he has not ever served in the capacity of a band director of a marching band. Thus, Respondent McKeown does not possess the special training and experience necessary to perform the duties of the band director.

21. Respondent Mara Chenik is a first grade teacher at Roosevelt Elementary School, with a seniority date of September 1, 2006. She is currently a tenured employee and received proper notice of this proceeding. Respondent Chenik questioned whether her seniority date was accurately calculated. The relevant timeline of her work history with the District is as follows:

2002-03	Temporary second grade teacher
2003-04	Long-term substitute teacher
2004-05	Part-time reading teacher
2005-06	Temporary full-time first grade teacher
2006-07	Full-time teacher; status at issue

Respondent Chenik is currently a tenured employee. With regard to the 2006-07 school year, Respondent Chenik began teaching first grade on September 1, 2006. She taught without a contract until September 19, 2006, and initially received a probationary contract on that date. Shortly thereafter, the District’s human resources department informed her that it mistakenly gave her a probationary contract; she was to be under a temporary contract. The District then issued a revised contract to Respondent Chenik on September 29, 2006, which stated that the contract was temporary. Respondent Chenik signed the temporary contract; and the District classified her as a temporary employee for that school year.

22. With the exception of Respondent Chenik, as explained below in legal conclusion number 4, no certificated employee junior to any Respondent was retained to render a service which any Respondent is 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 9.

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 10.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 22.

4. The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) A certificated employee is classified as permanent, i.e., acquires tenure, if, after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected for the following year. (§ 44929.21, subd. (b); *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1278-1279.) Probationary employees are “those persons employed in positions requiring certification qualifications for the school year, who have

not been classified as permanent employees or as substitute employees.” (§ 44915.) Substitutes are “those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. . . .” (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Education Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146.)

Districts are required to provide employees with written notice of their classification when first hired. (§ 44916; *Kavanaugh, supra*, 29 Cal.4th at 911.) Section 44916 provides:

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

The Supreme Court of California has interpreted this to mean “that certificated teachers must be informed in writing, on or before their first date of paid service to their employing districts, of their salary and employment status.” (*Kavanaugh, supra*, 29 Cal.4th at p. 921.) Failure to provide notice of temporary employment as required by section 44916 results in probationary service as a matter of law. (*Id.*, at p. 926.)

Respondent Chenik began teaching on September 1, 2006; but she did not receive a written statement indicating her temporary status until September 29, 2006. Thus, because the District failed to give her written notice of the temporary contract on her first date of paid service, Respondent’s Chenik became a probationary employee in the 2006-07 school year. According to Section 44920, Respondent Chenik’s proper seniority date is then one year earlier, September 2, 2005, which is her first paid date of service in the year when she served as a temporary employee. Because Respondent Chenik was hired as a probationary employee for the following school year, her temporary status converted to probationary pursuant to section 44918, subdivision (a).

Given that Respondent Chenik’s correct seniority date is September 2, 2005, her current position in the layoff order is incorrect. To determine whether the District retained an employee junior to Respondent Chenik that she is certificated and competent to perform, a review of the

seniority chart is necessary. The evidence showed that there is one potential position that Respondent Chenik could be eligible to perform; that of Jacqueline Papale. Ms. Papale was retained, and not subject to this proceeding. Both Respondent Chenik and Ms. Papale hold clear, multiple subject credentials and Crosscultural, Language and Academic Development (CLAD) certifications, and are highly qualified elementary education teachers under the No Child Left Behind Act. Because they share the same seniority date, the District should have applied Resolution No. 09-21, which set forth the tiebreaker criteria, to determine whether Respondent Chenik is eligible to hold the position that Ms. Papale has retained. The District did not provide sufficient information for the undersigned ALJ to apply the tiebreaker criteria and make that determination. Thus, the District has not established that it is not retaining a certificated employee junior to Respondent Chenik to render a service which she is certificated and competent to render. Accordingly, the Accusation against Respondent Chenik must be dismissed.

5. Cause does not exist to terminate the service of Respondent Mara Chenik, by reason of factual finding number 21, and legal conclusion number 4.

6. Cause exists to terminate the services of the 42 Respondents listed in Exhibit 10 (excluding Laura Check, Maribel Pulido, and Mara Chenik); and Kathryn Dehope, Tracy Kooy, Laura Meschel, Hong Le, and Henry Wadsworth, by reason of factual finding numbers 1 through 19, and legal conclusion numbers 1 through 3.

#### ORDER

The Accusations are sustained and the District may notify Respondents listed in legal conclusion number six, except for those specifically excluded, that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services.

DATED: May 5, 2010

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AMY C. LAHR  
Administrative Law Judge  
Office of Administrative Hearings