

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

In the Matter of the Reduction in Force of:  CERTIFICATED EMPLOYEES (NURSES) OF THE SANTA MONICA- MALIBU UNIFIED SCHOOL DISTRICT,  Respondents.	OAH No. 2011030355
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**PROPOSED DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 25, 2011, in Santa Monica.

Elizabeth Zamora-Mejia, Attorney at Law, represented the Santa Monica-Malibu Unified School District (District).

Deborah Eshaghian, Attorney at Law, represented Rachel Bressler Deese, Sandra Cano, JoAnn Housman, Margaret Mahon, Nora McElvain, Aimee Rand, Teri Sachs, and Sherry Waldorf (respondents), all of whom were present at the hearing.

The District has decided to reduce or discontinue certain services and has given respondents notice of its intent not to reemploy them for the 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

Oral and documentary evidence was received at the hearing. The record was closed and the matter was submitted for decision on April 25, 2010.

**FACTUAL FINDINGS**

1. Tim Cuneo, the District's Superintendent, and Debra Moore Washington, the District's Assistant Superintendent, Human Resources, took all relevant actions in their official capacity.

2. Respondents are certificated employees of the District.

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3. On February 17, 2011, the Board of Education (Board) of the District adopted Resolution No. 10-20 (Ex. 1) reducing or discontinuing the following particular kinds of services (PKS) for the 2011-2012 school year:

<u>Services</u>	<u>FTE</u> <sup>1</sup>
K-5 Classroom Teaching Services	6.0
Nursing Services	<u>5.6</u>
Total Certificated Positions	11.6

4. Resolution No. 10-20 further provides, among other things, that, due to the need of the District to retain those school nurses with special training, skills, and experience to provide bilingual nursing services to English Language Learners, which more senior school nurses do not possess, the Superintendent or his designee may deviate from terminating those school nurses in order of seniority where they can demonstrate that they are bilingual and fluent in both English and Spanish and that they are currently providing nursing services to District students whose primary language is other than English. Resolution No. 10-20 further provides that due to the need of the District to retain those school nurses with special training and experience to serve in the position of District Coordinating Nurse, the Superintendent or his designee may deviate from terminating those school nurses in order of seniority where they have special training and experience to serve in the position of District Coordinating Nurse.

5. The Board further determined that due to the reduction or discontinuance of particular kinds of services, the corresponding number of certificated employees of the District shall be terminated at the end of the 2010-2011 school year, and directed the Superintendent or his designee to take all actions necessary and proper to accomplish the purposes of Resolution No. 10-20.

6. On or before March 15, 2011, the District provided written notice to respondents, under Education Code sections 44949 and 44955,<sup>2</sup> that their services would not be required for the 2011-2012 school year. Each written notice set forth the reasons for the District's decision and noted that 11.6 FTE positions, consisting of 6.0 FTE K-5 classroom teaching positions and 5.6 FTE nursing services positions, would be reduced or discontinued.

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<sup>1</sup> Full-time equivalent position.

<sup>2</sup> All statutory citations are to the Education Code, unless indicated otherwise.

7. Between March 18 and March 22, 2011, the District filed and served the Accusation and related documents on respondents.<sup>3</sup> Respondents thereafter timely filed Notices of Defense, seeking a determination of whether cause exists for not reemploying them for the 2011-2012 school year.<sup>4</sup>

8. All prehearing jurisdictional requirements have been met.

9. The services set forth in factual finding 3 are particular kinds of services that may be reduced or discontinued within the meaning of section 44955.

10. The Board took action to reduce the services set forth in factual finding 3 because of uncertainty surrounding future state funding. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to reduce the particular kinds of services is related solely to the welfare of the District and its pupils, and is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

11. For the 2010-2011 school year, the District employed 11 nurses filling 9.8 FTE positions. These individuals provided a multitude of services to approximately 11,500 students at 16 schools and a child development site. A portion of the student population has serious health issues, including asthma and diabetes. Some students require specialized physical or mental health care services. The school nurses develop care plans for students, and coordinate and perform mandated vision, hearing, and scoliosis screening. They also perform federally mandated student assessments as part of the special education process.

12. Resolution No. 10-20 reduces 5.6 FTE nursing services positions. This would leave the District with 4.2 FTE credentialed school nurses. Several respondents contend that the District will not be able to provide federal and state mandated services to students with only 4.2 FTE school nurses.

13. Debra Moore Washington, the District's Assistant Superintendent, Human Resources, was involved in recommending reductions in particular kinds of services, as reflected in Resolution No. 10-20, including the reduction in nursing services. The District acknowledged that it must continue to provide legally mandated health services, including hearing, vision, and scoliosis screening. The District argued that the Education Code does not mandate that all the health care services

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<sup>3</sup> The District served precautionary written notices and Accusations on respondents Mahon and Rand even though the District proposes to retain the services of those respondents. (See factual finding 20.)

<sup>4</sup> All respondents provide nursing services. None of the K-5 classroom teachers filed a hearing request.

which the District's school nurses are currently providing must be provided by a certificated school nurse employed by the District. The District believes it will be able to meet its legal obligations to provide mandated services to students with 4.2 FTE certificated school nurses and additional services provided through other means that the District is currently exploring through the use of an ad hoc committee that will make recommendations to the Board. Other means being considered include the use of non-employee licensed vocational nurses or health clerks working under the supervision of registered nurse employees of the District. The District's argument was persuasive.

### *Seniority*

14. At hearing, respondent Housman questioned her seniority date of August 31, 1998. She testified that she was first hired by the District for the 1994-1995 school year as a temporary nurse, working three days per week, and that she accepted other temporary positions at the District between 1994 and 1998. She testified that she does not believe she worked 75 percent of full-time or more in any school year before 1998. The parties agree that the issue of respondent's seniority date is not dispositive of the District's right to lay off respondent in these proceedings. Based on the evidence presented, Ms. Housman's seniority date is August 31, 1998.

### *Tie-Breaking*

15. On February 17, 2011, the Board adopted Resolution No. 10-22 establishing tie-breaker criteria for determining the relative seniority of certificated employees with the same date of first paid service. The criteria provide that the order of layoff shall be determined according to the following criteria:

1. Possession of a Clear School Nurse Services Credential.
2. Experience serving in the position of District Coordinating Nurse.
3. Number of verified years of certificated employee's actual work experience within the District.
4. Number of verified years of employment as a school nurse in other school districts in California.
5. Number of verified total full time years of employment as a licensed nurse.
6. Assuming the preceding paragraphs do not resolve all ties, the tie will be broken by drawing of lots.

16. The tie-breaking criteria of Resolution No. 10-22 were applied in this matter to resolve a tie in seniority amongst certificated personnel, specifically to Lora Morn, who holds a school nurse services credential, and respondent JoAnn Housman. Both have a seniority date of August 31, 1998. The District applied criteria one—possession of a Clear School Nurse Services Credential—and then two—experience serving in the position of District Coordinating Nurse—which broke the tie in favor of Ms. Morn.

17. Ms. Housman testified to her belief that all nurses should be able to take any nursing position in the District, that the nursing coordinator position was once contemplated to be a shared position, and that she has experience in team meetings coordinating the Headstart program, and in ensuring compliance with federal requirements for that program, at the Child Developmental Services preschool.

18. School districts are given wide discretion in determining tie-breaking criteria.<sup>5</sup> In this case, the District reasonably exercised its discretion by giving credit for tie-breaking purposes to those with experience serving in the position of District Coordinating Nurse, given the need of the District expressed in Resolution No. 10-20 to retain those school nurses with special training and experience to serve in the position of District Coordinating Nurse. It cannot be concluded that the failure to include Headstart coordinating experience or the capabilities of the District's school nurses as a general matter in the tie-breaking criteria was an abuse of discretion or otherwise rendered the tie-breaking process not solely related to the welfare of the District and its students.

### *Skipping*

19. On February 17, 2011, the Board adopted Resolution No. 10-23, which provides in part that, due to the need of the District to retain those individual school nurses with special training, skills, and experience to provide bilingual nursing services to English Language Learners, which more senior school nurses do not possess, the Superintendent or his designee are authorized to deviate from terminating those school nurses in order of seniority in instances where they can demonstrate (a) they are bilingual and fluent in both English and Spanish, or another language that the District determines is utilized as the primary language for a significant number of parents or students, and (b) that they are currently providing nursing services to District students whose primary language is other than English. Resolution No. 10-23 further provides that, due to the need of the District to retain those individual school nurses with special training and experience to serve in the position of District Coordinating Nurse, the Superintendent or his designee are authorized to deviate from

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<sup>5</sup> Section 44955, subdivision (b), requires only that such criteria be based “solely on the basis of needs of the District and the students thereof.”

terminating those school nurses in order of seniority where they have special training and experience to serve in the position of District Coordinating Nurse.

20. The District seeks to retain two respondents, Margaret Mahon and Aimee Rand, who were served precautionary layoff notices and who are junior to other respondents. Both hold credentials that enable them to provide school nursing services.

21. All respondents contested the application of the District's skipping criteria set forth in Resolution 10-23. Respondents Cano and Waldorf argued that they are bilingual and are more senior than respondents Mahon and Rand. Other respondents argued that the criteria are arbitrary in that they are not clearly defined or that nursing services may be provided to Spanish-speaking pupils with the aid of a liaison.

22. In applying those criteria, the District ascertained respondents' experience through a questionnaire asking each respondent whether she speaks a second language, considers herself bilingual, has taken any courses or had any training in a second language or has had any training to help in the delivery of bilingual services, and is currently using a second language in the delivery of services and, if so, the percentage of time she uses that second language in the delivery of services.

23. Respondent Mahon is in a 0.8 FTE position and has a seniority date of August 30, 2002. Ms. Mahon testified that she has performed proficiently in Spanish as a nurse, and worked at the District's Edison Language Academy (Edison), a dual immersion program elementary school, for eight years.

24. Respondent Rand is in a 0.4 FTE position and has a seniority date of September 4, 2009. Ms. Rand is a school nurse at Edison. She testified that she speaks and writes Spanish and that, at Edison, she speaks Spanish about 50 percent of the time she is delivering nursing services.

25. Respondent Cano, who is in a 0.5 FTE position and who has a seniority date of September 2, 2005, testified that she considers herself bilingual. She testified that she studied Spanish in high school and for two years in college, has worked in local hospitals for over 30 years, where she has used Spanish, substituted at Edison about ten times during the 2009-2010 school year, and currently uses Spanish about five percent of the time she is delivering nursing services.

26. Respondent Waldorf, who is in a 1.0 FTE position and who has a seniority date of August 30, 2002, testified that she studied Spanish for two years in college, and once participated in a live-in program in Cuernavaca, Mexico. She testified that she has not needed to use Spanish a lot over the years and, sometimes with the aid of an interpreter, has been able to communicate with students in Spanish.

27. Respondents Bressler Deese, Housman, McElvain, and Sachs admitted that they are not bilingual.

28. A school district may deviate from terminating certificated employees in order of seniority where it demonstrates a specific need for personnel to provide services authorized by a services credential with, in the case of school nurses, a specialization in health that others with more seniority do not possess and that the certificated employee has special training and experience necessary to provide those services.<sup>6</sup> The District demonstrated a specific need for nurses with special training, skills, and experience to provide bilingual nursing services to English Language Learners.

29. The criteria used by the District to ascertain which school nurses have the requisite training, skills, and experience are neither arbitrary nor capricious but are rather a proper exercise of the District's discretion, except insofar as they require that a school nurse currently be using a second language in the delivery of services. Requiring current, rather than recent, use of a second language in the delivery of nursing services does not rationally distinguish, as to the ability to provide specialized services for the District, between nurses who are bilingual. Nor did the District, although it requested information about the percentage of time spent delivering nursing services in a second language, establish any scoring system or any cutoff below which the nurse's experience would be deemed inadequate.

30. The respondents with greater seniority than the two retained respondents served with precautionary notices failed to demonstrate that they possess the experience and specialized training that would allow them to provide the specialized services, with the exception of Ms. Cano, who did submit evidence sufficient to show that she possesses the required experience and specialized training. The Accusation is, therefore, dismissed as to Ms. Cano, who is in a 0.5 FTE position. Ms. Cano is senior to both Ms. Mahon and Ms. Rand; Ms. Mahon is senior to Ms. Rand. The Accusation is, therefore, sustained as to Ms. Rand, who is in a 0.4 FTE position. Ms. Mahon, who is in a 0.8 FTE position, has demonstrated the requisite training and experience to provide the services. The Accusation is, therefore, sustained as to Ms. Mahon with respect to 0.1 FTE only, and is dismissed as to Ms. Mahon with respect to a 0.7 FTE position.

#### *Other Findings*

31. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

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<sup>6</sup> Section 44955, subdivision (d)(1).

32. Except as set forth in factual finding 14, there was no challenge to the order of seniority on the seniority list.

33. The District properly considered all known attrition, resignations, retirements, and requests for transfer in determining the number of layoff notices to be delivered to employees by March 15, 2011.

34. Except as set forth in factual finding 30, the District did not retain any certificated employee junior to respondents to render a service that respondents are certificated and competent to render.

### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists under sections 44949 and 44955, by reason of factual findings 1 through 8.

2. The services identified in factual finding 3 are particular kinds of services that may be reduced or discontinued under section 44955, by reason of factual findings 3 and 9.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual findings 1 through 34.

4. School districts “shall give diligent care to the health and physical development of pupils, and *may* employ properly certified persons for the work.” (§ 49400 (italics added).) School districts must also “maintain fundamental school health services at a level that is adequate to accomplish all the following: [¶] (1) Preserve pupils’ ability to learn. [¶] (2) Fulfill existing state requirements and policies regarding pupils’ health. [¶] (3) Contain health care costs through preventive programs and education.” The Education Code requires school districts to conduct sight and hearing screening (§ 49452) and scoliosis screening (§ 49452.5). The Education Code also contains provisions governing the administration of medication to students (§ 49423) and the delivery of specialized physical health care services and other services that require medically related training (§ 49423.5.)

5. Courts have permitted districts to reduce or discontinue particular kinds of services, including those of school nurses, as long as mandated services continue to be performed. (See *Gallup v. Alta Loma School District Board of Trustees* (1996) 41 Cal.App.4th 1571, 1585-1589; *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 639-640.) These statutory provisions do not, however, require that only certificated school nurses can provide the described health care services. (*Gallup v. Board of Trustees, supra*, 41 Cal.App.4th at pp. 1585-1589, distinguishing *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

6. The District plans to continue to provide state-mandated nursing services, and it was not established that the discontinuation of nursing services set forth in factual finding number 3 will preclude the District from discharging its health care obligations. The District need not have a finalized plan in place for the provision of nursing services for the 2011-2012 school year at the time that it opts to reduce or eliminate nursing services and give notice to affected certificated employees. It must be presumed, absent evidence to the contrary, that the District will comply with its legally mandated obligations (Evid. Code § 664; *Degener v. Governing Board* (1977) 67 Cal. App.3d 689, 696.) The District has discretion to determine how and in what manner mandated services are to be provided. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 811; *Gallup v. Board of Trustees, supra*, 41 Cal.App.4th at pp. 1582-1590.) Changing the way in which a service is to be performed constitutes a reduction in a particular kind of service, as does having fewer employees available to perform the service. (*Rutherford v. Board of Trustees* (1976) 64 Cal. App.3d 167, 179; *Campbell Elementary Teachers Assn. v. Abbott, supra*, 76 Cal.App.3d at p. 811.) The evidence did not establish that the District would not be able to provide all legally mandated health care services to students if it reduces its certificated school nursing staff by 5.6 FTE positions.

7. Respondent Cano shall be retained in a 0.5 FTE position and respondent Mahon shall be retained in a 0.7 FTE position, by reason of factual findings 19-30. The Accusation may be dismissed as to Ms. Cano, and may be dismissed in part as to Ms. Mahon.

8. Cause exists to terminate the services of respondents Rachel Bressler Deese, JoAnn Housman, Nora McElvain, Aimee Rand, Teri Sachs, and Sherry Waldorf, by reason of factual findings 1 through 34 and legal conclusions 1 through 7.

#### ORDER

The Accusation is sustained as to respondents Rachel Bressler Deese, JoAnn Housman, Nora McElvain, Aimee Rand, Teri Sachs, and Sherry Waldorf, and the District may notify them that their services will not be required for the 2011-2012 school year due to the reduction of particular kinds of services. The Accusation is dismissed as to respondent Sandra Cano. The Accusation is dismissed in part and sustained in part as to respondent Margaret Mahon.

Dated: May 3, 2011

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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings