

BEFORE THE  
BOARD OF EDUCATION  
OF THE  
ESCONDIDO UNION SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2009020583

Respondents listed in Appendix A.

**PROPOSED DECISION**

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Escondido, California on April 2, 2009.

Dean T. Adams, Fagen Friedman & Fulfroost, LLP, represented the Escondido Union School District.

Fern M. Steiner, Tosdal, Smith, Steiner & Wax, represented the respondents listed in Appendix A.

No appearance was made by or on behalf of respondents Mary Deborah Elliott, Francis Quigue, C. Alexis Tate, Jennifer Lynn Wade, and Jamie R. Washington.

The matter was submitted on April 2, 2009.

**FACTUAL FINDINGS**

1. Jennifer Walters, Superintendent, Escondido Union School District, made and filed the accusation dated March 13, 2009, in her official capacity.
2. Respondents are the 35 certificated District employees identified in Appendix A.<sup>1</sup>

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<sup>1</sup> The District initially identified 55 certificated employees as respondents. One of those 55 employees did not receive the notice described below in Finding 5, and thus will not be laid off; 19 others did not file a request for hearing, and thus waived their right to a hearing to challenge their lay off. The 35 remaining respondents are parties to this proceeding and are identified in Appendix A.

3. On February 26, 2009, the Board adopted Resolution No. 2008-09-20, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The Board determined that the particular kinds of services that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary Teacher	25.0
Teacher on Special Assignment	15.0
Nurse	1.0
Psychologist	1.0

The proposed reductions totaled 42 FTE positions.

4. The Board directed the Superintendent to send appropriate notices to all certificated employees of the District who would be laid off as a result of the reduction of these particular kinds of services.

5. On or before March 15, 2009, the District timely served on respondents a written notice that the Superintendent had recommended that their services would not be required for the upcoming school year. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

6. Subsequent to the action the Board took on February 26, 2009, to reduce particular kinds of services by 42 FTE positions, the District continued to evaluate its personnel needs. After taking into consideration upcoming positively assured attrition, including resignations and retirements, the District has now determined it can meet its fiscal needs by reducing services by a total of 41 FTE positions for the 2009-2010 school year.<sup>2</sup> To accomplish this reduction of services, the District must give final notices of termination to the 35 certificated employees who are the respondents in this proceeding.

7. Respondents timely filed written requests for hearing to determine if there was cause for not reemploying them for the upcoming school year. The accusation, along with required accompanying documents, was thereafter timely served on respondents.

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<sup>2</sup> Specifically, the District rescinded the 1.0 FTE psychologist reduction.

Respondents were deemed to have filed timely notices of defense. All pre-hearing jurisdictional requirements were met.

8. Respondents are probationary or permanent certificated employees of the District.

9. The services the Board addressed in Resolution No. 2008-09-20 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

Respondent Lisa Elliott, R.N, is a school nurse within the meaning of Education Code section 49426. Ms. Elliott testified as to her belief that the District does not employ a sufficient number of school nurses to maintain fundamental school health services at a level that is adequate to accomplish the matters set forth in Education Code section 49427. She testified in support of her opinion that, *inter alia*, California is ranked forty-fourth among the 50 states in terms of student to nurse ratio, that certain professional organizations recommend that the ratio be 750 students for every nurse, that the ratio in California as a whole is 2,230 to one, and that the ratio in the district is 6,900 to one. Ms. Elliott conceded that under California law, no specific mandated ratios of students to school nurses are prescribed. Ms. Elliott spoke with eloquence, sincerity, passion, and care in support of her opinion. However, the evidence presented did not establish that the District acted arbitrarily or capriciously with regard to its decision to reduce its school nurses by 1.0 FTE. Instead, the District’s action constituted a proper exercise of its discretion.

10. 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.

11. The Board considered attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

12. Initially, 55 certificated employees received layoff notices in connection with the 42 FTE positions the Board resolved to eliminate. The District did not know in advance in what particulars the Board’s resolution, or the District’s implementation thereof, would be challenged, and if challenged, whether the actions of the Board or the District would be upheld in this proceeding. The District’s issuance of termination notices was based on its careful and reasonable assessment, constituted a proper exercise of its discretion, and was neither arbitrary nor capricious.

13. Between those employees who first rendered paid service to the District on the same date, the Governing Board determined their order of termination solely on the basis of needs of the District and the students. The specific criteria used to determine the order of termination were:

- a. Number of teaching and/or special service credentials  
**Rating: +1 per credential**
- b. Number of supplementary authorizations  
**Rating: +1 per supplementary authorization**
- c. Number of credentials and supplementary authorizations under which the employee meets the Highly Qualified Requirements under *No Child Left Behind*  
**Rating: +1 credential and supplemental authorization**
- d. Earned degrees beyond the BA/BS level  
**Rating: +1 per degree**
- e. BCLAD certified  
**Rating: +1 for BCLAD certification**
- f. Completion of SB472 training  
**Rating: +1 per each completed cycle of training**

The District properly applied the tiebreaker criteria with regard to certificated employees Anne O'Neill, Robert Riebel, Catrina Lieber, Krystle Miller, Albert Ngo, and Diane Chih.<sup>3</sup> The District properly determined that none of these employees, except for Diane Chih, were subject to layoff. The District properly gave notice to Ms. Chih that her services would no longer be required for the upcoming school year.

14. The District is seeking to exempt (skip) Michael De Neve. Mr. De Neve has a multiple subject credential, but is assigned to teach eighth grade math for the current school year. Effective July 1, 2007, pursuant to Board Resolution 2007-08-06, in accordance with Education Code sections 44256, subdivision (b), 44258.2 or 44263, Mr. De Neve was authorized to teach math, a course outside of his major or minor. Further, Mr. De Neve has been deemed competent to teach math pursuant to the "HOUSSE" (High, Objective, Uniform State Standard of Evaluation) method by virtue of his five years prior experience in teaching that subject. Respondents have neither alleged nor presented evidence that Mr. De Neve

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<sup>3</sup> Respondents Silvia Garcia, Cory Cunningham, Carrie Toorop, Julie Park, Julie Schafer, Katherine Nichols, Christine Davis, Kristine Christensen, Kyra Bowers, Kimberly Ontiveros, and Yadira Rodriguez all claimed that the tiebreaker criteria were applied improperly to them. However, even if they had been given the additional points to which they claimed they were entitled, they would all have remained subject to layoff. Accordingly, whether the tiebreaker criteria were properly applied to these employees is irrelevant to this proceeding and need not be determined.

does not have special training and experience necessary to teach math, which others with more seniority possess, or that for any other reason the skipping of Mr. De Neve is improper.

15. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

## 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. 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 v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

4. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. It is recommended that the Board give respondents notice before May 15, 2009, that their services are no longer required by the District.

ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained. Notice shall be given to respondents before May 15, 2009, that their services will not be required for the school year 2009-2010 because of the reduction or discontinuation of particular services as indicated.

DATED: \_\_\_\_\_

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DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

## Appendix A

1. BARBANI, ASA J
2. BASHEL, RICHARD
3. BENSON, JOSEPH
4. BLAKE, CHRISTY ELLEN
5. BOWERS, KYRA
6. CHIH, DIANE
7. CHRISTENSEN, KRISTINE B
8. CUNNINGHAM, CORY
9. DAME, HISAMI M
10. DAVIS, CHRISTINE MARIE
11. ELLIOTT, LISA DAWN
12. ELLIOTT, MARY DEBORAH
13. ERICKSON, PAUL
14. ESCALONA, SARAH
15. GARCIA, SILVIA
16. GILARDONE, CARRIE
17. LAUREL, NATHALIE M
18. MENDOZA, ALEJANDRA
19. NICHOLS, KATHERINE
20. ONTIVEROS, KIMBERLY S
21. ORTIZ, BRANDI RENEE
22. PARK, JULIE
23. PEET, ERIN
24. PRESLEY, CHARLOTTE CAROLINE
25. QUIOGUE, FRANCIS
26. ROBERTS, MARK
27. RODRIGUEZ, YADIRA
28. SCHAFER, JULIE
29. SPELTS, SAMANTHA
30. STEWARD, ROBERT
31. TATE, C. ALEXIS
32. TOOROP, CARRIE
33. VITTEK, VANESSA
34. WADE, JENNIFER LYNN
35. WASHINGTON, JAMIE R