

BEFORE THE  
GOVERNING BOARD  
MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE MARYSVILLE  
JOINT UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. 2009030335

**PROPOSED DECISION**

Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Marysville, California, on April 20, 2009.

Kingsley Bogard Thompson, LLP, by Paul R. Gant, Attorney at Law, represented the Marysville Joint Unified School District.

Langenkamp & Curtis, LLP, by Carolyn Langenkamp, Attorney at Law, represented 48 respondents identified in Exhibit A, a copy of which is attached hereto and incorporated herein by reference.

The matter was submitted for decision on April 20, 2009.

**FACTUAL FINDINGS**

1. Gay Todd, Ed.D., Superintendent of the Marysville Joint Unified School District (District), State of California, filed the Accusations in her official capacity as a public officer.

2. On February 26, 2009, the Board of Trustees of the Marysville Joint Unified School District (Board) adopted Resolution No. 2008-09/63, which reduced and/or discontinued particular kinds of certificated services no later than the beginning of the 2009-2010 school year.

3. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number of permanent and/or

probationary certificated employees at the close of the 2008-2009 school year by a corresponding number of full-time equivalent positions, and directed the Superintendent or her designee to proceed accordingly by notifying the appropriate employees to implement the Board's determination.

4. On or before March 15, 2009, the District served on 96 certificated employees, including respondents, a written notice that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation. The written notice attached and incorporated by reference Attachment A to Resolution No. 2008-09/63, which listed the services to be reduced or discontinued, resulting in a proposed reduction in the certificated staff by 58.3 full-time equivalent (FTE) positions.

5. Fifty-three certificated employees made a timely written request for a hearing to determine if there is cause for not reemploying them for the next school year.

6. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense were timely served on those certificated employees.

7. Notices of Defense were timely filed by 46 certificated employees (respondents).<sup>1</sup>

8. The following individuals were served with Accusations but did not file Notices of Defense, and were not represented by Ms. Langenkamp: Wendell Bolar, Lynda Bradbury, Christie Burns, Jesse Burns, Alma Pulgarin, Melissa Rodriguez, Amy Smith, and Peri Sutherland.

9. The parties stipulated that notices to the following certificated employees were rescinded by the District: Cassandra Astle, Jesse Burns, Youa Chue, Daniel De Vlaming, Megan Duarte, Robert Dunmore, Joseph Flood, James Graham, Miranda Hartridge, Heather Heap, Kathryn Heinz, Chris Hollingsworth, Duryea Jones, Lynnette Lucas, Jens Nielsen, Hailey Phelan, Billy Priddy, Alma Pulgarin, Melissa Rodriguez, James Rogers, Samantha Seavey, Joseph Seiler, Susan Trafford, Aileen Van Houten, Andrea Vitale, Jill Williams, Monica Wood, and Joua Xiong.

10. The parties further stipulated that Deanna Alexich shall be retained in 0.2 FTE position, and shall be laid off for 0.8 FTE; Michelle Hendrix shall be retained in 0.8 FTE, and shall be laid off for 0.2 FTE; and Michelle Jones shall be retained for 0.4 FTE, and shall be laid off for 0.6 FTE.

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<sup>1</sup> Joseph Flood and Michelle Hendrix did not file Notices of Defense, but were represented by Ms. Langenkamp. The District did not object to their inclusion as respondents in these layoff proceedings.

11. Except as set forth in Findings 9 and 10, any unrepresented employee (i.e., not listed on Exhibit A) that failed to file a request for hearing and/or a notice of defense, including the individuals listed in Finding 8, has waived his or her right to a hearing, and may be laid off by the District. No unrepresented employee appeared at the hearing.

12. Each respondent (set forth in Exhibit A) is presently a certificated probationary or permanent employee of the District.

13. Resolution No. 2008-09/63 called for the reduction or discontinuance of the following particular kinds of services for the 2009-2010 school year:

<b>Service</b>	<b>Grade Level</b>	<b>FTE</b>
Administrators	K-6	4.5
Elementary Education	K-6	27.0
Physical Education – Incentive Grant	K-6	3.6
Math	6-8	1.6
English/Language Arts	6-8	2.8
P.E.	6-12	1.0
Student Government	9-12	0.6
Voc. Arts/Cooking	9-12	0.2
English/ELD	9-12	0.4
Ag/Science	9-12	0.8
Health	9-12	0.2
Special Day Class	K-12	3.0
Beginning Teachers Support (BTSA)	K-12	3.0
Teachers on Special Assignment (Science Facilitator)	K-12	1.0
Teachers on Special Assignment (Reading Resource)	K-12	2.0

<b>Service</b>	<b>Grade Level</b>	<b>FTE</b>
Counselors – School Counseling Grant	K-12	4.6
Nursing	K-12	2.0
District Total		58.3

The above-described services are “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section 44955.

14. In arriving at the number of certificated employees required to be terminated, Resolution No. 2008-09/63 states that the Board “considered anticipated certificated employee attrition (resignation, retirements, non-reelections, temporary teacher releases, etc.)” as of February 26, 2009. The Board concluded that, notwithstanding any vacancies resulting in positively assured attrition, it would still be necessary to terminate certificated employees equal to 58.3 FTE.

15. The District maintains a seniority list which contains pertinent information such as employees’ date of first paid service, current assignment, and credentials on file. The District used the seniority list to develop a proposed layoff list. The District considered whether senior employees currently assigned in the various services being reduced or eliminated could displace, or “bump,” more junior employees. In determining who would be laid off for each kind of service reduced or eliminated, the District first applied known vacancies and then applied in progressive sequence the seniority list in inverse order, from least to most senior. Employees with the same date of hire were laid off according to the needs of the District and its students.

*Application of Tiebreaking Criteria*

16. On February 26, 2009, the Board adopted Resolution No. 2008-09/62, which set forth criteria “to be applied, in the order listed, to determine the relative seniority of those certificated employees who first rendered paid probationary service on the same day.” (tiebreaking criteria). The following criteria were listed in Resolution No. 2008-09/62:

- a. NCLB/HOUSSE compliance in an area of program need;
- b. CLAD or other authorization to serve English Language Development (ELD) students;
- c. Possession of credential needed by a particular district or school program;
- d. Breadth of credential needed by a particular district or school program;
- e. Clear credential over preliminary credential;

- f. Subject matter experience needed by a particular district or school program;
- g. All other criteria being equal, by lot.

#### Consideration of Experience in Other School Districts

17. At the Board's February 26, 2009 meeting, two motions were made to amend the tiebreaking criteria to add language permitting consideration of "additional experience in other districts." Both motions failed, and the tiebreaking criteria was adopted as initially proposed.

18. Ramiro Carreón is the Assistant Superintendent – Personnel Services for the District. Mr. Carreón was responsible for the application of the tiebreaking criteria to affected employees with the same seniority date. With respect to criteria f., Subject matter experience needed by a particular district or school program, Mr. Carreón testified that he only considered the type of credential held by the employee in determining "subject matter experience."

19. At hearing, the following respondents contended that the District should consider their teaching experience outside the District in determining subject matter experience: Mailee Lor; Nicole Robertson; Sia Cha Xiong; Arie Choy Phongmany; Jennifer McAdam; and Genae Du Chateau-Belding. However, the Board considered and rejected proposals to consider experience outside the District as a tiebreaking criterion. Under those circumstances, Mr. Carreón's interpretation of the tiebreaking criteria was a reasonable exercise of discretion, and was not arbitrary or capricious. The arguments of respondents to the contrary were not persuasive.

#### Use of the Lottery to Determine Relative Placement on the Seniority List

20. There were 41 certificated employees with the seniority date of August 17, 2007. Of those, 17 employees had multiple subjects (MS) credentials, without supplemental authorizations or other credentials. When Mr. Carreón originally applied the tiebreaking criteria, he conducted a lottery to determine the relative seniority of these employees. He subsequently determined that 10 of the 17 employees had clear credentials and seven had preliminary credentials. Under criteria e., Clear credential over preliminary credential, the 10 employees with clear credentials were entitled to a higher rank on the seniority list than the seven employees with preliminary credentials. However, application of the lottery was still necessary to determine the relative seniority within each group. Mr. Carreón did not thereafter conduct two separate lotteries; rather, he "moved up" the 10 employees with clear credentials, but maintained their relative positions to each other as determined by the original lottery. Likewise, the seven employees with preliminary credentials were ranked below the employees with clear credentials, but maintained the same relative positions to each other as determined by the original lottery.

21. Respondent Nikki Greminger holds a preliminary MS credential. Ms. Greminger contended that the District failed to follow the tiebreaking criteria as adopted by the Board, when it conducted the lottery, criteria g., before applying criteria e., clear versus preliminary credential. Ms. Greminger argued that the District should invalidate the original lottery, and should conduct two lotteries, one for the group of employees with clear credentials, and one for the group of employees with preliminary credentials.

22. Respondent Mailee Lor holds a clear MS credential. As a result of the application of the tiebreaking criteria, the District proposes to retain Ms. Lor. Ms. Lor argued against invalidating the original lottery, contending it was conducted appropriately. Likewise, the District objected to conducting separate lotteries for the two groups of employees with MS credentials, contending that it would be unfair to conduct a second set of lotteries, when the relative seniority of employees within each group could be determined from the original lottery. The District's argument was persuasive. While consideration of the lottery results only became applicable with "all other criteria being equal," the fact that the lottery was held prior to the application of criteria e. did not affect the outcome as between employees in each group. The decision not to conduct a second round of lotteries is a reasonable exercise of the District's discretion, and is not arbitrary or capricious.

23. As a result of the application of the tiebreaking criteria, Melissa Gonzalez and Mailee Lor shall be retained by the District.

#### *Nursing Services*

24. For the 2008-09 school year, the District employed three full-time school nurses, and two health clerks (classified employees) that work at the District office. These individuals provided services to 8,916 students at 18 school sites (excluding alternative and charter schools). The three credentialed school nurses provide a multitude of services to the District, including the supervision of unlicensed assistive personnel (health clerks and school secretaries or office personnel) who provide health services at school sites. Approximately 13 percent of the student population has serious health issues, including compromised immune systems, fragile cardiac conditions, asthma, and diabetes. Many of these students require specialized physical health care services. Approximately 190 students have mental health issues, and 468 students require daily medications. The school nurses develop care plans for students, coordinate and perform mandated vision, hearing, and scoliosis screening. They also perform federally mandated student assessments as part of the special education process.

25. Resolution No. 2008-09/63 reduces 2.0 FTE nursing services. This would leave the District with only one full-time credentialed school nurse. Respondents Carlene Brown and Rebecca Dittimore-Escalante contend that the District will not be able to provide federal and state mandated services to students with only one school nurse. They are particularly concerned that "without proper support and supervision, . . . unlicensed district employees will make decisions that legally require the knowledge and experience only a Registered Nurse or Physician can provide."

26. Mark Allgire is the Assistant Superintendent – Business Services for the District. He was involved in recommending reductions in particular kinds of services, as reflected in Resolution No. 2008-09/63, including the reduction in nursing services. The District believes it will be able to meet its legal obligations to provide mandated services to students with one full-time certificated school nurse. If necessary, the District will obtain additional services through the county office of education and/or the Yuba County Department of Public Health. The District may also contract out for physician services.

27. The District acknowledged that it must continue to provide legally mandated health services, including hearing, vision and scoliosis screening. However, the District argued that the Education Code does not mandate that all the health care services which the District's school nurses are currently providing must be provided by a certificated school nurse. The District's argument was persuasive.

28. School districts “shall give diligent care to the health and physical development of pupils, and *may* employ properly certified persons for the work.” (Ed. Code, § 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.”

29. The Education Code requires school districts to conduct sight and hearing screening (Ed. Code, § 49452), and scoliosis screening (Ed. Code, § 49452.5). The Education Code also contains provisions governing the administration of medication and epinephrine to students (Ed. Code, 49423), and the delivery of specialized physical health care services, including catheterization, gastric tube feeding, suctioning, and other services that require medically related training (Ed. Code, § 49423.5.) These statutory provisions do not, however, require that certificated school nurses must provide the described health care services. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571.) In addition, the law does not mandate that a certificated school nurse must attend all IEP and SST meetings, or that a certificated school nurse must be involved in the development of Section 504 plans for students with disabilities. Thus, while the District must provide all the health care services mandated in the Education Code, it is not required to utilize certificated school nurses to provide many of the services currently provided by Ms. Brown and Ms. Dittimore-Escalante.

30. The District will be required to have a plan in place for the provision of nursing services for the 2009-2010 school year, but it does not have to have a finalized plan in place 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 (Ev. Code §664, *Degener v. Governing Board* (1977) 67 Cal. App.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.4<sup>th</sup> 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 2.0 FTE positions.

31. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolution No. 2008-09/63 was not arbitrary or capricious, but constituted a proper exercise of discretion.

32. 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.

33. 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. The services identified in Resolution No. 2008-09/63 are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. 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, supra*, 64 Cal.App.3d at p. 178-179.)

4. As set forth in Finding 9, the District has rescinded notices of layoff to the following individuals:<sup>2</sup> Cassandra Astle, Jesse Burns, Youa Chue, \*Daniel De Vlaming, \*Megan Duarte, \*Robert Dunmore, \*Joseph Flood, James Graham, \*Miranda Hartridge, \*Heather Heap, \*Kathryn Heinz, Chris Hollingsworth, Duryea Jones, \*Lynnette Lucas,

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<sup>2</sup> Employees marked with an asterisk (\*) are respondents in this proceeding.

\*Jens Nielsen, \*Hailey Phelan, \*Billy Priddy, Alma Pulgarin, Melissa Rodriguez, James Rogers, Samantha Seavey, \*Joseph Seiler, Susan Trafford, Aileen Van Houten, \*Andrea Vitale, \*Jill Williams, Monica Wood, and \*Joua Xiong.

5. As set forth in Finding 10, Deanna Alexich shall be retained in 0.2 FTE position, and shall be laid off for 0.8 FTE; Michelle Hendrix shall be retained in 0.8 FTE, and shall be laid off for 0.2 FTE; and Michelle Jones shall be retained for 0.4 FTE, and shall be laid off for 0.6 FTE.

6. As set forth in Findings 16-22, the District properly applied the tiebreaking criteria to certificated employees having the seniority date of August 17, 2007. As set forth in Finding 23, Melissa Gonzalez and Mailee Lor shall be retained by the District, and notices of layoff shall be rescinded as to these employees.

7. No employee with less seniority than any named respondent is being retained to render a service which any named respondent is certificated and competent to render. Except as set forth in Legal Conclusions 4, 5, and 6, the Board may give respondents final notice before May 15, 2009, that their services will not be required for the ensuing school year, 2009-2010.

## ORDER

Except as set forth in Legal Conclusions 4, 5, and 6, the Accusations served on respondents are sustained. In addition to the certificated employees set forth in Legal Conclusion 4, notices of layoff shall be rescinded as to certificated employees Melissa Gonzalez and Mailee Lor. Deanna Alexich shall be retained in 0.2 FTE position, and shall be laid off for 0.8 FTE. Michelle Hendrix shall be retained in 0.8 FTE, and shall be laid off for 0.2 FTE. Michelle Jones shall be retained for 0.4 FTE, and shall be laid off for 0.6 FTE. Notices shall be given to the remaining respondents identified in attached Exhibit A that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

Dated: May 4, 2009.

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CATHERINE B. FRINK  
Administrative Law Judge  
Office of Administrative Hearings

EXHIBIT A

MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT

RESPONDENTS REPRESENTED BY LANGENKAMP & CURTIS, LLP

Amber Baker  
Alison Brandt  
Carlene Brown  
Rebecca Buist  
Youa Chue  
Jennifer Clayton  
Jason Coultrap  
Daniel T. DeVlaming  
Rebecca Dittimore-Escalante  
Megan Duarte  
Genae Du Chateau-Belding  
Robert Dunmore  
Sherri Dwyer  
Alyce Elliott  
Leslie Fields  
Joseph Flood  
Nikki Greminger-Buckland  
Troy Hane  
Bridget Hansard  
Cindy Haro  
Miranda Hartridge  
Deanna Hayes  
Heather Heap  
Kathryn Heinz

Michelle Hendrix  
Jetender Johal  
Kevin Kennedy  
Daiquiri Leal  
Marilyn Lees  
Mailee Lor  
Lynnette Lucas  
Jennifer McAdam  
Shane Mosley  
Jens Nielsen  
Hailey Phelan  
Arie Choy Phongmany  
Billy Priddy  
Nicole Robertson  
Gary Rogers  
Nancy Salm,  
Joe Seiler  
Christine Spade  
Yvonne Thornton  
Andrea Vitale  
Kathryn Westcamp  
Jill Williams  
Joua Xiong  
Sia Cha Xio