

BEFORE THE  
GOVERNING BOARD OF THE  
BONITA UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

15 Certificated Employees of the Bonita  
Unified School District,

Respondents.

OAH No. 2009030600

**PROPOSED DECISION**

This matter came on for hearing before Administrative Law Judge Timothy S. Thomas, Office of Administrative Hearings, at San Dimas, California, on April 16, 2009.

Mark W. Thompson and William Dietrich, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Bonita Unified School District (hereinafter the District).

Michael R. Feinberg, Schwartz, Steinsapir, Dohrmann & Sommers, Attorneys at Law, represented 10 of the Respondents.<sup>1</sup> Respondents Kathleen Eagleton and Mandy Longsine were present and represented themselves. Respondents Danny Lopez, Keri Hadjis, Joseph Chapin and Joshua Koepfer did not attend. A complete list of the Respondents is attached hereto as Exhibit A.

Oral and documentary evidence was received and argument was heard and considered. The matter was submitted for decision on April 16, 2009.

**FACTUAL FINDINGS**

1. The District employs 455 teachers and operates 13 elementary, middle and high schools that serve 9,654 children. Due to an expected and unprecedented budget shortfall, the District plans to reduce its teaching and administrative workforce.

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<sup>1</sup> Carolyn Cockrell, Linda Hand, Danny Lopez, Shara Lyons, Adrian Medrano, Donell McNeal, Erin Peters, Heather Pfeifer, Shannon Stark and Kristie Stragier.

2. On March 11, 2009, the District’s Superintendent, Dr. Gary Rapkin, recommended that the District’s Board of Education (the Board) approve a resolution to reduce particular kinds of services (PKS) and decrease the number of certificated employees by 16.8 full-time equivalent (FTE) positions.<sup>2</sup> On March 11, 2009, the Board passed Resolution No. 2009-17, authorizing the reductions. Specifically, the reductions were authorized as follows:

Music Teachers	1.0 FTE
P.E. Teachers	2.4 FTE
Student Services Coordinators	3.0 FTE
High School Math Teachers	1.8 FTE
High School English Teachers	2.8 FTE
Continuation High School Teacher	1.0 FTE
Dean	1.0 FTE
School Psychologist	1.0 FTE
Teachers on Special Assignment	1.2 FTE
Media Specialist	0.8 FTE
Work Experience Teachers	<u>0.8 FTE</u>
Total	16.8 FTE

3. On March 12 and March 13, 2009, a written notice that the Superintendent had recommended that notice be given to Respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year was personally served on all but one Respondent.<sup>3</sup> Each notice set forth the reasons for the recommendation and noted that the Board had passed a resolution reducing the certificated staff by 16.8 FTE. The notices attached the Accusation.

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<sup>2</sup> Note that .2 FTE is the equivalent of one class during a school day.

<sup>3</sup> The remaining Respondent, Kathleen Eagleton, requested that she be served by certified mail, which was accomplished on March 12, 2009.

4. Respondents timely filed a joint written request for a hearing to determine if there is cause for not re-employing them for the next school year, and a joint Notice of Defense to the Accusation.

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

6. Prior to and subsequent to the adoption of Resolution 2009-17 by the Board, the District identified vacancies expected in school year 2009-2010 due to retirements, resignations and the release of teachers. Those vacancies have been taken into account as part of the District's process to identify the teachers to be laid off. At hearing, the District represented that it has offered early retirement to certain employees and that if additional attrition results from those offers, the Accusation will be dismissed as to Respondents who are qualified, by certification and seniority, to fill those additional open positions.

7. On March 9, 2009, the Board adopted Resolution No. 2009-18, which established tie-breaking criteria for determining the relative seniority of certificated employees who first rendered paid service to the District on the same date. It provided that the order of termination shall be based on the needs of the District and its students in accordance with a 12-step analysis of credentials, supplementary authorizations, years of teaching outside the District, college degrees and post-secondary credits.

8. The District maintains a seniority list, which lists all certificated employees in the District in order, based on their first date of paid service with the District. The chart also lists each employee's FTE status (i.e., "100" if full-time, or "80" if teaches an FTE of .8, etc.), tenure status (whether tenured or probationary), position (e.g., "principal," "counselor," "fourth grade"), current work location, credentials held, supplemental authorizations and English language learner (ELL) certification achieved. Where teachers were shown to have the same first dates of paid service, the tie-breaking criteria were used to determine the teachers' places on the list. A separate list of certificated employees the District deemed temporary employees was maintained. Each of those teachers received notices that they would be released from their employment at the end of the current school year.

9. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. In making this determination for each kind of service to be reduced, the District counted the number of reductions not covered by known vacancies and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether any of the employees were entitled to "bump" less senior employees who had not been identified to be laid off, that is, whether by reason of their credentials and experience they could competently teach in areas of service not scheduled for reduction. By this method, Respondents Pfeiffer, Peters, Stark, and

Chapin were “bumped” and identified for layoff. The remaining Respondents were identified for layoff as being the least senior employees working in the areas of service scheduled for reduction who were without any “bumping” rights.

10. Implementation of the District’s layoff resolution involved no “skipping” of employees.

11. One PKS identified for reduction is described as Teachers on Special Assignment (TOSA). The District determines, on an annual basis, what assignment, if any, a teacher might receive in this category. In 2008-2009, two relatively senior teachers, Thomas Kiernan and Wendy Wallin, were assigned for 60 percent of their workdays to assist other teachers of English and language arts in the instruction of low income and low performing students. In the layoff implementation, because of their seniority and qualifications and the elimination of their TOSA positions, the senior teachers “bumped” .6 FTE high school English teaching positions held by Respondents Peters and Stark.

12. Mr. Kiernan is teaching 1.2 FTE classes this school year. The extra .2 FTE results from Mr. Kiernan being assigned an extra class period, called an “overload” class. His assignment this year is .6 FTE of TOSA, .4 FTE of English, and .2 FTE of journalism, although the District does not designate any particular portion of Kiernan’s schedule as the overload period. The intent of the District is that Mr. Kiernan will not teach an overload class next year. In implementing the layoff resolution, the District did not consider eliminating .2 FTE of the TOSA portion of Mr. Kiernan’s schedule, which would return Mr. Kiernan to 1.0 FTE, and then only reducing his TOSA assignment by the remaining .4 FTE, thus preserving .2 FTE of teacher Peters’ English assignment.

Teacher Robert Cates also carries a 1.2 FTE schedule. Of that service, the District seeks to reduce his “work experience” time by 0.4 FTE. Under the District’s implementation plan, due to his certification and experience, Mr. Cates “bumps” Respondent Chapin by 0.4 FTE in high school math. The District did not consider eliminating the 0.2 FTE “overload” portion of Mr. Cates’ schedule in order to save a like portion of Respondent Chapin’s class load.

13. Another PKS identified for reduction is described simply as “Dean.” In implementing the layoff resolution, the District identified the 1.0 FTE position of James Worthington, Dean of Students at San Dimas High School, for elimination. Mr. Worthington, in turn, “bumped” into the position held by Respondent Pfeifer, who teaches social sciences at San Dimas High.

During the hearing, the District moved to dismiss the Accusation as against Respondent Pfeifer based upon information provided the District by Pfeifer. The motion was granted.

14. 3.0 FTE school counseling positions (called “student services coordinators”) are being eliminated, affecting four of the current counselors.<sup>4</sup> Respondent Stragier is a counselor at San Dimas High School. She testified that the elimination of her position and the position of Dean of Students at the school would severely and adversely affect the ability of the remaining personnel to effectively deal with discipline problems at the school. Specifically, there are approximately 1,250 students at San Dimas High and only three counselors. Elimination of one counseling position will mean that the entire student body will be divided among the two remaining counselors. Additionally, the more severe discipline problems, now handled by the dean of students, will have to be handled by counselors. In contrast, Bonita High School has four counselors, two assistant principals, a dean of students and a full-time on-site police officer to handle the discipline of approximately 1,900 students. (San Dimas High has a part-time sheriff’s deputy.) Ms. Stragier acknowledged that staffing decisions for 2009-2010 have not yet been made. The District acknowledges that counselor to student ratios are “not what they should be, and will get worse.”

15. Respondent Cockrell, a counselor at Roynan Elementary School, was first hired pursuant to Education Code section 44909 as a “categorically funded employee” for the 2005-2006 school year. At that time, she held a full-time (1.0 FTE) position. At some point, Cockrell’s assignment, which continued to be funded pursuant to section 44909, was split between two schools on a 60/40 basis. Following the 2007-2008 school year, Cockrell resigned from the 60 percent position and was hired for the current school year for the 0.4 FTE position only, at Roynan. It is that 0.4 FTE position that the District seeks to eliminate as part of the layoff implementation.<sup>5</sup>

The source of funding for Respondent Cockrell’s position has always been S.B. 1802, which provided, among other programs, funding for school counselors for particularly at-risk children. The District’s witness, Assistant Superintendent Curtis Frick, did not know whether the funding for Respondent Cockrell’s position ever ended.

16. The music department reduction of 1.0 FTE involves a band teacher position, for which there are two vacancies currently. By virtue of attrition, therefore, no teacher will be laid off to accomplish the music department reduction. The District expects to fill the second vacant position.

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<sup>4</sup> The 1.0 FTE positions of Respondents McNeal and Stragier, the 0.4 FTE position of Respondent Cockrell and 0.6 of Respondent Lyon’s 1.0 FTE position are being eliminated.

<sup>5</sup> Although a temporary employee by contract, the District did not have a signed contract for the 2008-09 school year. Therefore, pursuant to *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, the District made Respondent Cockrell a probationary teacher and offered her layoff and hearing rights.

## LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.
2. A District may reduce services within the meaning of Education Code 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. The services identified in Board Resolution 2009-17 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949.
4. Respondents disagree that the services identified in the Board resolution are all particular kinds of services that may be reduced or discontinued. Specifically, Respondents argue that a TOSA is “whatever the District wants it to be” and, therefore, cannot qualify as a PKS.

Our appellate courts have long given school districts wide latitude to identify particular kinds of services for elimination or reduction. “ ‘As long as a district does not reduce its offerings in a code mandated course below the level required by law, that reduction should be considered a reduction of a particular kind of service.’ ” (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, at p. 695, quoting from Comment, *Teacher Dismissals Under Section 13447 of the California Education Code* (1976) 27 *Hastings L.J.* 1401, 1411.) Districts have reduced or eliminated countless kinds of services without running afoul of this basic tenet. For example, an appellate court sanctioned the discontinuation of a “traveling art teachers” program (*Davis v. Berkeley School District* (1934) 2 Cal.2d 770); another involved a reduction in services provided by “reading specialists, consultants, . . . traveling librarians, learning assistance teachers” (*Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796). The services offered by the TOSA teachers in this matter, the provision of special assistance to low income and low performing students in the language arts, cannot be said to differ in any meaningful way from those examples. The fact that a TOSA might be redefined by a district to involve a different type of service in the future does not render the decision to eliminate this TOSA arbitrary or capricious.

5. Respondents Peters and Chapin argue that 0.2 FTE of their respective positions could be saved if, rather than simply eliminating the 0.6 FTE TOSA and the 0.4 FTE work experience assignments of teachers Kiernan and Cates, respectively, the 0.2 FTE overload classes of the more senior teachers were first taken away. By that method, Respondents point out, only 0.4 FTE of Peters' class load and 0.2 FTE of Chapin's class load would be affected, leaving Peters with three classes next fall instead of two, and leaving Chapin with four classes instead of three. The problem with the suggestion is that the District would not thereby accomplish the goal of reducing staff by 16.8 FTE. It is inferred from the evidence that the District had already taken into account that the overload assignments at issue would be eliminated when it determined the need to reduce staff by an additional 16.8 FTE. Except to point out that the rights of Kiernan and Cates would not be infringed by first reducing their class loads, Respondents did not offer any authority that suggests that the method employed to reduce the services affecting Respondents Peters and Chapin as it did violated any provision of the Education Code.

6. Respondent Stragier asserts that her layoff is not in the best interests of the District or the pupils at San Dimas High School, in that the elimination of one-third of the counseling positions at the school, combined with the elimination of the dean of students' position at San Dimas, would negatively impact the school and its students. The District agreed that the impact will be negative. Indeed, the District was not happy with the level of counseling services before this layoff became necessary. Final staffing decisions for the provision of counseling services at the District's 13 schools have not been made, and the evidence did not include the total number of counselors available in the District to handle the district-wide need for counselors or for San Dimas High School in particular. Even if that number were known, to reach the conclusion that the expected strain on the schools' disciplinary program will reach crisis proportions would be to engage in substantial speculation based on this record. While the testimony of Respondent Stragier was sincere and credible and her prediction that the workloads of the remaining counselors would be great and present difficulties were accepted as factual, the evidence did not establish that the tasks of the counselors or the obligation of the District to provide the services could not be accomplished under the layoff plan. A school district faced with economic uncertainties must be allowed maximum flexibility in determining staffing for the ensuing school year in light of both available resources and needs. (*Campbell Elementary Teachers' Association, Inc. v. Abbott, supra*, at p. 808.)

7. Respondent Cockrell contends that because the District could not confirm or deny that the S.B.1802 funding for her position as a counselor to at-risk children had ended at any time during her four years of contractual service with the District, she is not subject to layoff.

Education Code section 44909 provides, in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

Section 44909 does not confer on Cockrell advantages greater than permanent or probationary employees enjoy or provide any immunity to layoff. “[C]ertificated teachers assigned to categorically funded projects may be laid off without the procedural formalities due a permanent or probationary employee only if the program has expired.” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1287.) Here, the District has observed the “procedural formalities” due Respondent Cockrell by including her in these layoff proceedings.

Until employees teaching in categorically funded programs acquire probationary status, their service does not count toward acquiring permanent status. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District, supra*, at p. 1286.) “Temporary teachers do not accrue seniority,” although a single year of service as a temporary employee may be counted toward seniority in some circumstances. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District, supra*, at p. 1293.)

Respondent Cockrell contends, in the alternative, that her seniority date should be changed to November 14, 2005, when she signed her first contract as a categorically funded employee, rather than August 29, 2007, the date when, by

operation of the principles set forth in *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, and Education Code section 44917, she was given two years' credit in establishing her seniority date. The authority cited by Cockrell in support of this contention is *Bakersfield Elementary Teachers Association v. Bakersfield City School District, supra*. But a review of that decision finds no support for the proposition that Cockrell is entitled to an earlier seniority date than assigned by the District. *Bakersfield* held that a school district may not categorize a teacher as temporary simply by virtue of the credential he or she holds and does not confer additional rights to employees formerly regarded as temporary as teachers under categorically funded programs who have gained probationary status by operation of law. Here, the law operated to give Cockrell probationary status, effective August 29, 2007. The statutory axiom that seniority shall date to the employee's first date of paid service as a probationary employee controls.

#### ORDER

1. The Accusation against Respondent Heather Pfeifer is dismissed.
2. The Accusation against the remaining Respondents is sustained. Notice shall be given to each of those Respondents before May 15, 2009, that his or her services will not be required for the 2009-2010 school year because of the reduction of particular kinds of services. Notice shall be given in the inverse order of seniority.

DATED: April 28, 2009

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TIMOTHY S. THOMAS  
Administrative Law Judge  
Office of Administrative Hearings