

**+BEFORE THE GOVERNING BOARD OF  
THE BEVERLY HILLS UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

OAH No. 2010030101

Certificated Employees of the Beverly Hills  
Unified School District:

JENNIFER POSTLEWAITE  
ASHLEY IRELAND  
LAURA MITCHELLE  
REBECCA METRANO  
EMILY MCCOWAN  
KATHRYN FEELEY  
ALEXANDER BREITMAN  
LYNEE HENEIDI  
MELISSA JOSEPH  
KEVIN CUTLER

Teachers of the Beverly Hills Unified School  
District

Respondents.

**PROPOSED DECISION**

Chris Ruiz, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on April 7, 2010, at 255 S. Lasky Drive, Beverly Hills, California.

Aaron O'Donnell, Esq., represented the Beverly Hills Unified School District (District).

Deborah Eshaghian, Esq., represented all Respondent teachers (Respondents), with the exception of those who did not file a Notice of Defense.

## FACTUAL FINDINGS

1. Jerry Gross, Superintendent of the District, acting in his official capacity, caused all pleadings, notices and other papers to be filed and served upon each Respondent pursuant to the provisions of Education Code Sections 44949 and 44955. The parties, by and through their counsel, stipulated that all pre-hearing jurisdictional requirements have been met.

2. Respondents are employed by the District as permanent, probationary, intern, pre-intern, emergency permitted, waiver, and/or temporary certificated employees of the District.

3. On February 25, 2010, pursuant to Education Code sections 44949 and 44955, the Governing Board of the District (Board) issued a written Resolution (number 2009-2010-014) which approved the recommendation by the Superintendent that notice be given to Respondents that their services will not be required for the ensuing school year and stating the reasons for that recommendation.

4. On March 24, 2010, Respondents were given written notice of the recommendation that notice be given to Respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year and stating the reasons for that recommendation. The District served a Notice of Layoff on each of the teacher Respondents. Laura Mitchell, Emily McCowan, and Lynne Heneidi did not file a Notice of Defense and were not present at the hearing.

5. The evidence established that cause exists, within the meaning of Education Code sections 44949 and 44955, for not reemploying Respondents for the ensuing school year for all of the reasons set forth below.

6. The District decided the following:

The following particular kinds of services of the District will be reduced or eliminated no later than the beginning of the 2010-2011 school year:

K – Fifth grade teachers	6	FTE <sup>1</sup>
English Teacher, grades 9-12	1	FTE
Math Teacher, grades 9-12	1	FTE
Phys. Ed. Teacher, grades 9-12	1	FTE

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<sup>1</sup> Full- Time Employee position(s).

Director, Curriculum and Assessment 1 FTE

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TOTAL CERTIFICATED POSTIONS 10.0 FTE

7. The Board decided that it is necessary to decrease the number of certificated employees as a result of the reduction in services. These services are “particular kinds of services” that may 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; rather, it constituted a proper exercise of discretion. Alex Cherniss (Cherniss), Director of Human Resources, testified that the Board’s decision was based on budgetary cutbacks. Further, while Cherniss was not fully aware of how the “tiebreaking” criteria was established, his testimony did establish that said criteria was modified from past years’ criteria and is based on the present needs of the District.

8. The reduction or discontinuation of these particular kinds of services is related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services is necessary to decrease the number of certificated employees of the District as determined by the Board. This reduction is necessary because of budget reductions.

9. The Board properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees as of March 15, 2010. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App. 3d 627 at 636).

10. The District properly created its seniority list by determining the first date of paid service of each certificated employee and properly utilized reasonable “tie-breaker” criteria when necessary.

11. The District provided the ALJ with a list of the teachers’ positions at issue. That list was marked after the conclusion of the hearing as exhibit 15. The list only indicated 9 FTE positions to be eliminated. For reasons that were not established, the “Director” position was no longer at issue at the time of the hearing.

12. Respondent Joseph (Joseph) is a .6 FTE. She teaches physical education for .4 FTE and a special dance class for .2 FTE. She established that her correct seniority date is November 1, 2008. Her contention that her seniority date should be October 4, 2008, the date she took and passed the “C-Best” test, was not convincing. Education Code section 44845 requires that a teacher be certified and probationary, which Joseph was not until November 1, 2008. Even with her corrected seniority date, Joseph is still subject to layoff as there is still no less senior physical education teacher.

13. The District “skipped” Joseph regarding her .2 FTE dance class. Respondent Cutler (Cutler) is a .6 FTE and is also a physical education teacher. He contended that he

could teach the dance class and thus he should “bump” the less senior Joseph. His seniority date is October 27, 2008, making him four days more senior than Joseph.

14. Joseph and Cutler both have a credential authorizing them to teach physical education classes. Cutler’s contention that he should bump into Joseph’s .2 FTE dance class was not convincing. In sum, the District “skipped” Joseph with respect to her dance class, which requires specialized experience and knowledge regarding dance. Joseph has such specialized experience, training, and knowledge. While Cutler has some gymnastics training and he took a few university courses regarding dance, he has not taught dance at any high school. Thus, the District established a specific need and reason for “skipping” Joseph as to her dance class.

15. Education Code Section 44955, subdivision (d), states:

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

16. There is thus a two prong test under subdivision (d)(1) for skipping a junior employee: (1) a district must demonstrate a specific need for a specific course or course of study; and (2) the junior employee has the special training to teach the course which a more senior teacher does not. The District sustained its burden with respect the Dance class that Joseph teaches and with respect to establishing a specific need to retain Joseph. Joseph possesses the necessary training and experience required under Education Code Section 44955, subdivision (d), to be properly skipped.

17. Respondents contended that “fractional” portions of a FTE position cannot be subject to layoff. The undersigned is unaware of any statute which prohibits eliminating portions of a position. It would be unfair to “skip” a teacher merely because he/she was a “fractional” employee in order to layoff a more senior FTE.

18. Respondents Breitman, Ireland, Postlewaite, and Feeley testified. It was established that they are dedicated and devoted to their chosen profession.

## CONCLUSIONS OF LAW

1. Jurisdiction for these proceedings exists pursuant to Education Code Sections 44949 and 44955.

2. Each of the services set forth in Findings 5 and 6 is a particular kind of service which may be reduced or discontinued in accordance with applicable statutes and case law.

3. The District's decision to reduce or discontinue the services is neither arbitrary nor capricious, but rather a proper exercise of the District's discretion.

4. Cause exists to reduce the District's teaching positions as described above and to give notice to the affected teachers pursuant to Education Code Section 44955. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689). Based on the above Findings, including the preamble to this Proposed Decision, the names of the affected teachers, those as to whom final notices of layoff may be given, are as follows:

JENNIFER POSTLEWAITE  
ASHLEY IRELAND  
REBECCA METRANO  
KATHRYN FEELEY  
ALEXANDER BREITMAN  
MELISSA JOSEPH (.4 FTE)  
KEVIN CUTLER (.6 FTE)

## ORDER

Because of the reductions of services, the District may give notice to the teachers identified in Legal Conclusion No. 4 that their services will not be required for the 2010-2011 school year.

Dated: April \_\_, 2010.

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CHRIS RUIZ  
Administrative Law Judge  
Office of Administrative Hearings

