

BEFORE THE
GOVERNING BOARD OF THE
YOSEMITE UNIFIED SCHOOL DISTRICT
COUNTY OF MADERA
STATE OF CALIFORNIA

In The Matter of the Reduction In Force of:

OAH No. 2010031594

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE YOSEMITE
UNIFIED SCHOOL DISTRICT,

Respondents.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 20, 2010, in Oakhurst, California.

Stephen A. Mendyk, Attorney at Law, appeared on behalf of the Yosemite Unified School District.

James F. McBrearty, Attorney at Law, appeared on behalf of respondents.

Evidence was received and the case was submitted for decision on April 20, 2010.

FACTUAL FINDINGS

1. Steve Raupp is the Superintendent of the Yosemite Unified School District (District). The actions of Mr. Raupp in making and filing the Accusation were taken in his official capacity.

2. Respondents are seven permanent or probationary certificated employees of the District.¹ On March 9, 2010, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would be reduced or would not be required for the 2010-2011 school year. Each written notice set forth the reasons for the recommendation and noted that the District Governing Board had passed a Resolution reducing the

¹ Respondents include Michelle Brewer, Melinda Gresham, Dana Hall, Duff McCartin, Tom Swan, Tamara Trebor and Amy Weigel.

certificated staff by 5.34 full-time equivalent (FTE) positions. Four respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.² Three did not request a hearing or were late in requesting a hearing.³ The parties stipulated that these three certificated employees are deemed laid off as a result of their failure to timely request a hearing.

3. On March 30, and April 1, 2010, the District timely served Accusations with required accompanying documents and blank Notices of Defense on respondents Michelle Brewer, Dana Hall, Duff McCartin and Amy Weigel. Each respondent timely filed Notices of Defense to the Accusation.

At the time of hearing, respondents Michelle Brewer, Dana Hall and Amy Weigel withdrew their Notices of Defense. These three thereby waived their right to a hearing. The hearing proceeded as to respondent Duff McCartin only.

4. On February 8, 2010, at a regular meeting, the District Governing Board was given notice of the Superintendent's recommendations that certificated employees holding 5.34 FTE positions be given notice that their services would be reduced or not required for the next school year and stating the reasons for that recommendation.

5. On February 8, 2010, the District Governing Board determined that it was necessary to decrease programs and services and thus it was necessary to reduce teaching and other certificated services affecting employment of 5.34 FTE positions. The District Governing Board adopted Resolution No. 2009/2010-09 providing for the reduction or elimination of the following particular kinds of services (PKS):

<u>Services</u>	<u>Equivalent Positions</u>
Hourly Adult Education Teacher	0.60
Hourly Adult Education Teacher	0.40
English Teacher	0.34
English Teacher	1.0
Elementary Teacher	1.0
Elementary Teacher (Precautionary Notice)	1.0
Elementary Teacher (Precautionary Notice)	1.0
TOTAL	5.34 FTE

6. The District serves approximately 2,100 students through one comprehensive high school, two elementary schools, two necessary small schools, two continuation schools, two community day schools, one adult education and two independent study programs. In January/February 2010, the Superintendent reviewed the District's financial situation and

² These included Michelle Brewer, Dana Hall, Duff McCartin and Amy Weigel.

³ These included Tom Swan (late), Melinda Gresham and Tamara Trebor.

determined that it was necessary to revise enrollment projections downward and to reduce or eliminate particular kinds of services for the District to account for revenue shortfalls.

The Governing Board's resolution to reduce or discontinue particular kinds of services was made in anticipation of decreased revenues. The proposed reductions are necessary for the District to remain solvent.

Skipping

7. On February 8, 2010, the Board adopted a second resolution (Board Resolution No. 2009/2010-08) that provided that the District has the need to retain certain certificated employees who possess certain credentials and which more senior employees do not possess. The Superintendent was authorized to deviate from terminating certificated employees in order of seniority in instances where:

1. To fill a demonstrated specific need for personnel to teach a specific course or courses of study; or
2. When the certificated employee has the special training or experience which others with more seniority do not possess; or
3. When the certificated employee has BCLAD and/or CLAD authorization or prior subsequent equivalent; or
4. To maintain or achieve compliance with constitutional requirements related to equal protection of the law; or
5. To maintain or achieve compliance with federal and state requirements and regulations.

8. The District's rationale for skipping is its belief that other provisions of the Education Code require that a teacher who provides instruction to even a single English language learner (ELL) student⁴ must possess a CLAD or the equivalent. Failure to comply with this perceived mandate would, in the view of the District, subject it to the risk of civil liability and sanctions by state and federal governmental agencies. These sanctions include the loss of funding. The District noted that it receives federal financial assistance and that the U.S. Department of Education, Office for Civil Rights (OCR), evaluates school district compliance with Title VI. Title VI of the Civil Rights Act of 1964 and its implementing regulations provide that a recipient of Federal financial assistance may not, directly or

⁴ Education Code section 306, subdivision (a), reads: "'English learner' means a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English, also known as a Limited English Proficiency or LEP child."

through contractual or other arrangements, on the ground of race, color, or national origin, exclude persons from participation in its programs, deny them any service or benefits of its programs, or subject them to separate treatment. (42 U.S.C. 2000d *et seq*; 34 C.F.R. § 100.6.) OCR maintains that a school district is not compliant with Title VI where a district fails to ensure the availability of instructional staff persons whose qualifications are sufficient to meet the instructional needs of ELL students. Thus, the District believes that ELL students must be taught by a teacher with appropriate certification in order to receive equal access to education.

9. The District further notes that the No Child Left Behind (NCLB) Act of 2001 provides resources for school districts to ensure that poor and minority students have an equal opportunity to achieve and meet state academic standards. As part of its performance goals, NCLB desires that all students be taught by highly qualified teachers, that all students attain proficiency in reading and mathematics, including ELL students, and that all ELL students become proficient in English. The District is required to report compliance with NCLB highly qualified teacher requirements, including ELL certification.

10. Finally, the District points to state requirements for access to quality education by ELL students. Education Code section 44253.3 provides:

The Legislature recognizes that limited-English-proficient pupils have the same right to a quality education as all California pupils. For these pupils to have access to quality education, their special needs must be met by teachers who have essential skills and knowledge related to English language development, specially designed content instruction delivered in English, and content instruction delivered in the pupils' primary languages.

The District believes that it is obligated to pursue 100 percent ELL certification for certificated employees, and therefore is justified in using ELL certification as skipping criteria in order to maintain employees with this specialized training.⁵

Duff McCartin

11. Respondent Duff McCartin is one of five teachers, and the only multiple subject teacher, currently employed by the District without ELL authorization. He has had several opportunities to become certified. In early 2004, he had an opportunity to enroll through a California State University-Fresno class, paid for by the District and taught at a District campus. He failed to enroll, expressing preference for a summer course.

⁵ The District is assessed by the California Department of Education through Categorical Program Monitoring (CPM). CPM, for purposes of ELL students, examines whether ELL students have equitable access to all programs provided by the schools and whether all staff members are trained to ensure program effectiveness.

In Spring 2007, Mr. McCartin was offered another opportunity to enroll in ELL certification training offered by the Tulare County Office of Education during the fall semester, paid for by the District. The District paid employees at the daily rate or granted credit on the salary schedule for employees' time spent on the course outside of the regular work day. Mr. McCartin failed to enroll in this course.

On May 9, 2007, District certificated employees were notified of another ELL certification training opportunity in June, also paid for by the District. Mr. McCartin did enroll in this course beginning in June 2007, but did not complete the portfolio requirement necessary to receive the ELL authorization. However, Mr. McCartin is scheduled to take an examination for certification on June 19, 2010. This would bypass the portfolio requirement if he passes the test and he would become ELL certified.

Mr. McCartin also had the option of enrolling in online coursework and/or checking out the online course compact discs in order to complete ELL certification.

12. Less than one percent of District students are ELL. This has been true over the past five years. Currently, only four District students are recognized as ELL learners.

13. Mr. McCartin's seniority date is August 14, 1992. He holds professional clear multiple subject, and single subject social science credentials. He is currently assigned to Raymond High School, one of the District's two necessary small schools. He will be assigned to Rivergold Elementary School for the 2010-2011 school year where he would teach grades 7/8 social science. He will be the only teacher at this site who will teach the social science classes. There are no ELL students at Rivergold Elementary School this year.

14. The District will not hire new teachers unless they have ELL certification. The District schools are remote and distant from each other. Students cannot easily be transported to different sites and many need to stay closer to their homes. The District is concerned that if an ELL student enrolls at a particular school site, the District may not have the flexibility to assign an ELL certificated teacher to provide instruction. In this case, the District notes that Mr. McCartin will be the only teacher assigned to teach 7/8 social science at the Rivergold Elementary School site. The District fears that if an ELL student is enrolled in grade 7/8 at that site next school year, the District would be found to be noncompliant and federal financial assistance may be placed at risk. (See Findings 8 and 9.)

LEGAL CONCLUSIONS

1. There is a single issue in this case – whether the District may, pursuant to Education Code section 44955, subdivision (d), skip junior employees who hold a BCLAD and/or CLAD authorization or prior subsequent equivalent and lay-off a more senior employee who does not. The District's contention that it may do so is based, in large measure, on the premise that only teachers holding a CLAD Certificate or equivalent may provide instruction to designated English language learners.

2. The Legislature has directed the California Commission on Teacher Credentialing (CTC) to “implement an assessment system to certify those teachers who have the essential skills and knowledge necessary to meet the needs of California’s limited-English-proficient pupils.” (Ed. Code, § 44253.1) This statute follows a legislative declaration that limited-English-proficient pupils have the right to a quality education and “their special needs *must* be met by teachers who have essential skills and knowledge related to English language development and specially designed content instruction delivered in English...” (Ed. Code, § 44253.1.) Education Code section 44253.5 requires the CTC to develop an examination by which teachers may establish their “competence in the knowledge and skills necessary for effective teaching of limited-English-proficient pupils.” School districts must report instances in which teachers have been misassigned including those instances in which districts have failed to follow Education Code sections 44253, et seq. (Ed. Code, §44258.9.) In summary, it is the CTC which “licenses” teachers and prescribes the areas in which they may provide instruction by virtue of their credentials. (Ed. Code, §§ 44001, 44830, 44831, and 44253.1.)

3. The CLAD certificate was the designated certificate created in response to the Legislative mandate. If such certificate, or its equivalent, “authorizes” instruction to limited-English-proficient pupils, the teaching of such students without the certificate is necessarily *unauthorized*. This interpretation is in accord with the position taken by CTC itself and the California Department of Education.

4. Having established that limited-English-proficient students, or English language learners, must be taught by a teacher possessing a CLAD or equivalent, the next step is determining whether the District may skip the holders of such certificates and lay off a more senior teacher who does not possess them. If District may do so, the authority must be found in Education Code section 44955, subdivision (d). Education Code section 44955 provides in pertinent part:

¶...¶

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may

terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

¶...¶

(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.

5. Education Code section 44955 provides that when certificated employees face layoffs due to economic exigency, the school district has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers, if the senior teacher has both the credentials and competence to occupy such positions. The intent of the Legislation is clearly to prevent Districts from laying off senior teachers while retaining junior teachers.

However, the District is permitted to depart from a seniority-based economic layoff in situations where the District “demonstrates a specific need for personnel to teach a specific course or course of study...and that the certificated employee (to be exempted from layoff) 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.” (Ed. Code, § 44955, subd. (d)(1).)

6. The District has the burden in this case of demonstrating a “specific need” for personnel to teach a “specific course or course of study.” If this specific need is demonstrated, the District must further establish that junior employees possess special qualifications necessary to teach such course or course of study; and that senior teachers do

not possess those special qualifications. (*Bledsoe v. Biggs Unified School Dist.* (2009) 170 Cal.App.4th 127.) The analysis of these factors by the court in *Bledsoe* makes it clear that ordinarily these are factual questions and the school district bears the burden of proving each element. (*Id.* at pp. 138-144.)

7. In this case, District has essentially designated its entire District educational instruction program as a “course or course of study.” The District does not simply contend that *certain* classes, by virtue of anticipated enrollment of ELL students, require the special training and experience evidenced by the possession of a CLAD certificate; rather, District implicitly asserts that *all* classes require such special qualifications.

The District’s designation of its entire educational instruction program as a “course or course of study” does not comport with the more narrow definitions of the words and phrase. Thus, Education Code section 51015 provides: “‘Course’ means an instructional unit of an area or field of organized knowledge, usually provided on a semester, year, or prescribed length of time basis.” Section 51014 states “‘Course of study’ means the planned content of a series of classes, courses, subjects, studies, or related activities.” The “field of organized knowledge” and the “planned content” of the studies vary from class to class.

8. Neither the testimony of District administrators nor any other evidence established that Mr. McCartin would be required to provide instruction to ELL students next school year. The District’s case is based on the possibility of having an ELL student enroll at Rivergold Elementary School. There are no ELL pupils currently enrolled at Rivergold Elementary School. There are currently four ELL pupils in the entire district. The District has had fewer than one percent enrollment of ELL pupils over the past 5 years. Mr. McCartin has been in the District for 18 years. He has never had an ELL student removed from his classroom because he was not ELL certificated. The District, in an abundance of caution, would like teachers at Rivergold Elementary School to have a CLAD certificate or other ELL certification in the event that ELL pupils enroll next year at that school. Mr. McCartin is the only District teacher holding a multiple subject credential who is not ELL authorized. This may change by June 2010.

9. If an ELL student does enroll in Mr. McCartin’s class, and Mr. McCartin is not successful in passing the examination this year, it may then become necessary to reassign him to a different assignment in which he is certificated and competent to render service. There may be a Grade 1-3 position opening up next year at Rivergold Elementary School. If Mr. McCartin is deemed certificated and competent to serve in that assignment, Education Code section 44955 affords him rights for consideration for assignment as a senior employee.⁶

⁶ See *Alexander v. Board of Trustees of the Delano Union High School District* (1983) 139 Cal.App.3d 567. The decision predated the addition of subdivision (d) to Education Code section 44955. However, the court’s holding that among teachers with different seniority dates, program needs, and not the “needs of the district and students” is the proper focus, remains viable. The *Alexander* court invalidated the District’s skipping of junior teachers regarded as bilingual where there was no demonstrated connection between teachers’ Spanish speaking ability and actual program needs.

10. The District suggests that if a teacher has been afforded adequate notice and a reasonable opportunity to secure ELL authorization and simply did not do so in a timely manner, a school district should be able to skip over him, even if he is in the process of attaining authorization. (See *Ripon Unified School District v. Commission on Professional Competence* (2009) 177 Cal.App.4th 1379.) In *Ripon Unified School District*, a music teacher's persistent refusal to become ELL certified was lawful ground for termination proceedings, and a requirement that all teachers within a school district become certified to teach English learners or face termination was a proper condition of continued employment.

Here, the District is justifiably concerned with Mr. McCartin's protracted history of delays in obtaining ELL certification. District funding may be at risk if it is non-compliant and penalized. Mr. McCartin surely received ample notice and opportunity to become ELL certified. He offers no good excuse. Yet these factors would be relevant only in disciplinary proceedings against Mr. McCartin. The District cannot otherwise make possession of BCLAD and/or CLAD authorization skipping criteria absent a showing that such is also necessary to teach a course or course of study, in this case Grade 7/8 Social Studies at Rivergold Elementary School. Such showing has not been made here. The notice to Mr. McCartin must therefore be rescinded.

11. Because the District failed to demonstrate a specific need for personnel to teach a specific course or course of study (Grade 7/8 Social Studies), it is unnecessary to discuss whether the District established that junior employees whom the District proposed to skip possess the special qualifications necessary to teach such a course or course of study and whether the District established that the senior employee does not possess such qualifications.

12. The District's decision to skip junior certificated employees holding BCLAD and/or CLAD authorization was not proper in this case. Cause does not exist under Education Code sections 44949 and 44955 to provide notice to respondent Duff McCartin that his services will not be required in the ensuing school year.

13. All notice and jurisdictional requirements set forth in California Education Code sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

14. The services identified in Board Resolution No. 2009/2010-09 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Governing Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

Except as noted in Legal Conclusion 12, cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. 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.

RECOMMENDATION

1. The Accusation against Duff McCartin is dismissed.
2. Notice shall be given to other respondents occupying up to 5.34 FTE that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services.

DATED: April 23, 2010

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings