

BEFORE THE
GOVERNING BOARD
OF THE DRY CREEK ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation (Reduction of
Particular Kinds of Services) Against:

OAH No. 2008020324

Robyn Annicchero, Judith Blasquez,
Katherine Camilleri, James Condon,
Amy Davis, Melissa Durrans, Scott
Olin, Savir Ravis, Barbara Scott and
James Vordestrasse,

Respondents

PROPOSED DECISION

Gary A. Geren, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on April 28, 2008, in Roseville, California.

Jacqueline S. McHaney, of Thurbon and McHaney, represented the Superintendent of the Dry Creek Elementary School District (District).

Michael N. McCallum, Attorney at Law, appeared on behalf of respondents.

The matter was submitted and the record was closed on April 28, 2008, subject to the parties filing and serving closing briefs. The briefs were timely received by OAH on April 30, 2008.

FACTUAL FINDINGS

1. Mark Geyer, Superintendent of the District, acted in his official capacity when he caused to have filed and served all pleadings, notices and other papers pursuant to Education Code Sections 44949 and 44955.

2. The Superintendent recommended to the Governing Board that it reduce or eliminate particular kinds of services. On February 28, 2008, the Governing Board of the District issued Resolution No. 2008-6 reducing the number of certificated employees because of the reduction and/or elimination of particular kinds of services. The Governing Board issued the resolution because of financial constraints imposed upon the District. The

Governing Board resolved to reduce the following positions and Full-Time Equivalents (FTE), for the 2008-2009 school year:

Assistant Principal-Middle School	1.0 FTE
Assistant Principal-Elementary School	1.5 FTE
Teacher-Elementary	21.0 FTE
Teacher-Middle School	4.0 FTE
Teacher-4/5 Science	1.0 FTE
Teacher on Assignment-Special Education	1.0 FTE
Instructional Technology Resource Teacher	1.0 FTE
Total	30.5 FTE

3. The Governing Board further resolved to decrease the number of certificated employees by a corresponding number of FTEs, and it directed the Superintendent to proceed to notify employees affected thereby. On March 5 and 6, 2008, respondents were served with written notice that their services would not be required for the 2008-2009 school year. In turn, respondents filed Requests for Hearing, the District filed an Accusation, and respondents filed Notices of Defense. The parties met all prehearing jurisdictional requirements, and this matter was properly set for hearing.

4. Between the passing of the resolution and the date of hearing, the FTEs to be reduced were changed from 30.5 to 10.

5. On April 12, 2008, respondent Savir Rivas withdrew her request for a hearing.

HAS THE DISTRICT DEMONSTRATED A SPECIFIC NEED TO RETAIN TEACHERS JUNIOR IN SENIORITY OVER RESPONDENTS BLASQUEZ, CONDIN, OLIN, SCOTT AND VORDERTASSE?

6. Districts are required to lay-off teachers in the inverse order of their seniority. An exception exists when a district "demonstrates a specific need for personnel to teach a specific course or course of study...and that the [retained] 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."¹

7. The District maintains it may lay-off the senior teachers here because it has a specific need to retain teachers junior to them, a process known as "skipping." The District contends "skipping" is appropriate because the less senior teachers (except for a teacher holding a Special Education Credential) hold Cross-cultural Language and Academic Development (CLAD) certificates that the senior teachers do not.² The California

¹ Education Code section 44955, subdivision (d)(1).

² For the purposes of this Decision, references to "CLAD" certification shall include functionally equivalent certifications that permit teachers to teach students known as "English Language Learners." English Language

Department of Education (CDE) requires a CLAD for teachers to instruct to teach English Language Learners (ELL).

8. The District entered into a "Plan of Correction" with CDE, following the findings of a Coordinated Compliance Review (CCR) completed by CDE in 2001. CDE found the District had too few CLAD certified teachers. In response to the CCR, the District instituted a policy of hiring new teachers only if they held their CLAD certification. The District also encouraged existing teachers to obtain CLAD certification. It was the District's goal to have all teachers CLAD certified by the end of 2003. Numerous memoranda and e-mails advised existing teachers that the District "required" all teachers to obtain CLAD certification. The District admonished teachers lacking CLAD certification that they may be "reassigned," if they did not comply.

9. The District serves nine sites. Thirteen percent of its students are considered ELL. Approximately 95 percent of the classroom teachers in the District hold CLAD certificates.

10. The District is concerned that if CDE conducted another audit it would find them to be out of compliance, despite having 95 percent of the teachers CLAD certified. The potential consequences of such an occurrence were not explained. By "skipping" junior teachers and laying off the five senior ones, the District would have 100 percent of its classroom teachers CLAD certified, thus alleviating the District's compliance concern.

11. The District did not establish a specific need for junior personnel to teach a specific course. While the District's concerns regarding its ELL students were laudable, it did not establish the need to retain junior employees over senior ones.

At the District's middle school sites, students are assigned to four or five different "teams." Deputy Superintendent of Personnel, Brad Tooker, testified that it is possible to assign ELL students to a "team" taught only by CLAD certified teachers.

At the elementary schools, Mr. Tooker explained that it would be possible to assign ELL students to a class staffed by CLAD certified teachers; however, it would be difficult to assure that ELL students transferring into the District during mid-school year would be assigned CLAD certified teachers. With 95 percent of its teachers CLAD certified, it does not follow that it would unduly burdensome for the District to assign new ELL students to teachers holding CLAD certification.

12. Each of the five senior teachers has significant seniority, for example, Ms. Scott is the District's most senior teacher. Each was hired before CLAD certification was required. CLAD certification requires completing a 65 hour course and passing an examination. Presently the cost of the course is approximately \$1,200. The amount that the

Learners are students who reside in homes where the primary language spoken is other than English and testing shows the student's English language abilities require teachers with special training to properly teach them.

District pays towards that cost was not established by the record. Since receiving their layoff notices, four teachers have enrolled in, and one is "scheduled" to enroll in a CLAD certification course. Their enrollment in the course would allow them to teach ELL students under a provisional authorization. If the teachers are granted a provisional CLAD credential, the District will also achieve 100% compliance.

13. In anticipation of the layoffs, the District began reviewing its Certified Seniority List and discussing laying off those teachers not holding CLAD certifications. These discussions took place no later than mid-February 2008.

14. On February 21, 2008, Colleen Slattery, District Director of Personnel Services, distributed e-mails to teachers who lacked CLAD credentials, informing them of various programs in which they could enroll to obtain certification. Conspicuously absent from these e-mails is any advisement that the District was considering laying-off teachers who did not enroll. Instead, the first notification the teachers received that their lack of a CLAD certification would result in their being laid off, was when they received their lay-off notices.

15. Had the District informed the teachers about its plan to "skip," the teachers could have enrolled in a CLAD instruction course (as they have since receiving their lay-off notices) and requested that provisional authorizations be issued. As set forth below, other districts provided such notice to teachers.

16. The District's contention that it had no obligation to advise teachers of its intention to skip, as a general proposition, may be true. However, the District, having previously represented to the teachers that the absence of a CLAD certification might result in nothing more than their "reassignment," was obligated to notify teachers of a change in this policy in order to avoid lulling senior teachers into a false sense of security before laying them off.

17. The e-mails from the Director of Personnel Services could be fairly characterized as expressing a status quo in the District's CLAD policy, at a time when teacher lay-offs were on the horizon. The District offered no explanation, other than they were "not obligated to," for failing to advise the teachers of the new, and more severe, consequences of their failure to hold a CLAD certificate.³

³ The District cited prior OAH decisions in support of their "skipping" policy. Primarily, the District relied on *Alioto v Sonoma County Superintendent of Schools*, OAH 2005030692. In *Alioto*, prior to the teachers receiving lay-off notices, they received a letter that stating, "...participating in training and earning a certificate would help protect existing teachers from the possibility of reassignment or exposure to layoff for not having the required certification." Another subsequent letter stated that in the event of a layoff, teachers with less seniority who had CLAD certification would be skipped while teachers with more seniority who did not have CLAD certification would be laid off. Clearly, Sonoma County was not attempting to use the layoff process to catch non-compliant teachers off-guard. The same cannot clearly be said here. Accordingly, the reasoning in *Alioto* is unpersuasive.

18. The explanations offered by the teachers as to why they failed to obtain their CLAD certification were less than compelling. The District's point that the teachers should have obtained their certification is correct. However, the lay-off process is an inappropriate mechanism to determine the appropriate consequences of the teachers' recalcitrance.⁴

OTHER MATTERS

19. With respect to the remaining respondents, there is no dispute that the proposed layoff list prepared by the District accurately identified them as the most junior teachers, after the District considered all known attrition, resignations, retirements, deaths and requests for transfers. The reduction in the particular kinds of services that affected those respondents was necessary and appropriate in light of the District's bona fide financial concerns.

20. There was no evidence that the Board's decision to eliminate the particular kinds of services described in Factual Finding 2 was arbitrary or capricious.

21. There was no evidence that the Board's decision to reduce the particular kinds of services described in Factual Finding 2 will cause it to reduce its offerings in Code mandated courses below the level required by law.

LEGAL CONCLUSIONS

1. Education code section 44955 generally provides that layoffs must be done on the basis of seniority.

2. Education Code section 44955, subdivision (d)(1), permits a district to depart from a seniority-based layoff only when it, "demonstrates a specific need for personnel to teach a specific course or course of study...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."

3. The District's attempt to lay-off teachers not holding a CLAD certificate is not a valid exercise under Education Code section 44955, subdivision (d)(1).

4. In *Alexander v. Board of Trustees* (1982) 139 Cal.App. 567, the district implemented a similar "skipping" formula where junior teachers with an ability to communicate in Spanish, Tagalog, or Phillipino, were retained over senior teachers who lacked such skills.

⁴ A similar situation was presented to the ALJ in the matter of *Rialto Unified School District*, OAH L2007030796. The decision in this matter is consistent with the reasoning in *Rialto*.

The *Alexander* court acknowledged the validity of districts' consideration of the multi-language skills of its teachers when developing a tie breaking criteria for teachers sharing the same hiring date. However, at pages 573-574, the court specifically noted that in determining the order of layoffs for teachers having different hiring dates, the "needs of the district and its students is not a proper measure of priority." In so stating, the *Alexander* court affirmed that districts must follow the general rule of seniority-based lay-offs in instances other than where teachers share the same hiring date. Specifically, the court stated:

Employment of new teachers with bilingual ability and gradual prospective amendment of job descriptions to include language skills, may be a proper means of creating district-wide bilingualism. However, presently employed teachers hired as monolingual, who are otherwise competent may not be discharged under these conditions merely because more junior employees have achieved passing grades from a committee of bilingual teachers.

The reasoning of the *Alexander* applies: Retaining junior employees here because they obtained their CLAD certification is no more appropriate than was retaining junior employees in *Alexander* who "achieved passing grades from a committee of bilingual teachers." Both efforts are aimed at providing ELL students with greater access to their curricula, but such efforts do not allow districts the authority to "trump" the long-standing principle of seniority based layoffs established in Education Code section 44955.

In addition to *Alexander*, OAH has addressed the appropriateness of districts' "skipping" based on the concerns of ELL students. The conclusions reached by the Administrative Law Judges have differed, as have the facts of each matter. In reviewing the OAH decisions cited by the parties, Judge Engeman's decision in *Travis Unified School District*, OAH 2003020278, contains the only statutory analysis of section 44955, subdivision (d)(1), and accordingly, provides guidance.

In the *Travis* matter, Judge Engeman determined that the District failed to identify a "specific course or course of study" when it laid-off teachers who did not possess the equivalent of a CLAD certification. As in *Travis*, the District failed to identify a "specific course or course of study" that senior teachers were not certificated and competent to teach. In both instances, the districts, in effect, designated their entire curriculum as "a specific course or course of study."

The District's "skipping" in an attempt to place a CLAD certified teacher in every classroom, stands inapposite to the language of section 44955, subdivision (d)(1), that requires Districts identify specific courses and to show why specific junior personnel are competent to teach them, to the exclusion of senior teachers. The District's "skipping" formula all but concludes that a senior teacher lacks certification and is incompetent merely because they lack CLAD certification. The District failed to provide authority that would support such a conclusion. Both *Alexander* and *Travis* support the opposite.

5. Furthermore, Education Code section 51015 defines a "course" as an "area or field of organized knowledge, usually provided on a semester, year or prescribed length-of-time basis" and Education Code section 51014 states that a "course of study" means "the planned content of a series of classes, courses, subjects, studies or related activities."

6. These statutes make clear that classes being taught by teachers holding CLAD certificates do not become, *ipso facto*, a "specific course or course of study." Put another way, there is no "specific course or specific course of study" known as "CLAD."

7. Education Code section 44955, subdivision (b), states a district "shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." As set forth in Factual Finding 11, the District is capable of making "assignments and reassignments" that would not require the five senior teachers to be laid-off. Easing the District's burden to assimilate new ELL students transferring into the District during mid-year does not provide a basis for laying-off senior teachers.

8. The services set forth in Factual Finding 2 are particular kinds of services which may be reduced or discontinued in accordance with applicable statutes and case law. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167.178-179).

9. The notices sent to respondents identified the statutory basis for the reduction of their services and, therefore, were sufficiently detailed to provide them with due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d. 627).

10. Cause exists because of the reduction in particular kinds of services to reduce the District's certificated staff by 10 FTE. However, the District improperly determined the order of seniority of teachers to be laid off because it did not establish that CLAD certification is a separate course of study or that it could not make assignments and reassignments in such a manner to retain senior employees. Additionally, the District attempted to use the lay-off process to effectively terminate teachers who failed to meet its requirement to become CLAD certified, a practice that if allowed would undermine the principle of seniority based lay-offs.


11. Accordingly, the District must retain respondents Blasquez, Condin, Olin, Scott and Vordertasse.

12. Services reduced below the level mandated by law are not "particular kinds of services" under Education Code section 44955. So long as a school 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*, supra, 67 Cal.App.3d 689.) The District may proceed to lay off the remaining respondents because it is appropriately reducing the level of services mandated by law.

RECOMMENDATION

As a result of the reduction of services, the District may give notice to respondents Robyn Annicchero, Cynthia Autrey, Katherine Camilleri, Amy Davis and Melissa Durrans, that their services will not be required for the 2008-2009 school year. The District may not lay-off respondents Judith Blasquez, James Condon, Scott Olin, Barbara Scott and James Vordestrasse.

DATED: May 2, 2008



GARY A. GEREN
Administrative Law Judge
Office of Administrative Hearings