

**BEFORE THE  
GOVERNING BOARD  
OF THE BEARDSLEY SCHOOL DISTRICT  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Julia M. Whorton,

Respondent.

OAH Case No. 2013040417

**PROPOSED DECISION**

The hearing in the above-captioned matter was held on April 24, 2013, at Bakersfield, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Melissa H. Brown, Schools Legal Service. Respondent Julia M. Whorton was represented by Joshua F. Richtel, Tuttle and McCloskey.

Oral and documentary evidence was received, argument was heard, and the matter submitted for decision on the hearing date.

The ALJ hereby makes his factual findings, legal conclusions, and order, as follows.

**FACTUAL FINDINGS**

*The Parties and Jurisdiction*

1. Complainant Paul Miller filed and maintained the Accusation<sup>1</sup> in the above-captioned matter while acting in his official capacity as Superintendent of the Beardsley School District (District).

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<sup>1</sup> The term “accusation” refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondent is not “accused” in the everyday sense of that word; she has done nothing wrong, and gives every appearance of being a dedicated professional. It might be said that she is simply accused of not having enough seniority or other qualifications to retain her position with the District in the face of a resolution to reduce positions.

2. Julia M. Whorton is a certificated employee of the District and she is the sole Respondent in this case.

3. (A) On February 12, 2013, the Governing Board of the District (Board) adopted Resolution number 6, pertaining to the reduction of services within the District (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2013-2014 school year. Specifically, the resolution requires the reduction of 5 “FTE”—Full Time Equivalents—by reducing two types of services.

(B) The FTEs that the Board determined to reduce are described in the Reduction Resolution, as follows:

K through 6 Self-contained classroom	4
School Psychologist	1

4. On February 12, 2013, in connection with the Reduction Resolution, the Board adopted Resolution number 7, which created “tie breaking” criteria for determining seniority in cases where two or more certificated employees shared the same seniority date. The tie-breaking criteria were based solely on the needs of the District and its students.

5. On February 15, 2013, Respondent Julia Whorton and four certificated teachers were given written notice that pursuant to Education Code sections 44949 and 44955,<sup>2</sup> their services would not be required in the 2013-2014 school year (hereafter the preliminary notices). The four classroom teachers waived their rights to a hearing, but Respondent Whorton did not. Thereafter, Respondent was served with an Accusation and other documents pertaining to the hearing process. Respondent Whorton filed a notice of defense in a timely manner, and this matter proceeded to hearing as to her rights alone.

6. All jurisdictional requirements have been met.

7. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under section 44955. This applies to the services of the self-contained K-6 classroom instructors, as well as Respondent Whorton’s services as a school psychologist.

8. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

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<sup>2</sup> All further statutory references are to the Education Code.

9. (A) The Board decided to change or reorganize how special education services were provided and administered in the District. Prior to 2013, there was no formal administrator to oversee the provision of special education services in the District. Hence, the Superintendent had a certain amount of oversight duties, and no administrator or manager between the Superintendent's position and that of the special education teachers and staff, or the school psychologist.

(B) The Board determined that it was necessary to create a new position, that of Director of Special Education, who would be an administrator to supervise, manage, and direct the District's special education program, and who would also act as the school psychologist. The Board determined that it could retain a person qualified and credentialed to perform both roles, for slightly more annual cost than that of employing a school psychologist alone, but for less expense than if it employed two persons, one dedicated to administration and supervision, and the other dedicated to providing psychological services.

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

11. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

#### *The Change in the Delivery of Psychologist Services*

12. The new position created by the District will require the Director of Special Education to be certificated to act as a school psychologist, as well as an administrator. The position will require that the Director hold a Pupil Personnel Services Credential, with a school psychologist authorization, and an Administrative Services Credential. A Masters degree in school psychology or counseling, or a higher degree, would also be a prerequisite to appointment as director.

13. The Director of Special Education will have a number of duties, such as representing the District in mediations, due process proceedings, and section 504 hearings, as well as providing assessments. Respondent Whorton has been providing most of the services contemplated for the Director, except some supervisory duties vis-à-vis special education staff.

14. Respondent, at this time, does not possess the administrator credentials needed to fill the new position. Otherwise, Respondent appears as a well-educated and well-qualified school psychologist, obviously dedicated to her profession and the District's students.

15. As set out further in the Legal Conclusions, it must be found that no junior certificated employee is being retained in a position which a senior employee is certificated and competent to fill.

## LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 6.

2. (A) A District may reduce particular kind of services (PKS) 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* (1976) 64 Cal.App.3d 167, 178-179.) The Court of Appeal has made clear that a PKS reduction does not have to lead to fewer classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) At first blush, it might appear that the particular kind of service provided by Respondent—school psychologist in the special education arena—is not being discontinued. Instead, it could be argued that it is being reconfigured. However, pertinent case law controls this matter, and allows the District to eliminate Respondent Whorton’s position and to create a new one. In the case *Gallup v. Board of Trustees of the Alta Loma School District* (1996) 41 Cal.App.4th 1571, the Fourth District Court of Appeal held that a school district was deemed to have reduced particular kinds of services when it laid off school psychologists, and then hired independent contractors to perform those tasks in their places. One of the three school psychologists was to be employed as an administrator to supervise the independent contractors, as that person had administrative credentials. After a review of case authority trailing back more than 60 years, the court concluded that a change in how a certificated service was to be provided amounted to a reduction in a particular kind of service. Furthermore, it ruled that the Alta Loma district could hire one of the laid-off school psychologists as the new administrator, even though he was junior to the plaintiff, Gallup, and that Gallup could not displace that individual, because Gallup did not have an administrator’s credential.

(C) The undersigned is bound by that decision, and cannot substitute his judgment for that of the Board in this matter. The services to be discontinued are particular kinds of services within the meaning of 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 section 44949. This Legal Conclusion is based on Factual Findings 1 through 13, and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) At the same time, a junior teacher may be given retention priority over one or more senior teachers—may be “skipped” in favor of senior employees—if the junior teacher possesses superior skills or capabilities not possessed by more senior colleagues which must be necessary to teach a course or course of study that is specifically needed in the District. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) Unfortunately, Respondent Whorton is unable to bump another employee, and the District has not seen fit to skip, or exempt her, from lay off, despite her qualifications and experience as a school psychologist.

4. Under the circumstances, it must be concluded that no junior certificated employee is being retained to perform a service that Respondent Whorton is certificated and competent to perform, based on Legal Conclusions 1 through 3, and Factual Findings 3 through 15. Therefore, the District may issue a final lay off notice to the Respondent Whorton, and the other four teachers who did not request a hearing.

#### ORDER

Respondent Julia M. Whorton may be served with a final lay off notice. The District may also issue final layoff notices to its four certificated employees who did not request a hearing.

May 1, 2013

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings