

**BEFORE THE  
BOARD OF EDUCATION OF  
MOUNT DIABLO UNIFIED SCHOOL DISTRICT**

**In the Matter of the Statement of Reduction in Force of:  
  
The Certificated Employees Identified in Attachment A,  
  
Respondents.**

**OAH No. 2020030728**

**PROPOSED DECISION**

Administrative Law Judge Diane Schneider, State of California, Office of Administrative Hearings, heard this matter on April 23, 2020. This hearing was conducted telephonically and by videoconference. The participants appeared from various locations near Oakland, California.

Attorney Joshua A. Stevens, Fagen, Friedman & Fulfroast, LLP, represented the Mount Diablo Unified School District.

Attorney Ernest H. Tuttle III, Tuttle & McCloskey, represented the respondents identified in Attachment A, with the exception of administrators Afsaneh Olinga, Craig Bocks, and Lisa Murphy Oates. The following respondents were present at hearing: Anjelika Saverio, Debra Niethold, Diana Castellanos, Erika Austen, Jeong Kinser, Tyler Mintzer, Jessica Moreno, Nancy Grabow, Rebecca Schnee, Tamara Prosis, Valerie Gallardo, Afsaneh Olinga, Craig Bocks, and Lisa Murphy Oates.

The record closed and the matter was submitted for decision on April 23, 2020.

## **FACTUAL FINDINGS**

1. Robert Martinez, Ed.D., made and filed the Statement of Reduction in Force in his official capacity as Superintendent of the Mt. Diablo Unified School District (District).

2. The respondents listed on Attachment A, attached hereto and incorporated herein, are certificated employees of the District who were served with a Reduction in Force packet. Prior to hearing, the District rescinded the layoff notices issued to respondents Katherine Koch and Rebekah Anthon. At hearing, the District rescinded the layoff notices issued to respondents Erika Austen and Lisa Murphy Oates.

3. On March 9, 2020, the Board of Education of Mount Diablo School District (Board) passed Resolution No. 19/20-42. Resolution No. 19/20-42,<sup>1</sup> attached hereto and incorporated herein as Attachment B, sets forth the Board's determination that is necessary and in the best interests of the District and its students, to reduce or discontinue particular kinds of services for 2020-2021 school year, for a total of 117.04 full-time equivalent (FTE) certificated positions. Resolution No. 19/20-42 directed Superintendent Martinez or his designee, to give appropriate notices to all employees

---

<sup>1</sup>The Board's Tie-Breaker Resolution, No. 19/20-39, was attached to Resolution No. 19/20-42 and is included in Attachment B.

whose positions will or be may affected by the action, in accordance with the applicable provisions of the Education Code.

4. By letter dated March 13, 2019, Superintendent Martinez gave written notice to 106 certificated employees of the recommendation that their services will not be required for the 2020-2021 school year. In his letter, Superintendent Martinez explained the reasons for his recommendation. He emphasized that the recommendation to reduce or eliminate services was based solely upon the District's budgetary requirements and was not a reflection of the District's esteem for its employees. The layoff notices were sent to the certificated employees at the addresses they provided to the District, by certified mail, return receipt requested.

5. Ninety-seven of the certificated employees, respondents herein, filed timely requests for hearing to determine if there is cause for eliminating their services for the 2020-2021 school year. A Statement of Reduction in Force was served on respondents, all of whom are deemed to have timely filed Notices of Participation.

6. All Notices were timely and properly served on respondents. All Notices and other jurisdictional requirements contained in Education Code sections 44949 and 44955 have been timely provided or satisfied.

7. Before issuing the layoff notices, the District took into account all positively assured attrition.

8. Emily Lopez Frizzell is the District's Senior Human Resource Specialist. In consultation with the District's Associate General Counsel, Cesar Alvarado, and the Interim Director of Human Resources, Michael Gardner, Frizzell performed a number of tasks in connection with the layoff. The tasks included preparing and sending layoff

notices, Reduction in Force packets, and notices of hearing, and preparing the District's seniority lists.

## **Skipping Issues**

9. Resolution No. 19/20-42 authorizes the District to deviate from terminating certificated employees in order of seniority where the District demonstrates a specific need for employees with special training and experience to teach a specific course or courses of study which others with more seniority do not possess. The process of retaining junior employees if such conditions are present, is commonly referred to as "skipping." The skipping criteria, set forth in Resolution 19/20-42, provide:

There is a direct and specific need within the District for certificated employees who possess special training and/or experience, or competency, necessary to teach specific courses or courses of study or to provide specific services to students of the District, which others with more seniority do not possess, as follows:

- a. Courses requiring Bilingual Cross-Cultural Language and Development (BCLAD) certificates, which are highly specialized programs requiring the possession and utilization of additional specialized certificates and/or credentials.
- b. Courses requiring IB: Completion of District Approved International Baccalaureate training, which

are highly specialized programs requiring the possession and utilization of additional training.

- C. Courses requiring Adaptive Physical Education credential or supplementary authorization which are highly specialized programs requiring the possession and utilization of additional specialized certificates and/or credentials.

Pursuant to Education Code section 44955(d)(1), it will be necessary to retain the services of certificated employees in the 2020-2021 school year, regardless of seniority, who possess these qualifications as demonstrated by the possession of a valid certificate and/or credential or special training and experience and use that certificate and/or credential or that special training and experience in the employee's 2020-2021 assignment.

10. Frizzell explained that the teaching assignments for the 2020-2021 school year were not made on March 9, 2020, when the skipping criteria were adopted by the Board. According to Frizzell, teaching assignments for the 2020-2021 school year are made on April 27, 2020. No teacher, therefore, could meet the criterion that he or she would be using the specialized training and experience in their assignment for the 2020-2021 school year.

11. Diana Castellanos: The District has a direct and specific need for certificated employees who possess specialized training and experience to teach the

International Baccalaureate (IB) curriculum, which is offered at some of the District's elementary, middle and high schools.

12. Castellanos completed District-approved IB training, and she taught IB curriculum at Ygnacio Valley High School during the 2018-2019 school year. Castellanos was involuntarily transferred from Ygnacio Valley High School to Concord High School for the 2019-2020 school year, where she currently teaches Spanish. According to Frizzell, the District determined that Castellanos did not meet the criteria to be skipped because although Castellanos taught IB curriculum during the 2018-2019 school year, her current teaching assignment is not at an IB school. Castellanos would be happy to return to teaching IB curriculum.

13. The District stipulated that it skipped teachers less senior to Castellanos who are teaching IB curriculum in their current assignments. Those teachers did not receive layoff notices.

14. Debra Niethold: The District maintains separate Adaptive Physical Education (PE) classes that are different from General Education PE classes. Niethold currently teaches PE to fourth and fifth graders in a general education setting. Niethold also holds a credential to teach Adaptive PE. She believes that she should have been retained because she uses some of the knowledge that she gained from her Adaptive PE training in her work teaching PE in a general education setting. The District did not retain any teachers who had less seniority than Niethold to teach Adaptive PE.

### **Administrators Bocks and Olinga**

15. Craig Bocks and Afsaneh Olinga are vice-principals who received layoff notices. Olinga holds a credential to teach foreign language, and her seniority date is

November 19, 2019. Bocks is credentialed to teach social science, and his seniority date is August 13, 2018.

16. Olinga and Bocks testified at hearing to their disappointment at losing their positions as administrators.

17. Bocks and Olinga began working for the District as administrators, and they received seniority credit for the time that they worked as site administrators at their respective schools.<sup>2</sup> The District took into account their placement on the District's seniority list prior to issuing layoff notices to them. Bocks and Olinga impress as highly competent and dedicated professionals. The District, however, did not retain any junior employees to render services that either Bocks or Olinga are certificated and competent to perform.

### **Notice to Tyler Mintzer**

18. Mintzer claims that the District failed to comply with the notice requirements set forth in in section 44949, subdivision (d). That section provides that any notice sent by the District to the employee is "deemed sufficient" if it is sent to the last known address of the employee.

19. On January 20, 2020, Mintzer moved from Clayton to a new residence in Concord. He notified the United States Postal Service of his change of address on January 18, 2020. Because Mintzer was distracted by his move, he forgot to inform the District of his new address. Mintzer, however, thought that the postal service had notified the District of his new address in the end of January or the beginning of

---

<sup>2</sup> See Education Code section 44956.5.

February, and that the District would update his address based on information it received from the postal service.

20. Prior to March 15, 2020, Frizzell sent the preliminary layoff notice to Mintzer, by certified mail, at the last known address that he provided to the District, which was in Clayton. Each employee is required to provide the District with his or her address and notify the District of any changes to the address. At the time the notice was sent, District had not been notified of any change in Mintzer's address.

21. Mintzer first learned about the layoff on March 19, 2020, after receiving an email from the Mount Diablo Education Association. On March 20, 2020, after Frizzell learned that Mintzer had moved, she mailed him notice of the layoff to his new address.

22. Because the District sent the preliminary layoff notice to Mintzer at his last known address, the notice provided by the District is deemed sufficient under Education Code section 44949, subdivision (d).

### **Request by Jeong Kinser to Continue Employment**

23. Kinser testified at hearing. She is a kindergarten teacher with a seniority date of August 29, 2019, who received a layoff notice. Kinser has a multiple subject teaching credential and a single subject teaching credential. She also has advanced degrees in educational technology and teaching English to students who speak other languages. Kinser is passionate about teaching technology in an educational setting. She believes that there is currently a greater need than ever to train students to use remote learning technology. Her partner has medical conditions that make it hard for him to work. In light of her skills and the economic pressures her family faces following the outbreak of Covid-19, Kinser asked the District to allow her to continue teaching.



## Ultimate Findings

24. With the exception of Castellanos, no certificated junior employee is being retained to perform services that any respondent is certificated and competent to perform.

25. The reduction of discontinuation of services is related solely to the welfare of the District and of its pupils.

26. Any contentions made by respondents not addressed above are found to be without merit and rejected.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955.<sup>3</sup> Pursuant to Factual Findings 6 and 22, all notices and jurisdictional requirements contained in these sections have been satisfied.

2. The services identified in Attachment B are particular kinds of services that may be reduced or discontinued under Education Code section 44955 and pertinent case law. (See *Campbell Elem. Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.) The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious and was a proper exercise of its discretion.

---

<sup>3</sup> All further statutory citations are to the Education Code.

3. In issuing its layoff notices to effectuate the reduction in teaching services, the District must comply with section 44955, subdivision (b), which provides:

Except as otherwise provided for by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

Additionally, section 44955, subdivision (c), requires the District to make assignments "in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render."

### **Skiping Issues**

4. Although the Legislature mandates that teachers have a right to be retained and that assignments be made, according to seniority, a limited exception exists under section 44955, subdivision (d)(1), which allows the District to deviate from terminating certificated employees in order of seniority. Under section 44955, subdivision (d)(1), a District may retain a junior employee over a senior employee, if the District demonstrates a specific need for a teacher to teach a specific course or course of study for which special training and experience are necessary, and that no senior teacher has the necessary special training and experience to teach the specific course or course of study. If the District establishes the conditions described in section 44955, subdivision (d)(1), the District may skip over a junior teacher who possesses the special training and experience to teach a specific course or course of study and may lay off a more senior teacher instead. It is the District's burden to demonstrate that its

proposed skips comply with the statutory requirements set forth in section 44955, subdivision (d). (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127.)

5. Castellanos: As established by Board Resolution 19/20-42, the District has a specific need to retain certificated employees who have special training and experience teaching IB curriculum. Castellanos completed the District-approved IB training and taught IB curriculum during the 2018-2019 school year. The District, however, issued Castellanos a layoff notice while retaining junior teachers to teach IB curriculum, in spite of the fact that Castellanos has the specialized training and experience to teach in the District's IB programs.

Castellanos asserts that the District's retention of junior employees to teach IB curriculum was improper because it was inconsistent with its skipping criteria and contravened the provisions in section 44955, subdivision (d). She also asserts that pursuant to section 44955, subdivision (c), she is entitled to be assigned to an IB school by reason of her seniority and qualifications.

The District contends that the layoff of Castellanos was consistent with its skipping criteria, because although Castellanos had previously taught IB curriculum, she was not teaching IB in her current position in the 2019-2020 school year. The skipping criteria contained in the Resolution adopted by the Board, however, do not contain any requirement that in order to be skipped, a teacher must utilize such specialized training, certification or credential in the teacher's current assignment.

The District's argument is unpersuasive. The District erred when it determined that Castellanos did not satisfy its skipping criteria. As a result, the District improperly retained junior employees to teach in IB curriculum while laying off Castellanos. As such, the District's layoff violated section 44955, subdivisions (b), (c), and (d)(1).

6. Niethold: Niethold claims that she should have been retained because she possesses an Adaptive PE credential and, although she does not teach Adaptive PE, she uses some of the skills she learned while obtaining this credential in her work as a regular PE teacher. She did not establish, however, that the District retained a junior employee to teach Adaptive PE or that she possesses special training and experience as an Adaptive PE teacher which others with more seniority do not possess. Accordingly, the District's layoff of Niethold did not violate section 44955, subdivisions (b), or (d)(1).

## **Conclusion**

7. Cause exists because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents, other than those identified in Finding 2 (layoff notices rescinded for Katherine Koch, Rebekah Anthon, Erika Austen, and Lisa Murphy Oates), and Legal Conclusion 5 (improper layoff of Castellanos), that their services will not be required for the 2020-2021 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

## **RECOMMENDATION**

1. By reason of the matters set forth in Legal Conclusion 7, respondents Katherine Koch, Rebekah Anthon, Erika Austen, Lisa Murphy Oates, and Diana Castellanos are dismissed from this Reduction in Force proceeding. These certificated employees must be retained for the 2020-2021 school year.

2. Notice may be given to the remaining respondents identified in Attachment A that their services will be reduced or eliminated for the 2020-2021 school year because of the reduction or discontinuation of particular kinds of services.

DATE: May 5, 2020

DocuSigned by:  
*Diane Schneider*  
DIANE SCHNEIDER

Administrative Law Judge

Office of Administrative Hearings

List of Attachments:

Attachment A: List of Respondents

Attachment B: Resolution No. 90/20-42  
and No. 19/20-39