

BEFORE THE
GOVERNING BOARD OF THE
GATEWAY UNIFIED SCHOOL DISTRICT
SHASTA COUNTY, STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DANEECE BYRUM and
DAVID MELCHER,

Respondents.

OAH No. 2008030976

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 9, 2008, in Redding, California.

Joseph C. Kinkade, Attorney at Law, represented the Gateway Unified School District (District).

Respondent Daneece Byrum was present and was represented by Michael N. McCallum, Attorney at Law.

There was no appearance by or on behalf of respondent David Melcher.

Evidence was received on May 9, 2008. The record was left open until May 22, 2008, for counsel to file closing briefs. On May 22, 2008, Mr. Kinkade filed a closing brief on behalf of the District, which was marked for identification as Exhibit 14. On May 22, 2008, Mr. McCallum filed a closing brief on behalf of Ms. Byrum, which was marked for identification as Exhibit I. The record was closed and the matter was submitted for decision on May 22, 2008. Pursuant to Government Code section 11524 and Education Code section 44949, subdivision (e), the time within which the proposed decision shall be submitted under Education Code section 44949, subdivision (c), was continued to and including June 5, 2008, and the time within which notice of termination of services shall be given under Education Code section 44955, subdivision (c), was continued to and including June 12, 2008.

testing; (2) Specialized Physical Health Care Procedures (SPHC's) for students with diabetes, epi-pens, and G-tubes; (3) Individual Health Services and Section 504 plans; (4) medication administration; (5) mandated reports, including kindergarten immunization reports, program and compliance supervision, oral health assessments for kindergartners, and hearing reports to the state; (6) health and development reports, including initial, triennial, and preschool reports, IEP/SST¹ attendance, and GREAT² and NPS³ work; and (7) TB skin tests for District employees.⁴ According to the Study, when all these services are added, they total 237.3 nurse days a year. One certificated school nurse works about 190 days a year. Given the difference between these two numbers, Ms. Byrum and Ms. Mancuso believe that one certificated school nurse would not be able to provide all the nursing services listed in their Study.

10. The District disputed the amount of nursing time set forth in the Study. In particular, Mr. Strohmayer disputed that certificated nurses spent 182 hours a year on insulin administration, since there is only one student in the District who currently requires insulin administered by a nurse. He also questioned whether certificated nurses spend 33 hours a year on Section 504 plans, or 280 hours a year attending IEP and SST meetings. According to Jody Thulin, the Assistant Superintendent in charge of special education, the law requires that a nurse must attend an IEP meeting only when nursing services are a required part of the IEP. Historically, services provided by a certificated nurse have been included as a mandatory requirement in the IEP's of only about four students.

Ms. Byrum and Ms. Mancuso testified that, while there was only one student with diabetes who needs insulin administered by a nurse, there are six or seven other diabetic students who require nursing assistance. They also testified that they attend IEP and SST meetings whenever their attendance is requested and fill out forms as required for these meetings. There was not enough evidence presented at hearing to determine whether the Study accurately reflects the amount of time certificated school nurses spend in providing the listed services.

11. The District also argued that the Education Code does not mandate that all the health care services which the District's school nurses are currently providing must be provided by a certificated school nurse. The District's argument was persuasive.

¹ "IEP" stands for individualized education program. "SST" stands for student study team.

² "GREAT" stands for the Gateway Redding Enterprise Achieving Together. It is a special education consortium comprised of three school districts. Through GREAT, the District has provided the nursing services of Ms. Mancuso to the Redding Unified School District one day a week for special education students with nursing needs.

³ "NPS" stands for non-public school.

⁴ Ms. Byrum and Ms. Mancuso also provide nursing services to approximately 20 students who have medically complex conditions, and to students who attend after school programs.

School districts "shall give diligent care to the health and physical development of pupils, and *may* employ properly certified persons for the work." (Ed. Code, § 49400. Italics added.) School districts must also "maintain fundamental school health services at a level that is adequate to accomplish all the following: [¶] (1) Preserve pupils' ability to learn. [¶] (2) Fulfill existing state requirements and policies regarding pupils' health. [¶] (3) Contain health care costs through preventive programs and education."

The Education Code requires school districts to conduct sight and hearing screening (Ed. Code, § 49452), and scoliosis screening (Ed. Code, § 49452.5). The Education Code also contains provisions governing the administration of medication and epinephrine to students (Ed. Code, 49423), and the delivery of specialized physical health care services, including catheterization, gastric tube feeding, suctioning, and other services that require medically related training (Ed. Code, § 49423.5.) These statutory provisions do not, however, require that certificated school nurses must provide the described health care services. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571.) In addition, the law does not mandate that a certificated school nurse must attend all IEP and SST meetings, or that a certificated school nurse must be involved in the development of Section 504 plans for students with disabilities. Thus, while the District must provide all the health care services mandated in the Education Code, it is not required to utilize certificated school nurses to provide many of the services listed in the Study prepared by Ms. Byrum and Ms. Mancuso.

12. It was apparent that both Ms. Mancuso and Ms. Byrum are very dedicated school nurses who provide valuable health care services to the District. The law, however, grants the District the discretion to determine how and in what manner mandated health care services will be provided to students. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 769.) The evidence did not establish that the District would not be able to provide all legally mandated health care services to students if it reduces its certificated school nursing staff by one Full Time Equivalent position.

13. In sum, the math and nursing services identified in the Layoff Resolution are particular kinds of services that may be reduced or discontinued under Education Code section 44955. The Board's decision to reduce or discontinue these services was not arbitrary or capricious, and was a proper exercise of its discretion. The Board's decision was based solely on the welfare of the District and its pupils. The District properly identified the certificated employees providing these particular kinds of services. No junior certificated employee is scheduled to be retained to perform services that respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notice and jurisdictional prerequisites required by those sections were satisfied.

2. The math and nursing services the District seeks to eliminate in this matter, as set forth in the Layoff Resolution, 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, but constituted a proper exercise of the Board's discretion. Pursuant to Education Code sections 44949 and 44955, legal cause exists for the District to reduce or discontinue these particular kinds of services. The reduction or discontinuance of these particular kinds of services relates solely to the welfare of the District and its pupils.


3. No certificated employee with less seniority than either respondent is being retained to render a service that respondents are certificated and competent to render. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents final notice that their services will not be required for 2008-2009 school year.

RECOMMENDATION

1. The Gateway Unified School District's action to reduce or eliminate the particular kinds of math and nursing services identified in the Layoff Resolution for the 2008-2009 school year is AFFIRMED.

2. The Accusation against respondents is SUSTAINED. The Gateway Unified School District may give final notices to respondents that their services will not be required for the 2008-2009 school year.

DATED: May 27, 2008


KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings