

BEFORE THE
BOARD OF EDUCATION
JAMUL-DULZURA UNION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2011030252

TANIA DUMITRU, GAIL EASTERLY,
CATHERINE GALE, SUSAN
GACKOWSKI, ELIZABETH HUDSON,
DESHEILA MANUEL-POWELL, LEAH
ROSENTHAL, GREGORY SPIELMAN,
RON WAGNER, JOHN ZIESKE.

Respondents.

PROPOSED DECISION

On April 26, 2011, in Jamul, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Cathie L. Fields, Attorney at Law, represented the Jamul-Dulzura Union School District.

Georgiana D’Alessandro, Attorney at Law, represented respondents Susan Gackowski and Gail Easterly.

Jack Cottrell, California Teachers Association, represented respondents Tania Dumitru, Catherine Gale, Elizabeth Hudson, Desheila Manuel-Powell, Leah Rosenthal, Gregory Spielman, Ron Wagner, and John Zieske.

The matter was submitted on April 26, 2011.

FACTUAL FINDINGS

1. On March 24, 2011, Nadine Bennett, Superintendent of the Jamul-Dulzura Union School District (hereafter, “the District”), made and filed the accusations against respondents in her official capacity.

2. Respondents are certificated employees of the District.

3. Before March 15, 2011, pursuant to Education Code sections 44949 and 44955, Ms. Bennett notified the Board of Education (hereafter, “the Board”) of the District of the Superintendent’s recommendation that respondents be notified their services will not be required for the ensuing school year. The Superintendent's notification to the Board set forth the reasons for the recommendation.

4. On or before March 15, 2011, each respondent was given written notice that the Superintendent had recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing year. Each written notice set forth the reasons for the recommendation. The notices satisfied the requirements of sections 44949 and 44955. *San Jose Teachers Association, Inc. v. Allen* (1983) 144 Cal.App.3d 627, 632; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803-04, distinguishing *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-63.

5. Each respondent timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. Accusations were timely served on respondents, and each respondent filed a timely Notice of Defense. All pre-hearing jurisdictional requirements have been met.

6. The Board took action in Resolution No. 030911.1 to discontinue the following services for the 2011-12 school year:

1.	Primary Classroom Instruction	4.0 FTE
2.	Intermediate/Middle School Classroom Instruction	2.0 FTE
3.	Middle School Roving Teacher	1.0 FTE
	Total	7.0 FTE

The resolution further provided:

“Qualifications for a position must include status of “highly qualified” for the subject or field within the meaning of the No Child Left Behind Act, and appropriate certification qualifications (including appropriate English Language authorizations). In no event may a more senior employee displace a less senior employee unless the more senior employee is both competent and credentialed for the entire assignment of the less senior employee.”

The services set forth above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. *California Teachers Association v. Board of Trustees of the Goleta Union School District* (1982) 132 Cal.App.3d 32, 34-37 and cases cited therein. See also *San Jose Teachers Association v. Allen*, *supra* at 635-38, in which the court specifically rejected the reasoning of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571; *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838,853-54.

Furthermore, these services may be reduced because of budgetary difficulties. *Zalac v. Governing Board, supra*, and cases cited therein. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

7. No certificated employee junior to any respondent is retained to perform services which any respondent is certificated and competent to render.

8. The reduction or 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 of the District as determined by the Board.

9. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The Board established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The Board provided the order of termination shall be based on the needs of the District and its students.

11. The District created a Seniority List which contains employees' seniority dates (first date of paid service), status, years at hire, units after bachelor's degree, grade, site, assignment, position title, credentials and supplements, BCLAD/CLAD/SDAIE, and whether the teacher was in the particular kind of service reduced. The District used the Seniority List to develop a proposed layoff of the least senior employees currently assigned in the services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

The District proposes to lay off two primary school teachers, Susan Gackowski and Gail Easterly, but gave precautionary layoff notices to eight other teachers.

12. Susan Gackowski (seniority date of 8/24/1998) has a clear multiple subject credential, a Crosscultural, Language, and Academic Development (CLAD), and a supplemental authorization in English. She teaches first grade at Jamul Primary School. With her supplemental authorization in English, she could teach English language to English Learners (EL) in middle school. She has taught in the District for 13 years, eight years in kindergarten and five years in first grade. She has one EL student now and in the previous school year, had three, including one who spoke no English at all.

Ms. Gackowski testified at the hearing that based on her credentials, she could teach English Language Development (ELD), based upon information she found on the California Commission on Teacher Credentialing (CTC) website. According to the CTC website, ELD “is designed to promote the effective and efficient acquisition of listening, speaking, reading, and writing skills of the EL student.” She testified that in the past, she has provided support to EL students, including students who spoke no English.

Ms. Gackowski does not have a HOUSSE certification in math or science and has not undertaken any steps to obtain such certification.

Ms. Gackowski is the most senior teacher the District proposes to lay off.

13. Gail Easterly (seniority date of 1/4/99) has a clear multiple subject credential and a CLAD and teaches fourth grade at Jamul Intermediate School. She has taught fourth grade for more than 12 years with the District and in the past has taught fifth grade and pre-kindergarten. She has 27 students in her current class, and seven of them are EL students. Last year, she had five EL students, including one who spoke no English, and who is now in the fifth grade, but not in a bilingual class.

Ms. Easterly has received Specially Designed Academic Instruction Delivered in English (SDAIE) and Guided Language Acquisition by Design (GLAD) training, and along with the training she received when she obtained her CLAD certificate, has been able to provide ELD instruction. She has been able to communicate with non-English speaking students and parents in a variety of ways.

Ms. Easterly does not have a HOUSSE certification in math or science and has not undertaken any steps to obtain such certification.

14. In order for the District to lay off Ms. Gackowski and Ms. Easterly, it was required to skip eight other teachers less senior than them.

Tania Dumitru has a clear multiple subject credential, a CLAD, a Language/English supplemental authorization, and a math supplemental authorization. She teaches algebra and pre-algebra at a middle school. Catherine Gale has a clear multiple subject credential, a CLAD, and a supplemental authorization in science. She teaches science and technology in the middle school. Neither Ms. Gackowski nor Ms. Easterly is certificated and competent to teach these subjects. Therefore, Ms. Dumitru and Ms. Gale were properly skipped.

Jeneva Hackney and Desheila Manuel-Howell have clear multiple subject credentials, BCLADs, and supplemental authorizations in Spanish. They both teach in the District’s dual immersion program at the primary school. The District requires that teachers who are hired to teach in this program have a BCLAD and be able to read, write, and converse in Spanish, and design curricula in all areas of Spanish. Since neither Ms. Gackowski nor Ms. Easterly has a BCLAD, they are not certificated and competent to teach in the dual immersion program. Ms. Hackney and Ms. Manuel-Howell were therefore properly skipped.

15. Ron Wagner (seniority date 8/21/2000) is the least senior teacher the District has proposed for layoff. He has a master's degree in drama, a clear multiple subject credential, an additional supplemental authorization in social science, and teaches social studies and Show Choir at Oak Grove Middle School. The District seeks to skip him because of his service to the Show Choir, which is a particular kind of service and a course or course of study and which the District does not seek to reduce or eliminate.

The show choir is an ongoing performing arts program and is a well-respected program in California. Ms. Bennett testified at the hearing the District wanted to retain Mr. Wagner to run the choir because of his interest in drama, as indicated by his master's degree in drama as well as music. A significant portion of the program includes competitions, and in order for students to participate in the choir, they must audition. Mr. Wagner created a series of expectations for the students to meet, including expectations relating to performance, classroom procedures, participation, and performance. In addition to local, state, and national competitions, the choir performs at festivals and at such locales as Disneyland, the Midway aircraft carrier in San Diego, Knotts Berry Farm, and so forth. There are 40 students in the Show Choir plus additional students who work on the crew and provide background support.

16. Greg Spielman (seniority date 8/24/98) has a clear multiple subject credential and a supplemental authorization in English. He teaches social studies and art in the middle school. The District proposes to skip him because of his work with social science competitions. These competitions within a social studies class is a particular kind of service and a course or course of study which the District does not seek to reduce or eliminate.

One of the five classes Mr. Spielman teaches, a social studies class, has students participate in local, state, and national competitions. The competitions include History Day, We the People, and Project Citizen, a program that focuses on policy and how it shapes a governing organization. The competitions require students to research historical subjects or policies, create projects, and present their work. District witnesses testified the competitions are key components of a social studies program that prepare students for high school and college by teaching them research and analytical skills.

Witnesses for the District described Mr. Spielman as uniquely qualified to perform the work associated with these competitions. He has taught the program for 11 years and is passionate about it. He is president of the California Social Studies Council, the District's social studies committee, and a leader in the field. He has worked hard to develop the curriculum and prepare students for the work they are required to do. Mr. Spielman had a child last year and worked a reduced schedule. As a result, another teacher took over the program and the District had to reduce the number of students who could participate.

17. John Zieske (seniority date 8/24/1998) has a clear multiple subject credential, a supplemental authorization in English, and is HOUSSE qualified in math and science. He teaches science and technology in the middle school. The District does not intend to reduce math or science and desires to skip Mr. Zieske.

Ms. Bennett described the middle school as departmentalized, and pointed to the Administrator's Assignment Manual, revised in 2007, published by the CTC. The manual provides that "When the teacher teaches one subject to several groups of students, he or she needs to have a credential that authorizes teaching that subject in a departmentalized setting." Mr. Zieske's Housse certificate allows him to teach math and science in the departmentalized setting of the middle school.

18. Elizabeth Hudson (seniority date of 8/21/2000) has a clear multiple subject credential and a BCLAD. She teaches eighth grade language arts and ELD at Oak Grove Middle School. Leah Rosenthal (seniority date of 8/24/1999) has a life multiple subject credential and a BCLAD, as well as a master's degree in education. She teaches fifth grade at Jamul Intermediate School. Both are bilingual. The District proposes to skip them because they have BCLADs. None of the classes these teachers teach requires a BCLAD.

Ms. Bennett testified that it was valuable and an asset for the District to have one teacher at each school site who spoke Spanish, given the substantial number of Spanish-speaking students and families who attended the District's schools. She testified that both Ms. Hudson and Ms. Rosenthal provide primary language support to students and family members who do not speak English. They are the only teachers at their respective school sites who are bilingual. Ms. Bennett testified the two are often called to translate for students and family members who attend meetings such as IEP meetings or need to communicate with a teacher. She noted the District often has students who are new to the country and they, and their families do not speak any English, and that Ms. Hudson and Ms. Rosenthal provide bilingual support and translation services for them. Ms. Bennett added that each of these teachers are very well-qualified and there is a need for the District to have them at their respective sites.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter relating to the elimination of 84.2 full-time equivalent positions exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Education Code section 44955 provides in relevant part:

...

(b) [W]henver a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . 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. . . As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) . . .

The governing board shall make assignments and reassignments in such a manner that the employees shall be retained to render any service which their seniority and qualifications entitle them 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.*

To put it more succinctly, 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. See *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469. Junior

teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. See *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; see also *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.

3. The No Child Left Behind Act of 2001 (Public Law 107-110) was designed to improve the performance of U.S. primary and secondary schools by increasing the standards of accountability for states, school districts, and schools, as well as to provide parents with more flexibility in choosing which schools their children would attend. NCLB promoted an increased focus on reading and reauthorized the Elementary and Secondary Education Act of 1965 (ESEA). NCLB was signed into law on January 8, 2002.

A key goal of NCLB is that all students be taught by “highly qualified teachers” by the end of the 2005/06 school year. To become designated as “highly qualified,” the teacher must meet the following three criteria: Possession of a bachelor’s degree; possession of an appropriate California teaching credential; and demonstrated core academic subject area competence by means of examination, coursework, advanced certification, or completion of the California High Objective Uniform State Standard of Evaluation (HOUSSE) in the subject area being taught. NCLB defines “core academic subject areas” as reading, English-language arts (including the English language development component of an adopted program), mathematics, science, foreign languages, civics/government, economics, arts, history, and geography.

Self-contained elementary school teachers (who typically hold a multiple subject teaching credential) must demonstrate competence in the areas generally taught as part of the elementary school curriculum. NCLB requires all elementary school teachers “new” to the profession who receive a multiple subject teaching credential or a multiple subject intern credential to demonstrate subject-matter competency by exam. (Tit. 5, Cal. Code of Regs. §6102.) For NCLB compliance, all “new” teachers who receive a Multiple Subject Preliminary, Clear, Professional Clear or an intern credential on or after July 1, 2002, must pass a CTC-approved subject-matter exam to become NCLB-compliant (even though they may not be required to do so in order to receive a credential). Currently, the CSET is the only CTC-approved exam for “new” school elementary teachers. “Not new” elementary school teachers have two options to demonstrate subject-matter competency: the exam option (passing any current or prior CTC-approved multiple-subjects exam), meeting HOUSSE standards through a process that evaluates the teacher’s knowledge and ability based on a high, objective uniform State standard of evaluation that meets federally established criteria.

For middle and high school teachers, there are options for demonstrating NCLB core academic subject competency. For “new” single subject credentialed teachers: the exam option requires the applicant to pass a CTC-approved subject-matter exam in the NCLB core academic subject area; the course work option requires (a) the completion of CTC-approved single subject matter program in the core area; (b) a major in the core area; (c) a graduate degree in the core area; (d) a major equivalent in the core area (32 non-remedial units earned with a grade of C or higher); or (e) advanced certification (National Board Certification) in

the core area. “Not new” middle and high school teachers have four options to demonstrate subject-matter competency: the exam option (CTC-approved single subject matter program in the core area); the course work option (major or major-equivalent in the core area); advanced certification (National Board Certification) in the core area; or the successful completion of HOUSSE.

4. Regarding Finding 17, the evidence established the Mr. Zieske was HOUSSE qualified in math and science and could therefore teach those subjects in a departmentalized setting at the middle school. The evidence also established that neither Ms. Gackowski nor Ms. Easterly were certificated and competent to teach these subjects. While they both testified they believed they could qualify under HOUSSE for the certification necessary to teach in a departmentalized setting, the fact remains that as of the date the Board acted to reduce services and determined who was qualified to perform the remaining services and who was not, neither had the certification.

It is well established that in considering a teacher’s credentials and qualifications in a layoff proceeding, a District may ignore credentials acquired by an employee or registered by an employee after the March 15 deadline for issuing layoff notices. *Duax v. Kern Community College District* (1987) 196 Cal. App. 3rd 555, 567-68; *Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal. App. 3rd 796, 815. Both Ms. Gackowski and Ms. Easterly failed to demonstrate to the District before March 15, 2011 that they were qualified to teach middle school science. Thus, both are not certificated and competent to teach middle school science. The District properly skipped Mr. Zieske and the accusation against him must therefore be dismissed.

5. Regarding Finding 16, it was not established that any other permanent certificated employee had the experience and background required to bump Mr. Spielman from his position. The District properly skipped him and the accusation against him must therefore be dismissed.

6. Regarding Finding 15, it was not established that any other permanent certificated employee had the experience and background required to bump Mr. Wagner from this position. The District properly skipped him and the accusation against him must therefore be dismissed.

7. Regarding Finding 14, neither Ms. Gackowski nor Ms. Easterly is certificated and competent to teach the subjects taught by Ms. Dumitry, Ms. Gale, Ms. Hackney, and Ms. Manuel-Howell. Accordingly, Ms. Dumitry, Ms. Gale, Ms. Hackney, and Ms. Manuel-Howell were properly skipped and the accusations against Ms. Dumitry, Ms. Gale, and Ms. Manuel-Howell must be dismissed. Ms. Hackney is not part of this proceeding.

8. In *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App. 4th 127, Bledsoe, a tenured teacher was laid off although he was senior to two teachers who were retained by the district to teach in the district’s community day school. The court determined that Bledsoe was qualified to teach at the community day school, but the district demonstrated it had a specific need for specific teachers to teach in its community day school

and the two junior teachers had the special training and experience necessary to teach at that school while Bledsoe did not. The court pointed out that under section 44955, subdivision (d)(1), a district may have special needs for personnel to teach a specific course of study that go beyond base qualifications, but to retain a junior teacher, it must establish such teacher has special training and experience necessary to teach that course of study.

9. Education Code section 51014 provides: “ ‘Course of study’ ” means the planned content of a series of classes, courses, subjects, studies, or related activities.”

10. 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.”

11. In order for a District to skip junior teachers and lay off more senior teachers under section 44955, subdivision (d)(1), a District must establish three facts: there is a specific need, there is need for personnel to teach a specific course or course of study, and the junior teacher has special training and experience necessary to teach that course or course of study which more senior teachers do not possess.

The District established it had a need for teachers who were bilingual. It also established that Ms. Hudson and Ms. Rosenthal have special training and experience as teachers with bilingual skills and BCLADs that Ms. Gackowski and Ms. Easterly do not have. However, the District failed to establish there was a course or a course of study that Ms. Hudson and Ms. Rosenthal were assigned to teach which Ms. Gackowski and Ms. Easterly could not teach. Both Ms. Gackowski and Ms. Easterly could teach the classes Ms. Hudson and Ms. Rosenthal teach. There is no requirement for the classes that Ms. Hudson and Ms. Rosenthal teach for bilingual skills or a BCLAD. It cannot be concluded that the purposes for which the District use Ms. Hudson and Ms. Rosenthal, primarily to serve as translators for non-English speaking students and families in situations outside the classroom, is a course or course of study as required by section 44955, subdivision (d)(1). *See Alexander v. Board of Trustees* (1983) 139 Cal. App. 3rd 567, 575-76.

Accordingly, it is concluded the District acted improperly when it skipped Ms. Hudson and Ms. Rosenthal and laid off Ms. Gackowski and Ms. Easterly. The accusations against Ms. Gackowski and Ms. Easterly must be dismissed and the accusations against Ms. Hudson and Ms. Rosenthal must be sustained.

12. Any additional arguments offered by respondents have been considered and are rejected.

13. Cause exists under Education Code sections 44949 and 44955 for the District to discontinue particular kinds of services relating to seven full-time equivalent positions. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the Accusation. It is recommended that the Board give respondents

Elizabeth Hudson and Leah Rosenthal notice before May 15, 2011, that their services will no longer be required by the District.

ORDER

1. The Accusations served on respondents Tania Dumitru, Gail Easterly, Susan Gackowski, Catherine Gale, Desheila Manuel-Powell, Gregory Spielman, Ron Wagner, and John Zieske are dismissed

2. The Accusations served on the respondents Elizabeth Hudson and Leah Rosenthal are sustained. Notice shall be given to respondents Elizabeth Hudson and Leah Rosenthal before May 15, 2011 that her services will not be required for the 2011-12 school year pursuant to the Board's resolution because of the reduction of particular kinds of services.

Notice shall be given in inverse order of seniority.

DATED: April 28, 2011

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings