

BEFORE THE  
BOARD OF TRUSTEES  
MCCLOUD UNION ELEMENTARY SCHOOL DISTRICT  
COUNTY OF SISKIYOU, STATE OF CALIFORNIA

In the Matter of the District Statement of  
Reduction in Force of:

FRANKIE DEVORE,  
ROGER GUGGENHEIMER

Respondents.

OAH No. 2015030879

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings, State of California, on April 15, 2015, in McCloud, California.

McCloud Union Elementary School District was represented by Gabriela Flowers and Thomas Gauthier, Attorneys at Law.

Respondents Frankie Devore and Roger Guggenheimer were represented by Lesley Beth Curtis, Attorney at Law.

Testimony and documentary evidence were received, and oral closing arguments were made. The record was closed, and the matter was submitted for decision on April 15, 2015.

**FACTUAL FINDINGS**

*Jurisdiction*

1. Shelley Cain is the Superintendent of the McCloud Union Elementary School District (District). The actions of Superintendent Cain, and those of the District's staff and Board of Trustees (Board), were taken solely in their official capacities.

2. On February 12, 2015, Superintendent Cain recommended that the Board reduce or discontinue particular kinds of services (PKS) no later than the beginning of the 2015-2016 school year in the amount of 2.0 full-time equivalent (FTE) positions. The Board adopted Resolution No. 15-16, entitled "Resolution of Intention to Dismiss Certificated

Employees” (Resolution), which provides that it was necessary to reduce or discontinue PKS in the amount of 2.0 FTE.

3. The Board further determined that it was necessary by reason of the reduction or discontinuance of services to decrease the number of certificated employees at the close of the 2014-2015 school year by a corresponding number of FTE positions. The Board directed Superintendent Cain or her designee to send appropriate notices to all employees whose services would be terminated as a result of the Board’s action to reduce or discontinue PKS.

4. On February 13, 2015, Superintendent Cain served respondents written notice, entitled “Notice of Recommendation that Services will be Terminated” (Notice), pursuant to Education Code sections 44949 and 44955, of her recommendation to the Board that respondents’ services be terminated at the close of the 2014-2015 school year. A copy of the Resolution was served with the Notice.

5. The parties stipulated that respondents were properly and timely served with the Notice and that they timely requested a hearing to determine if there is cause for not reemploying them for the 2015-2016 school year. The parties also stipulated the respondents were properly and timely served with the District’s Statement of Reduction of Force, signed by Superintendent Cain on February 25, 2015, and that respondents timely filed notices of participation.

6. Both respondents are certificated permanent employees of the District.

7. Jurisdiction for the subject proceedings exists pursuant to Education Code sections 44949 and 44955.

*Services to be Reduced or Discontinued*

8. The Resolution authorized Superintendent Cain to take action to reduce or discontinue the following particular kinds of services for the 2015-2016 school year:

<b>Services</b>	<b>Number of FTE Positions</b>
Multiple Subject Teaching Services	2.0 FTE
<b>Total FTE Reduction</b>	<b>2.0 FTE</b>

*Cause for Reduction or Discontinuance of Services*

9. The District is a small school district, with one campus that services approximately 68 elementary school children in kindergarten through eighth grade. The District employs four and one-half certificated employees. Over the years, the District has experienced declining enrollment and declining revenue. The District has been operating in a budget deficit for a number of years, and has utilized its reserve funds to pay for operating

expenses. There is a possibility that there will be a decline in revenue next year, in part, due to decreased enrollment. The District also expects that its expenses will increase. Considering all of this, the reduction or discontinuances of services are in the interest of the District's school and its pupils.

10. The services set forth in the Resolution are "particular kinds of services" that may be reduced or discontinued within the meaning of section 44955. The Resolution does not reduce services below the mandated levels. There was no evidence that the Board's decision to reduce or discontinue the identified services was arbitrary or capricious. The reduction or elimination of the services set forth in the Resolution constituted a proper exercise of the Board's discretion, within the meaning of section 44955.

*District's Intention to Deviate from Seniority – Skipping Criteria*

11. In the Resolution, the Board established criteria for deviating from seniority and skipping junior employees. The Resolution provides in relevant part:

WHEREAS, pursuant to Education Code section 44955, subdivision (d), the District may deviate from terminating a certificated employee in order of seniority ("skipping") if the District demonstrates: (1) a specific need for personnel to teach a specific course or course of study; (2) the certificated employee has special training and experience necessary to teach that course or course of study, which others with more seniority do not possess; or (3) for purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the law. For the 2015-2016 school year only, to meet the requirements of Education Code section 44955, subdivision (d), the Governing Board determines the needs of the District and its students as follows:

1. At least two (2) school years of experience in the past five (5) school years teaching math in grades 6-8.

12. Superintendent Cain drafted and recommended the skipping criteria, based upon the District's current staffing and her belief that middle school math is more complex and should be taught by a teacher with experience teaching middle school math. Since 2001, the District had "departmentalized" math, which means that students rotate out of their general education classrooms to receive math instruction. Superintendent Cain selected the criteria of at least two years of experience teaching middle school math in the last five years because Kathleen Poehlmann has been teaching middle school math in a "departmentalized" setting for the District and meets the criteria.

13. Ms. Poehlmann is the only certificated employee in the District that meets the skipping criteria. She was not served with a Notice. Ms. Poehlmann's seniority date is 2007. She has a clear multiple subject credential, a single subject credential with authorization to teach introductory mathematics and home economics. She also holds a cross-cultural, language and academic development certificate. Ms. Poehlmann currently teaches math to children in all grades except fifth grade. She also teaches spelling and physical education to second and third grade students.

14. Superintendent Cain was also skipped. Her seniority date is 2002. She holds a clear multiple subject credential and an administrative credential. During the school year, Superintendent Cain holds .50 FTE. She teaches reading and English language arts to seventh and eighth grade students, five days per week from 8:25 a.m. until noon. Superintendent Cain does not meet the skipping criteria. She does not have two years of experience in the last five years teaching middle school math. Superintendent Cain was not served with a Notice. The District did not explain why Superintendent Cain was skipped or provide any justification as to why she retained her .50 FTE when two senior certificated employees were not skipped and received notices. As a result, the District failed to establish any basis for skipping Superintendent Cain.

15. Respondents were not skipped because they have not taught middle school math in a "departmentalized" setting in two of the last five years.

16. Mr. Guggenheimer has a seniority date of 1986. He has a clear multiple subject credential, a standard secondary teaching credential for physical education and Italian, and a certificate of completion of staff development. He has taught middle school math in a self-contained classroom, but not in a "departmentalized" setting. In 2012 and 2013, Mr. Guggenheimer attended three math trainings presented at the District by the County Office of Education. Mr. Guggenheimer currently teaches English language arts, science and social studies to second and third grade students, and science, history and physical education to seventh and eighth grade students.

17. Ms. Devore has a seniority date of 1992. She has a clear multiple subject credential, a specialist instruction credential in special education, a resource specialist added authorization and a certificate of completion of staff development. Ms. Devore worked as a special education teacher until approximately 2002. She taught middle school math in a self-contained classroom, as part of her duties a special education teacher. Ms. Devore also attended the 2012 and 2013 math trainings presented at the District by the County Office of Education. Ms. Devore currently teaches all subjects to kindergarten and first grade students.

18. Superintendent Cain drafted a document titled "Potential Arrangements for 2015-2016" which sets forth possible teaching arrangements in the event the District reduces the number for certificated employees by either 1.0 or 2.0 FTE. She did not discuss the document or potential teaching arrangements with the Board or staff. In both scenarios set forth in the document, teachers would be assigned multiple grades levels that would be

combined in self-contained classrooms. The potential arrangements do not provide for math to be “departmentalized.”

19. Respondents contend that the District’s is attempting to skip two junior teachers to teach a course, departmentalized middle school math, which the District failed to establish will exist in the future. Respondents also contend that the skipping criteria is inappropriately and narrowly defined in order to retain Ms. Poehlmann, because she possesses a math credential, for a position that does not require such a credential. Respondents further contend that they are competent to teach math in a self-contained setting, such as the settings that are contemplated in “Potential Arrangements for 2015-2016,” because they hold clear multiple subject teaching credentials. Respondents’ credentials authorize them to “teach all subjects in a self-contained class” and “to teach core classes consisting of two or more subjects to the same group of students in grades five through eight, and to teach any of the core subjects he or she is teaching to a single group of students in the same grade level as the core for less than fifty percent of his or her work day.”

20. In order to deviate from seniority order and retain a junior teacher, the District must satisfy the requirements of Education Code section 44955, subdivision (d). This section provides in relevant part:

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, . . . and that the certificated employee has special training and experience necessary to teach that course or course of study . . . 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.

21. Thus in order to skip Ms. Poehlmann and Superintendent Cain and layoff respondents who are more senior, the District must first demonstrate a specific need for personnel to teach a specific course or course of study. Second, the District must demonstrate that respondents do not have the special training and experience necessary to teach that course. The District may not use specified periods of experience in its skipping criteria simply to secure continuity in a position.

22. Education Code section 51014 defines “course of study” to mean the “planned content of a series of classes, courses, subjects, studies, or related activities.” Education Code section 51015 defines “course” as an “instructional unit of an area or field of organized knowledge, usually provided on a semester, year, or prescribed length-of-time basis.” The

District failed to demonstrate a specific need for personnel to teach a specific course of study. Although historically the District has “departmentalized” math by pulling children from their general education classrooms to receive math instruction, such an approach is not planned for the 2015-2016 school year. The potential teaching arrangements for the 2015-2016 school year anticipate that grades will be combined and all instruction will be provided in a self-contained classroom settings. As a result, the District failed to establish a specific need for personnel to teach a specific course or course of study.

23. Furthermore, the District may not use skipping criteria that are not “necessary” to teach a course. The District failed to establish that it is necessary for certificated employees to have two school years of experience in the past five school years teaching math in grades sixth through eighth. Respondents have the special training and experience necessary to teach math in a self-contained classroom setting. Mr. Guggenheimer has taught for the District for over 28 years. Ms. Devore had taught for 23 years. Respondents hold clear multiple subject teaching credentials which authorize them to “teach all subjects in a self-contained class.” Both respondents have experience teaching math in a self-contained classroom settings and within the last three years have attended math training. While the District may desire to have a teacher with recent experience teaching middle school math, the District failed to establish that such experience is necessary as required under Education Code section 44955, subdivision (d)(1).

24. The District has not established cause under Education Code section 44955, subdivision (d), to deviate from seniority order with respect to respondents. Respondents have been affected by the District’s erroneous decision to skip Ms. Poehlmann and Superintendent Cain. The appropriate remedy for this error is to direct that notices to respondents Mr. Guggenheimer and Ms. Devore be rescinded.

## LEGAL CONCLUSIONS

1. The fundamental principle of a particular kinds of services layoff is that permanent teachers must be laid off in inverse of their seniority. (Ed. Code, § 44955, subs. (b) & (c).) As set forth in Education Code section 44955, subdivision (b):

Except as otherwise provided by statute, the services of no permanent employee may be terminated . . . 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.

2. A District may reduce services 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 burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)

3. Legal cause exists to reduce or discontinue 2.0 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. 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 discontinuance of services relates solely to the welfare of the District's school and pupils within the meaning of Education Code section 44949.

4. Pursuant to Education Code section 44955, subdivision (b), a district may deviate from seniority and retain junior employees only when authorized by statute to do so. In Education Code section 44955, subdivision (d)(1) the Legislature has authorized districts to deviate from terminating in order of seniority in very limited and specified circumstances. Specifically, subdivision (d)(1), provides that the District may deviate from seniority if:

The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a service 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 of study or to provide those services, which others with more seniority do not possess.

5. The District may not create skipping justifications other than those authorized by statute in order to avoid the seniority protection afforded to certificated employees with earlier dates of hire. This is true even if the District believes that skipping junior certificated employees is in the best interests of the District and of its students. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 573-576 [invalidating school district's skipping of junior teachers based solely on language skills].) "A contrary construction would place all teachers in a single group measured by the sometimes vague needs of the district and pupils, as determined by the school board." (*Id.* at p. 574.)

6. As set forth in Factual Findings 11 through 24, because the District did not establish compliance with section 44955, subdivision (d)(1), when it skipped respondents, the notices served on Ms. Devore and Mr. Guggenheimer should be rescinded.

## RECOMMENDATIONS

1. Cause exists for the reduction of 2.0 full-time equivalent certificated positions at the end of the 2014-2015 school year.

2. As set forth in Legal Conclusion 6, the District shall rescind the notices given to Frankie Devore and Roger Guggenheimer.

DATED: April 24, 2015

/s/  
MARCIE LARSON  
Administrative Law Judge  
Office of Administrative Hearings