

**BEFORE THE
GOVERNING BOARD OF THE
IMPERIAL COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA**

In the Matter of the Reduction in Force Involving:

21 Certificated Employees, Respondents

OAH No. 2024030662

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on April 23, 2024.

Gil Abed, Esq., Attorney at Law, represented the Imperial County Office of Education (ICOE).

Fern Steiner, Attorney at Law, Smith, Steiner, Vanderpool, A.P.C., represented the 12 respondents, Alejandra Barrios, Barbara McAndrews, Carlos Saldana, Elba Palma, Erika Baxter, Etna Quevedo, Evet P. Bresseas, Jerika Finnell, Luz Guerrero, Mariel Gomez, Sylvia Ramirez, and Thema Guerrero (collectively referred to herein as "respondents").

Despite being properly served, the following certificated employees did not file a request for hearing: Octavio Ortiz, Monica Romero, Jesse Lovin, Oscar Gonzalez, Jr., Silvia Baltazar, Esteban Gonzalez, Maribel Gomez, Mireli Lopez, and Jazmin Carrillo Alvarez. Pursuant to Education Code section 44949, subdivision (b), these certificated

employees waived their right to a hearing, and the matter proceeded as a default against them.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on April 23, 2024.

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 16, 2024, the Imperial County Superintendent of Schools of the Imperial County Office of Education (ICOE) adopted a resolution reducing or discontinuing particular kinds of services for the 2024-2025 school year and directing the Senior Director of Human Resources to give appropriate notices to 21 certificated employees whose positions would be affected by the reduction. The resolution called for the reduction or discontinuation of 21 full-time equivalent (FTE) positions consisting of: 15.0 FTE of Teacher of Severely Disabled-SPED, 1.0 FTE of School Nurse-Support Services, and 5.0 FTE of Speech, Language & Hearing Specialist-Support Services. The February 16, 2024, resolution listed by name the 21 certificated employees (15 special education teachers, one school nurse, and five speech, language and hearing specialists) to be given layoff notices pursuant to Education Code sections 44949 and 44955. The 15 special education teachers are listed by name in the resolution as: Silvia Baltazar, Alejandra Barrios, Erika Baxter, Evet Bresseas, Jerika Finnell, Mariel Garcia Gomez, Esteban Gonzalez, Oscar Gonzalez, Jr., Luz Guerrero, Jesse Lovin, Barbara McAndrews, Octavio Ortiz, Etna Quevedo, Monica Romero, and

Carlos Saldana. The one school nurse is listed in the resolution as Sylvia Ramirez.¹ The five speech, language and hearing specialists are listed in the resolution as Savannah Contreras, Ivet Juarez Lemus, Ericka Pompa, Ruis Sanchez, and Adelaida Sandoval.²

2. On March 8, 2024, the Superintendent adopted an additional resolution reducing or discontinuing particular kinds of services for the 2024-2025 school year, incorporating and amending the prior resolution of February 16, 2024, and directing the Senior Director of Human Resources to give appropriate layoff notices to an additional five certificated employees, who are probationary certificated employees, namely Elba Palma, Maribel Gomez, Thema Guerrero, Mireli Lopez, and Jazmin Carrillo Alvarez.

3. The decision to reduce or discontinue a particular kind of service is a matter reserved to ICOE's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District*

¹ As explained below, both resolutions at issue in this matter relate to the layoff of certificated employees and cite only to the applicable Education Code sections related to certificated employees. However, as established by testimony, the school nurse Sylvia Ramirez is not a certificated employee, but rather is a classified employee.

² As explained below, none of the five speech, language and hearing specialists received layoff notices pursuant to the February 16, 2024, resolution. Instead, each of these five employees were probationary employees and were "non-reelected" to return to ICOE for the 2024-2025 school year. Accordingly, the five speech, language and hearing specialists listed in the February 16, 2024, resolution are not at issue in this matter.

(1976) 64 Cal.App.3d 167.) Offices of Education have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.) The decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

4. On February 29, 2024, ICOE sent preliminary notification to employees advising them that their services would not be required for the 2024-2025 school year. The reasons for that decision were set forth in the preliminary notification letter, which provided that ICOE will transfer the Special Education Program, and the funding and work for the Special Education staff classifications will transfer with the remainder of the Special Education Program. Thereafter, the district served Statements of Reduction in Force and other documents on the employees (respondents) who requested a hearing. All prehearing jurisdictional requirements were met.

Witness Testimony

5. ICOE provided three witnesses at the hearing in this matter, namely Judith Bermudez, Martha Garcia, and Carlos R. Gonzales. None of the respondents testified at hearing. The following factual findings are made based upon the testimony of the three witnesses, as well as documents received in evidence.

TESTIMONY OF JUDITH BERMUDEZ

6. Judith Bermudez is the Human Resources Manager with ICOE. Her duties include oversight of all hiring, recruitment, and layoffs at ICOE. Ms. Bermudez testified that as part of her job duties, she determined that ICOE must reduce some services offered by ICOE for the 2024-2025 school year because of a program transfer of the

special education program from ICOE back to the individual school districts. Ms. Bermudez stated that the special education moderate/severe program was being transferred from ICOE to the individual school districts, meaning that the students in that program will return back to individual school districts and ICOE will no longer provide the services associated with that program. Ms. Bermudez explained that moving forward for the 2024-2025 school year, the students in the special education program will now be given the special education services at the local school district from which the student originates. The program transfer of the special education program from ICOE to the school districts impacts the financial situation of ICOE because the funding for the special education program will no longer be provided to ICOE, but will instead go to the school districts. Based on the program transfer, ICOE staff that provided services for the special education program need to be reduced because that funding will no longer be available to ICOE.

Ms. Bermudez made this recommendation to the Superintendent of ICOE, who thereafter issued the February 16, 2024, resolution. In her recommendation to the Superintendent, Ms. Bermudez provided him with the list of 21 certificated employees to receive layoff notices. She testified that she created that list of employees based upon their seniority from their first date of paid service as an employee with ICOE. The most junior employees were selected for layoff first. Ms. Bermudez prepared the list of all employees of ICOE and their first date of employment at ICOE, which she used to prepare the list of certificated employees to receive layoff notices. After the Superintendent issued the February 16, 2024, resolution, Ms. Bermudez sent out the layoff notices to the 21 listed certificated employees on the February 16, 2024, resolution. Ms. Bermudez testified that none of those 21 employees had displacement rights (also known as bumping rights), and all of the 21 employees have reemployment rights. Ms. Bermudez further testified that of the 21 employees that

received layoff notices, there are no more junior certificated employees being retained while more senior certificated employees are receiving layoff notices. She stated that the reduction in staff is solely based on the program transfer and is to benefit the general welfare of the students of ICOE.

7. Ms. Bermudez also testified about the additional March 8, 2024, resolution, wherein an additional five certificated employees were listed to receive layoff notices. She explained that those are five certificated employees, namely special education teachers, who are probationary employees on year one or year two of probation. ICOE had originally taken the position that probationary certificated employees should not be given notice and hearing rights under Education Code sections 44949 and 44955. However, after ICOE met with representatives for the California Teacher's Association, ICOE agreed to issue five of the probationary special education teachers layoff notices because they were in their year one or two of probation, as opposed to being in year zero of probation. Accordingly, the second resolution was issued. Ms. Bermudez noted that there was one special education teacher on probation year one, named Danitza Leal, who did not receive a layoff notice and instead was non-reelected as a probationary employee, but she was an exception, as explained below.

8. During redirect, Ms. Bermudez clarified her earlier testimony regarding which employees received layoff notices. Specifically, she stated that the five speech, language and hearing specialists listed in the February 16, 2024, resolution as individuals who would receive layoff notices did not actually get layoff notices. Instead, each of those five employees received a "probationary release" because each of the five employees were probationary employees on year zero and "on a waiver," and therefore those employees are "released on a yearly basis." None of those five

employees, namely Savannah Contreras, Ivet Juarez Lemus, Ericka Pompa, Ruis Sanchez, and Adelaida Sandoval, will be returning to ICOE for the 2024-2025 school year and none have hearing rights under Education code sections 44949 and 44955.

Furthermore, pursuant to the March 8, 2024, resolution, an additional five certificated employees did receive layoff notices. Those five employees were special education teachers and certificated employees. Ms. Bermudez clarified that the school nurse, who received a layoff notice pursuant to the February 16, 2024, resolution is a classified employee. Accordingly, the total number of certificated employees receiving layoff notices is 20, and one classified employee (the school nurse) received a layoff notice, making the total number of employees receiving layoff notices 21.

9. Ms. Bermudez also testified that she understands that ICOE has an obligation to allow a certificated employee to “bump” another more junior employee with the same credentials. With regard to respondent Barbara McAndrews, a special education teacher, Ms. Bermudez is aware that Ms. McAndrews has multiple credentials, including Education Specialist Instruction, Pupil Personnel Services (PPS) credential, and Multiple Subject Teaching credential. Ms. McAndrews’s seniority date is August 24, 2007. Ms. Bermudez acknowledged that Ms. McAndrews’s PPS credential allows her to work as a school counselor. Comparison of Ms. McAndrews’s credentials and seniority date to the list of employees for ICOE shows there are multiple school counselors who are junior to Ms. McAndrews with a later seniority date and a PPS credential. Two such examples are Danielle Robinson, a school counselor with a PPS credential and seniority date of August 10, 2020, and Vivian Rodriguez-Velasquez, a school counselor with a PPS credential and seniority date of February 7, 2022. Ms. Bermudez acknowledged that there are more junior employees with Ms. McAndrew’s credential that did not receive layoff notices, and that while “it is the correct

procedure” to allow Ms. McAndrews to bump those employees, ICOE, instead, offered Ms. McAndrews three³ other vacant positions (two positions as a school counselor, and one position as an alternative education community teacher) in the alternative education program. Ms. Bermudez acknowledged that Ms. McAndrews remains on the layoff list, did not accept any of the vacant positions offered to her by ICOE, and was not assigned another position to bump another employee to avoid the layoff. Ms. Bermudez testified that when reviewing Ms. McAndrews’s ability to bump junior employees working as school counselors, ICOE did not “submit her for bumping” because she determined Ms. McAndrews lacks “competency” to be a school counselor because she had not worked as a school counselor previously. However, Ms. Bermudez then acknowledged that Ms. McAndrews was competent to perform the vacant school counselor job that ICOE offered to her and that ICOE “changed their position” on Ms. McAndrews’s competency to be a school counselor after the layoff notices were sent out.

In addition to Ms. McAndrews, ICOE also offered other vacant positions to two other respondents who received layoff notices based on the credentials they hold. Specifically, two special education teachers, respondent Jesse Lovin and respondent Octavio Ortiz, were each offered positions. Respondent Jesse Lovin was offered a vacant position as an alternative education community teacher, and respondent

³ Ms. Bermudez testified that Ms. McAndrews was offered four different vacant positions with ICOE. However, documents received in evidence provide a list of only three positions offered. However, Ms. Bermudez testified that Ms. McAndrews declined to accept any of the four positions offered.

Octavio Ortiz was offered a vacant position of RSP⁴ alternative education teacher. According to the employee list received in evidence, respondent Jesse Lovin holds a general subjects (examination) credential and an education specialist instruction credential, and his seniority date is August 15, 2011. Respondent Octavio Ortiz holds an education specialist instruction credential with a seniority date of August 20, 2007.

The employee list received into evidence shows that there are multiple employees working as an alternative education community teacher who are more junior than Jesse Lovin based on their seniority date. However, none of those more junior employees appear to have the same teaching credentials as Jesse Lovin, but presumably he is credentialed and competent to be an alternative education community teacher since ICOE offered him that position. Furthermore, there are at least two "RSP teachers" listed on the employee list (Carlos Chao with seniority date of August 16, 2021, and Alondra Flores with a seniority date of August 15, 2022) with the same teaching credential as Octavio Ortiz. No evidence was presented regarding whether Jesse Lovin or Octavio Ortiz accepted the vacant positions with ICOE offered to them, but if they have bumping rights, they are not required to do so. Instead, they can bump into those positions currently held by junior employees that they are credentialed and competent to perform. Ms. Bermudez testified that both Jesse Lovin and Octavio Ortiz were competent to perform the vacant jobs that ICOE offered to them.

10. With regard to the school nurse, respondent Sylvia Ramirez, Ms. Bermudez testified that ICOE is not eliminating nursing as a service provided by ICOE.

⁴ The RSP acronym stands for resource specialist program according to the testimony of Martha Garcia.

Presently there are two nurses working at ICOE, namely respondent Ramirez and Rebecca Barham, both of whom perform the same duties. Rebecca Barham's seniority date with ICOE is August 24, 1998. By comparison, respondent Sylvia Ramirez's seniority date with ICOE is March 5, 2009, making her the junior employee. Ms. Bermudez testified that because of the program transfer from ICOE to the districts, the number of students serviced by the nurse at ICOE will dramatically decrease. As a result, respondent Sylvia Ramirez's nursing services will no longer be needed.

TESTIMONY OF MARTHA GARCIA

11. Martha Garcia is the Senior Director of Human Resources at ICOE. Ms. Garcia was involved in the preparation and issuance of the layoff notices in this matter. Ms. Garcia testified that there was a second resolution regarding the layoffs dated March 8, 2024, because initially some special education teachers on probationary status for years one and two were given a non-reelect by ICOE not to return for the next school year. However, after discussions with legal counsel, ICOE decided to rescind the "non-reelect" for the probationary years one and two special education teachers and provide them with a layoff notice instead. This is the reason the March 8, 2024, second resolution was made. Ms. Garcia noted that there was one exception to the probationary year one special education teachers who were given a layoff notice, which was Danitza Leal, a special education probationary year one teacher. With regard to Danitza Leal, ICOE provided her with a non-reelect as a probationary employee and "Ms. Leal's attorney agreed with that."

12. Ms. Garcia testified that the name of the program that was transferred from ICOE to the districts causing the requirement for the layoffs was the Community Based Classrooms, which relates to special education.

13. With regard to respondent Barbara McAndrews, Ms. Garcia testified that ICOE issued a layoff notice to her, and thereafter offered Ms. McAndrews any one of four vacant positions, namely: community teacher in the alternative education program, RSP (resource specialist program) teacher position, alternative education program counselor, and HEAL (higher education and learning) counselor position. Ms. Garcia testified that she was aware that at the time layoff notices were sent to Ms. McAndrews, and some other teachers, that those teachers had more credentials than just their special education credentials. Ms. Garcia is also aware that at the time the layoff notice was sent to Ms. McAndrews, ICOE retained more junior employees as counselors and alternative education teachers, positions for which Ms. McAndrews had credentials. Ms. Garcia admitted that ICOE made the decision not to allow Ms. McAndrews to use her credentials to bump a less senior employee in those positions. Instead, ICOE offered Ms. McAndrews her choice of the four vacant positions mentioned above. Ms. Garcia explained that when ICOE made the decision to layoff Ms. McAndrews, ICOE looked at the Education Code's definition of "competency," which required Ms. McAndrews to have five years or work in the same service, but she did not. However, Ms. Garcia admitted, and ICOE stipulated, that neither of the resolutions set forth a competency requirement of at least five years of prior service. Additionally, Ms. Garcia admitted during her testimony that Ms. McAndrews is competent to perform the duties of the vacant positions offered to her by ICOE, which are the same positions from which she would have been able to bump junior employees. Accordingly, Ms. Garcia admitted that Ms. McAndrews is competent to bump junior employees, but she was not given the opportunity to do so.

14. Ms. Garcia did not provide any testimony regarding the bumping rights of either Jesse Lovin or Octavio Ortiz. However, as noted above, neither Jesse Lovin

nor Octavio Ortiz filed a request for hearing in this matter, so they waived their rights to make those arguments.

TESTIMONY OF CARLOS R. GONZALES

15. Carlos R. Gonzales is the Associate Superintendent of ICOE. His duties include the oversight of several departments at ICOE, including business, curriculum, instruction, maintenance and operations, internal technology, Imperial Pathways Charter School, and migrant education. Mr. Gonzales testified that the community based program was being transferred from ICOE to the districts, which created a significant detrimental financial impact to ICOE. He explained that the program is being funded by "AB602" funds and because the program is being transferred to the districts, that funding will no longer be available to ICOE but will "follow the students" back to the districts. As a result, ICOE's ability to employ the certificated employees that serve those students is impacted, and ICOE will have "far less" students for whom ICOE will provide services. Mr. Gonzales testified that the financial impact to ICOE of the program transfer is a loss of about \$13.3 million.

16. Mr. Gonzales explained that the program transfer from ICOE to the districts impacts ICOE's ability to retain both certificated employees, as well as "itinerant staff," such as the school nurse. He noted that because of the program transfer, next year the community based program students will no longer be serviced by ICOE and, as a result, there is no need for two nurses.

The Parties' Arguments

17. ICOE argued that the program transfer of the community based program from ICOE back to the districts necessitated the layoff of certificated (and one classified) employees of ICOE, who provided services to those community based

program students. ICOE noted that “hopefully the districts who now need these services will hire these employees who received layoff notices.” ICOE admitted that “some opinions were changed” regarding Ms. McAndrews after the layoff notices were sent, and that she does have the ability to bump more junior employees and “maybe that decision [to issue a layoff notice] was a mistake.” ICOE stated that “other than that” ICOE properly followed all procedural requirements for this layoff.

18. Respondents argued that whether the employees receiving layoff notices from ICOE will be offered positions at the districts is not relevant to the issues at hand. Respondents argued that three certificated employees, namely Barbara McAndrews, Jesse Lovin, and Octavio Ortiz,⁵ have the legal right to bump more junior employees with the same credentials, but that ICOE failed to bump them into those positions. With regard to Ms. McAndrews, ICOE admitted that it made a mistake by failing to allow her to bump a more junior employee for a position that Ms. McAndrews is competent to perform.

Evaluation

19. The services identified in the February 16, 2024, Resolution, which was incorporated into the March 8, 2024, Resolution are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 45117. ICOE’s decision to reduce or discontinue those services was neither arbitrary nor capricious. It was a proper exercise of the ICOE’s discretion. The reduction and discontinuation of services was related to the welfare of the district and its pupils, and

⁵ As noted above, since Jesse Lovin and Octavio Ortiz waived their rights to a hearing, no findings regarding their bumping rights will be made.

it became necessary to decrease the number of certificated (and one classified) employees as determined by the ICOE after the program transfer to the districts. No particular kind of service was lowered to levels less than those levels mandated by law, and other than with respect to respondent Barbara McAndrews, no respondent employee with less seniority was being retained to perform the service any of the respondent employees currently perform.⁶ With regard to all respondents other than respondent Barbara McAndrews, ICOE followed proper procedure regarding the layoffs.

20. As to respondent Barbara McAndrews, ICOE incorrectly failed to bump her to other positions for which Ms. McAndrews is certificated and competent to perform. ICOE admitted during the hearing to this "mistake" in procedure. While ICOE did offer Ms. McAndrews other vacant positions, ICOE failed to follow proper procedures for the layoff with regard to Ms. McAndrews, and her layoff notice shall be rescinded.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955, and with regard to the one classified employee pursuant to 45308, and all notices and other requirements of those sections were provided as required.

⁶ No findings are being made with regard to Jesse Lovin and Octavio Ortiz based on the fact that both of these employees failed to file a request for hearing in this matter.

2. Education Code sections 45117, subdivision (a)(1), authorizes a district to “reduce services due to lack of work or lack of funds.”

3. A district may reduce services, “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.)

4. A senior employee 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 is entitled to displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.)

5. Except for Ms. McAndrews, a preponderance of the evidence sustained the statements set forth in the ICOE’s statements of reduction in force served on respondents concerning the services that will not be required.

6. With regard to Ms. McAndrews, a preponderance of the evidence did not sustain the statements set forth in the ICOE’s statements of reduction in force served on Ms. McAndrews based on the above findings.

7. ICOE identified the certificated (and one classified) employees who are providing the particular kinds of services that ICOE directed be reduced or discontinued. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to all respondents except Ms. McAndrews that their services will not be required for the 2024-2025 school year. The

cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

8. The services being reduced are the kind that ICOE may reduce.

9. Other than with regard to respondent Barbara McAndrews, no employee with less seniority than any respondent is being retained to perform a service that any respondent is certificated and competent to render.

RECOMMENDATION

It is recommended that before May 15, 2024, ICOE give notice to the respondents whose names are set forth below in Appendix 1, that their employment will be terminated at the close of the current school year, and that their services will not be needed for the 2024-2025 school year.

It is recommended that before May 15, 2024, the layoff notice issued to Ms. Barbara McAndrews be rescinded, and she be allowed to exercise her displacement rights.

DATE: April 29, 2024

Debra D. Nye-Perkins

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings

Appendix 1⁷

1. Alejandra Barrios
2. Carlos Saldana
3. Elba Palma
4. Erika Baxter
5. Etna Quevedo
6. Evet P. Bresseas
7. Jerika Finnell
8. Luz Guerrero
9. Mariel Gomez
10. Sylvia Ramirez
11. Thelma Guerrero

⁷ The numbers used in this Appendix reflect nothing more than the number of respondents being laid off, these numbers have no bearing on rehire or recall rights.