

# CLIENT NEWS BRIEF

## New Case Clarifies Temporary Teachers' Preferential Rights To Vacant Positions

March 2013  
Number 15

Under Education Code section 44918, temporary teachers who have served two consecutive school years shall receive "first priority" in filling a vacant position in the subsequent school year, if the vacancy occurs at the grade level in which that teacher served during either of the two prior years. The Education Code does not define "first priority" and is silent as to the discretion a district has in granting "first priority" rights to such temporary teachers when filling such vacancies. The recent decision of *Henderson v. Newport-Mesa Unified School District* (Mar. 13, 2013) \_\_ Cal.App.4th \_\_ (2013 WL 952350) provides some guidance in this area and serves as a reminder that certain temporary certificated employees have a preferential right to fill vacant positions.

Gloria Henderson was hired by the District as a temporary teacher in January of 2008. She was rehired as a temporary teacher for the 2008-2009 school year to teach the same advanced placement classes she was hired to teach the prior year. At the end of the school year, Ms. Henderson was "released" pursuant to Education Code section 44954, but was once again rehired as at temporary teacher for the 2009-2010 school year and was assigned to teach the same advanced placement courses she had taught the previous years. At the end of the 2009-2010 school year, the District again notified Ms. Henderson that she was being released pursuant to Education Code section 44954. The District also sent layoff notices to 242 probationary and permanent certificated teachers along with release notices to its 71 temporary teachers.

Ms. Henderson was among 173 teachers who elected to contest the proposed layoff at a layoff hearing. At the hearing, Ms. Henderson argued she had been improperly classified as a temporary teacher when others with lesser qualifications and less seniority had been classified as probationary or permanent. The Administrative Law Judge ruled in favor of the District on all issues and found the District had good cause for its decision to terminate each of the 173 employees who elected to contest the layoff. Over the course of the summer of 2010, Ms. Henderson applied for three vacant positions for which she was qualified, but she was neither offered a position nor asked to interview for the openings.

Ms. Henderson filed a lawsuit against the District alleging two causes of action: (1) violation of Education Code section 44918 and the requirement she be accorded "first priority" if the District chose to fill any vacant teaching positions in the subjects she had previously taught; and (2) wrongful discrimination against her based on her Chinese heritage.

The trial court dismissed Mr. Henderson's lawsuit finding that the District had not violated Education Code section 44918 because it had "considered" Ms. Henderson for the vacancies. The trial court also held that section 44918 does not give rise to a private right of action for damages since it



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was not intended to protect the “financial well-being” of temporary teachers.

Ms. Henderson appealed, challenging the trial court’s decision to dismiss the lawsuit. The court of appeal reversed the trial court’s decision to dismiss the action.

The appellate court held section 44918 imposes more than a mere obligation that the District *consider* Ms. Henderson for an available position, since it presumed the District *considered* everyone who applied. Instead, the court held that the statute obligates the District to give a temporary teacher who fulfills its requirements “a preferential right of reemployment.”

The court analogized “first priority” under section 44918 to Education Code section 44919, which requires that an open coaching position “shall first be made available to teachers presently employed by the district.” The seminal case interpreting section 44919 is *California Teachers Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627. This case held that section 44919 requires districts to offer existing teachers “some tangible advantage” over non-teachers in the hiring process for coaches. *Rialto* did not require however, that teachers automatically be given coaching positions regardless of qualifications. Instead, the court held “each school district (retains) the discretion to promulgate and apply heightened qualifications standards for a particular coaching position so as to ensure that level of competence, knowledge, skill, and experience the district preferred.”

As in the *Rialto* case, the *Henderson* court determined the use of the word “first” in section 44918 means that Ms. Henderson is entitled to more than an opportunity to compete for the vacant position. The court reasoned that if Ms. Henderson met the qualifications of the vacant position, as determined by the District, then section 44918 imposes a mandatory duty to *prefer* her for the position over another candidate who does not meet the statutory requirement of prior temporary service. This duty, the court said, restricts what would otherwise be the District’s discretion to choose an outside candidate over Ms. Henderson.

Ms. Henderson will now be allowed to move her case forward to the trial stage on all aspects of her claim, including whether the District violated section 44918 by not providing her “first priority” in hiring, as well as determining if the District discriminated against her on the basis of race. The District is considering filing a petition for reconsideration of this case and may also file an appeal with the California Supreme Court. The District has until approximately April 20, 2013 to make a decision regarding an appeal.

We will keep school districts apprised of further developments in the law on this topic. In the meantime, employers should be mindful to give “first priority” to temporary teachers who apply for vacant positions, and who are qualified for the position and have served at least 75% of two consecutive school years as a temporary teacher in the grade level or subject area of the vacancy.

If you have any questions regarding this case or need assistance with issues related to temporary teachers, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#), or download our [Client News Brief App](#).