

TEXAS EDUCATION AGENCY  
Docket No. 021-LH-01-2021

Dallas ISD,  
Petitioner

V.

Luke Nuttall,  
Respondent

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BEFORE THE

INDEPENDENT HEARING EXAMINER

DIEGO J. PEÑA

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File Date:	01/14/2021	Governor's Extension:	04/15/2021
Pre-Hearing:	02/01/2021	Hearing:	04/14 & 15/2021
60 Days:	03/16/2021	Waived to:	04/30/2021

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**INDEPENDENT HEARING EXAMINER'S  
RECOMMENDATION**

The Petitioner, the Dallas Independent School District ("DISD") recommends terminating the employment-term contract of Respondent, Luke Nuttall pursuant to the Texas Education Code Section 21.211 and District policies. DISD claims that Nuttall violated the terms of his contract by failing to comply with DISD policies, insubordination, job abandonment and other reasons determined to be in the best interest of the District. Nuttall appealed timely and requested a hearing. The Independent Hearing Examiner convened a virtual hearing via Zoom on April 14 and April 15, 2021. The record of the proceedings was transcribed by Ms. Kristy Owen, RPR, Texas CSR PCR-10790, a certified court reporter.

Diego J. Peña is the Independent Hearing Examiner ("IHE") appointed by the Texas Commissioner of Education to preside over this proceeding.

DISD is represented by Mr. David Giddens and Ms. Heather Rhea, Thompson Horton LLP., 500 Akard Street, Suite 3150, Dallas, Texas, 75201. Luke Nuttall represented himself.

On December 16, 2020, DISD notified Nuttall that the District recommended his

employment be terminated for good cause pursuant to the Texas Education Code § 21.211 and DISD board policies. Nuttall received the recommendation on January 5, 2021 and filed a written request for appeal before a Texas Education Agency (“TEA”) IHE. On February 2, 2021, the parties agreed to extend the deadlines for issuing a recommendation in this matter to April 30, 2021.

### FINDINGS OF FACT

After due consideration of the evidence properly admitted into the record, including the credibility of the witnesses and matters officially noticed, before me in my capacity as Hearing Examiner, the following Findings of Fact have been proven by the evidence. Citations to evidence in the footnotes are not exhaustive or exclusive but are intended to indicate some basis for the particular finding of fact.

1. Nuttall is employed, pursuant to a one-year term contract, by the DISD for the 2020-2021 school year.<sup>1</sup>
  
2. According to the employment contract, Nuttall is required to fulfill the duties contained in the job description and carry out other assigned duties. Nuttall’s employment contract also required that he comply with all state and federal laws, District policies, rules, regulations, and administrative directives in effect at the time he signed the contract. Nuttall was also expected to report in-person to his assigned campus and teach.<sup>2</sup>
  
3. The DISD Board of Trustees approved policy DF (Local). This policy states that the following acts or actions constitute good cause for termination of an employment contract:
  - a. Failure to comply with District policies.
  - b. Failure to meet the District standards of conduct.

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<sup>1</sup> Citations to the evidence are not exhaustive but are intended to provide evidentiary basis for the finding. References to the court reporter’s transcript will be identified as “Tr. \_\_\_.” Exhibits offered by the DISD will be identified as “DX-\_\_\_.” Exhibits offered by Nuttall will be identified as “NX-\_\_\_.” It is important to note that the IHE reviewed and considered all the evidence submitted the parties that was admitted into evidence, including the electronic recordings. The IHE listened to the recordings that are part of the record. *See also* DX-3 (Nuttall’s Term Contract for

- c. Insubordination or failure to comply with directives.
- d. Failure to fulfill job duties, incompetency, or inefficiency in the performance of duties.
- e. Pattern of absences and/or tardiness.
- f. Job abandonment.
- g. Conduct that adversely affects the District.
- h. Any other reason determined to be in the best interest of the District.<sup>3</sup>

4. On December 9, 2020, the District's Legal Review Committee recommended terminating Nuttall's employment contract.<sup>4</sup>

5. On December 16, 2020, Nuttall filed an appeal prematurely after receiving a letter dated December 1, 2020 from the DISD Benefits Department notifying him that they recommended that the DISD consider terminating his employment. The TEA processed Nuttall's request, appointing Diego J. Peña as the IHE for the premature appeal. The parties agreed to dismiss the premature appeal, which was formally dismissed on January 25, 2021 and agreed to allow Mr. Peña to serve as the IHE in this proceeding.<sup>5</sup>

6. The District's notice of the recommended termination of his contract and employment for good cause (the "Notice of Recommended Termination"), dated December 16, 2020 and emailed to Nuttall on January 5, 2021, identified the reasons for recommending termination.<sup>6</sup>

7. The DISD's reasons for recommending Nuttall's termination are as follows:

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2020-21 School Year); Tr. 420-23.

<sup>2</sup> *Id.*; see DX-4 (Job Description) and Tr. 45; Tr. 420-21.

<sup>3</sup> DX-96, at pp. 4326-27.

<sup>4</sup> See DX-65, pp. 776-77 (Legal Review Committee Recommendation) and pp. 786-87 (Legal Review Recommendation Letter).

<sup>5</sup> DX-64. See also *Dallas ISD v. Nuttall*, Docket No. 017-LH-12-2020. Parties agreed to dismiss, and IHE signed Joint Order of Dismissal on January 25, 2021.

- Failure to comply with District policies. (DF Local #1)
- Failure to meet the District standards of conduct. (DF Local #2)
- Insubordination or failure to comply with directives. (DF Local #3)
- Failure to fulfill job duties, incompetency, or inefficiency in the performance of duties. (DF Local #4)
  
- Pattern of absences and/or tardiness. [See DEC] (DF Local #5)
- Job abandonment. [See DEC] (DF Local #6)
- Conduct that adversely affects the District. [See DH] (DF Local #21)
- Any other reason determined to be in the best interest of the District. (DF Local #39)<sup>7</sup>

8. On January 14, 2021, Nuttall filed an appeal with the TEA regarding the DISD's Notice of Recommended Termination which is the subject of this proceeding. Pursuant to the parties' agreement following the premature appeal, on January 15, 2021, the TEA assigned Mr. Pena as the IHE.<sup>8</sup>

### **Standards of Conduct**

9. Nuttall's employment contract required him to comply with DISD policies and procedures. DK (Local) and DK (Regulation), DISD policies, state that the District's Superintendent of Schools determines the work calendar. A school calendar is adopted each year designating the work calendar for professional employees. DISD employees are expected to work on-site at their assigned campuses or work locations, with the exception for employees with an approved Alternative Work Arrangement ("AWA"). In the event of a crisis, government shutdown or other emergency, DISD may allow employees to work off-site on a district-wide basis.<sup>9</sup>

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<sup>6</sup> DX-1 and DX-2; Tr. 424.

<sup>7</sup> *Id.*

<sup>8</sup> See Footnote 5. IHE takes judicial notice of the proceedings in that case and confirms this sequence of events; *see also* Tr. 45, 418-20.

<sup>9</sup> See DX-3 (Nuttall's 2020-21 Educator Term Contract), DX-68 (DISD 2020-21 School Calendar); DX-113 (DISD BK(Regulation) discussed AWAs), Tr. 188-89.

10. DISD policies DEC (Local), DEC (Regulation), and DAA (Regulation) set forth provisions regarding employee leaves, including requests for ADA accommodations and leaves submitted to the DISD Benefits Review Committee. Nuttall was also subject to these policies.

The provisions in these policies relevant to this proceeding are:

- Requests for ADA accommodations must be supported by proper documentation.
- Employees absent more than five consecutive workdays must apply for a leave of absence by contacting the Benefits Department.
- Failure to apply for leave in such a situation will constitute grounds for disciplinary action, including termination.
- Absences are considered excessive when they become a performance concern and/or establish a pattern and are not due to an approved leave or accrued compensatory or vacation time.
- An employee may be subject to disciplinary action including termination for excessive absences.
- An employee is deemed to have voluntarily resigned for job abandonment if the employee is absent for five consecutive days, is not on an approved leave, and is unable to be reached to return to work.<sup>10</sup>

11. The Texas Educator Code of Ethics (DH Exhibit) applies to every teacher in Texas including teachers at Dallas ISD. Standard 1.7 states, “The educator shall comply with state regulations, written local school board policies, and other state and federal law.”<sup>11</sup>

**COVID-19 Forces District-Wide Alternative Work Arrangements for Remainder of 2019-20 School Year**

12. In early March 2020, the Covid-19 pandemic affected the Dallas community. At that time, Nuttall taught mathematics to 11<sup>th</sup> grade students at Hillcrest High School. On March 13, 2020, concerned about his safety, Nuttall began wearing a mask on campus. At the time he wore the mask, neither the federal, state nor local governments had implemented any formal

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<sup>10</sup> DX-3, DX-112 and DX-113; DX-90 (DEC (Local)); DX-91 (DEC (Regulation)).

mask-wearing protocols. Wearing a mask startled some employees, prompting concerned staff members to notify Hillcrest principal, Mr. Joseph Sotelo. He asked Nuttall why he was wearing a mask. Nuttall explained that based on his experiences in China, he believed he should wear a mask. Mr. Sotelo asked Nuttall to not wear the mask and Nuttall declined to do so. Mr. Sotelo then asked Nuttall to leave for *the day*. Nuttall was not disciplined and was not docked any pay for leaving campus that day.<sup>12</sup>

13. As the pandemic intensified, DISD shut down its schools and facilities to in-person classroom beginning on March 23, 2020. DISD temporarily transitioned all teachers to virtual instruction for the remainder of the 2019-20 school year. DISD closed its campuses to in-person classroom instruction for the remainder of the school year. Nuttall did not have an AWA or ADA accommodation to work remotely in the 2019-20 school year. The last day of the school year was May 27, 2020.<sup>13</sup>

14. The Covid pandemic continued past the 2019-20 school year into the summer. Anticipating returning to in-person classroom teaching, the DISD amended its DK (Regulation) policy regarding AWAs. If approved, AWAs allowed an employee to work off-site. The policy was also amended to include that an “AWA implemented during a widespread crisis, government shutdown or other emergency will terminate upon the District’s ability to resume normal operations.”<sup>14</sup>

15. Employees wishing to continue working remotely were required to submit an AWA request form to their supervisor. An AWA was contingent upon meeting several conditions outlined in the District’s DK (Regulation) policy. The employee’s supervisor, executive director and/or chief were charged with approving or denying an AWA request.

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<sup>11</sup> DX-108, at p. 4372; Tr. 417-18.

<sup>12</sup> Tr. 43, 45-47, 164-66; *See* DX-5 (Nuttall asked in an email for an ADA accommodation as a “coping mechanism” but did not submit a formal written request to the DISD Benefits Department); *see also* Tr. 166 (Mr. Florie testifies that Mr. Sotelo made it clear that that Nuttall was only excused for a single day.)

<sup>13</sup> DX-6 and DX-7, Tr 45-55; *see* Tr 164-68, 171-72 (Nuttall had no AWA or ADA accommodation for 2019-2020 school year).

<sup>14</sup> Tr. 55-57; DX-10.

AWAs were discretionary and could be revoked at any time. The policy also made it clear that employees were expected to work in-person at their assigned work locations and that any employees who failed to return to work must apply for a leave or request an ADA accommodation. Failure to return to work in-person could result in disciplinary action. 15

**DISD Notifies Teachers of Plan to Return to In-Person Classroom Teaching for 2020-21 School Year**

16. DISD notified teachers of a draft re-entry plan on July 23, 2020. DISD believed that it was in the best interest of its students to return to in-person classroom instruction in the 2020-21 school year. In response, Nuttall sent Mr. Sotelo an email stating his preference to work from home rather than teach in-person. 16

17. Nuttall submitted his first AWA Request on August 18, 2020 (“AWA Request 1”).<sup>17</sup>

18. The AWA Request #1 form instructed Respondent that if he required an ADA accommodation, he should contact the DISD Benefits Department. Unlike the AWA process, which was discretionary with the employee’s chain of command, the District’s ADA accommodation process was administered by the DISD Benefits Department. The District’s ADA documentation indicates that an employee can request an accommodation through a supervisor; the supervisor simply refers the employee to the DISD Benefits Department so that the employee can submit the proper forms and supporting documentation for an ADA accommodation. The District’s Benefits Review Committee (“BRC”) makes the final determination.<sup>18</sup>

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<sup>15</sup> Tr. 56; DX-10 and DX-113; Tr. 80; DX-18 at pp. 34-35, Tr. 72 and 203.

<sup>16</sup> DX-10 and DX-25, Tr. 90. DX-12 (Nuttall’s email to Mr. Sotelo “I would like to continue working from home.”).

<sup>17</sup> DX-14. Nuttall identified the following reasons for his AWA request: (a) he was in a high-risk category for COVID-19, (b) he had a qualifying disability, (c) he was unable to work onsite due to needing to care for a child under the age of 18 and (d) “other,” stating “ I was asked to work from home before the district went digital and have not yet been asked to return to work.” Tr. 58-65.

<sup>18</sup> *Id.*, DX-79 and Tr. 288.

19. Nuttall notified Mr. Sotelo and Mr. Florie, the Hillcrest assistant principal, that he had submitted an AWA request. Mr. Sotelo responded, telling Nuttall that he would review AWA requests after the DISD decided whether students would return on September 8, 2020.<sup>19</sup>

20. A few days later, on August 20, 2020, DISD declared its re-entry plan for the 2020-21 school year. The main points of the plan were: (a) the school year would begin with remote virtual learning on September 8, 2020; (b) remote virtual instruction would continue between September 8 to September 16, 2020; and (c) teachers would be required to return to their assigned campuses on September 17, 2020 for in-person classroom instruction unless on an approved AWA, ADA accommodation to work remotely or on an approved leave of absence. As part of the re-entry plan, the District implemented a series of safety protocols and procedures designed to protect students, faculty and employees while on campus. The District had also deemed teachers to be essential workers. DISD teachers and employees with questions were encouraged to contact the Benefits Department if they had questions related to ADA leaves.<sup>20</sup>

21. Following DISD's announcement, Mr. Sotelo notified Hillcrest teachers on August 24, 2020 that they would have the option to teach remotely until September 17, 2020. His email also indicated that if teachers wished to continue teaching remotely after September 17, they would need to have (a) an approved AWA—which would be reviewed by the employee's immediate chain of command; (b) have an approved ADA accommodation approved by the District's Benefits Department or (c) be on an approved leave of absence. The District expected all teachers to return to in-person classroom teaching on September 17, 2020. Mr. Sotelo also expected all Hillcrest teachers to report to campus on September 17 unless the teacher had an approved AWA, ADA accommodation or leave.<sup>21</sup>

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<sup>19</sup> DX-15; Tr. 64-65.

<sup>20</sup> DX-16 and DX-17, Tr. 66-69; *see* Tr. 81-82 (Safety protocols and procedures); Tr 98, DX-32 (Teachers deemed to be essential workers).

<sup>21</sup> DX-17 DX-18 and DX19, Tr. 68-69, 75-76, 201.



22. Nuttall learned on August 31, 2020 that AWA Request #1 had been denied. The notification Nuttall received informed him to contact the DISD Benefits Department to discuss any possible ADA accommodations. The notification also indicated that he might need to submit medical documentation to substantiate any ADA accommodation or leave request.<sup>22</sup>

23. Nuttall submitted a second AWA Request (AWA Request #2”) on September 2, 2020. The form Nuttall submitted for AWA Request #2 clearly indicated that he would need to contact the DISD Benefits Department if he was seeking an ADA accommodation.<sup>23</sup>

24. When the 2020-21 school year began on September 8, 2020, Nuttall taught his classes remotely.<sup>24</sup>

25. DISD notified Nuttall that it denied AWA Request #2 on September 10, 2020. He immediately submitted his third AWA Request (“AWA Request #3”). In AWA Request #3, Nuttall stated his justification for the AWA as “I have a qualifying disability.” This form—which was identical to the prior forms—stated that if he wanted to request an ADA accommodation, he would need to contact the DISD Benefits Department. Nuttall also sent an email to the DISD BRC claiming that he already filed an ADA accommodation.<sup>25</sup>

26. Mr. Sotelo denied AWA Request #3 on September 11, 2020. Just as the prior denial notifications, this notification indicated that if he had an underlying medical condition or wished to discuss a possible ADA accommodation, he would need to contact the DISD Benefits Department. The notification also stated that any ADA accommodation may require medical documentation. Mr. Sotelo informed Nuttall that all teachers were expected to perform in-person classroom instruction upon the return of the students to campus.<sup>26</sup>

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<sup>22</sup> DX-14, DX-20; Tr 58-64.

<sup>23</sup> DX-21. Nuttall’s stated justifications for an AWA were (a) that he was in a high-risk category for COVID-19, (b) that he had an underlying medical condition (c) that he had a qualifying disability, (d) that he unable to work onsite because he needed to care for a child under the age of 18, (e.) that he was “in a position identified by the department of an AWA,” (f) that it was “the department’s preference that I work from home,” and (g) that he had “already begun working from home in March.”

<sup>24</sup> Tr. 76-77.

<sup>25</sup> See DX-22 (Denial of AWA Request #2), DX-23 (Nuttall’s AWA Request #3).

<sup>26</sup> DX-24; see also DX-25 at pp. 258-59 (Mr. Sotelo explains why he is denying teachers’ AWA requests); Tr.

27. Hillcrest 9<sup>th</sup> grade students returned to campus on September 28, 2020, and the remainder of the students subsequently returned to campus on October 5, 2020. 27

**Nuttall Fails to Provide DISD Medical Documentation to Support His ADA Accommodation Request**

28. After denying Nuttall's AWA Request #3, Mr. Sotelo suggested to Nuttall that he contact the Benefits Department to inquire about an ADA accommodation. Nuttall responded to Mr. Sotelo in an email, telling him that the Benefits Department refused to talk to him. Mr. Sotelo forwarded Nuttall's email to DISD Executive Director Dr. Melody Cogsworth-Paschall, who then directed Nuttall's email to the DISD Benefits Department.28

29. That email was eventually forwarded to Ms. Valerie Robertson, Director of Benefits. She contacted Nuttall and explained the District's ADA process for requesting an accommodation. She explained the distinction between an AWA request and an ADA accommodation request. She also explained that Nuttall's request would need to be supported by a health care provider's statement or letter. To make sure he received consistent advice regarding the ADA process, Ms. Robertson instructed her staff on September 14 to forward any communications or calls from Nuttall so that she could deal with him.29

30. To assist him, Ms. Robertson explained to Nuttall the differences between the District's AWA process and the ADA accommodation process. She explained that to request an AWA, an employee must submit the DISD's AWA form, which is then reviewed and either approved or denied by the employee's supervisor, executive director, and/or chief. The approval of the AWA is discretionary, based on a variety of factors which the employee's supervisor team is best able to assess. 30

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85-90.

27 Tr. 98-99.

28 Tr. 88-90, DX-25. *See* DX-26 (Mr.Sotelo's email to Benefits Department). Mr. Florie also testified that he told Nuttall that he needed to go through the Benefits Department to apply for an ADA accommodation. Tr. 177.

29 DX25 and DX-28, Tr. 205-08. *See* Tr. 208-09, 328-29 (Ms. Robertson to deal with Nuttall); Tr. 211.

30 Tr. 203-04 (Nuttall's email (NX-2) demonstrates his confusion between AWA and ADA request process). Tr. 189-92 (Ms. Robertson explains distinctions between AWA and ADA accommodation requests, who they go to, the review process and who approves).

31. Ms. Robertson also explained the ADA accommodation process to Nuttall. To request an ADA accommodation, an employee must submit the DISD Accommodation form which is available on the District's public-access website. The DISD ADA Accommodation form is to be completed by the employee and his health care provider. The employee can fill out the general ADA accommodation request, but his health care provider must submit documentation supporting the accommodation request. The DISD Benefits Department reviews the submitted information, initiating the ADA review process.<sup>31</sup>

32. Following his conversation with Ms. Roberts, rather than submit a request for an ADA accommodation, Nuttall submitted his fourth AWA request ("AWA Request #4") on September 13, 2020. DISD denied AWA Request #4 the following day. The denial notification stated that if Nuttall had an underlying medical condition or was in a high-risk category based on CDC guidelines, he needed to contact the DISD Benefits Department to discuss a possible accommodation or leave.<sup>32</sup>

33. Between September 11 and September 14, 2021, Nuttall and Ms. Robertson continued to exchange emails and talk over the telephone. Believing Nuttall to still be confused between how to request an AWA and an ADA accommodation and not understanding what information the District needed, Ms. Robertson explained what he needed to do to request an ADA accommodation. In addition to directing Nuttall to the District's public website that had all the necessary ADA forms he would need, she emailed him the District's Request for Accommodation Form, the Health Care Provider Form and instructions on how to submit his ADA accommodation request. She explained that the medical information requested on the Health Care Provider Form was necessary to identify what disability exists, assess the essential functions he can or cannot perform and to assist the District in determining whether a reasonable accommodation could be provided.<sup>33</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> DX-29, Tr 92-94.

<sup>33</sup> DX-30, Tr. 93-94. *See* DX-42 at p. 303 (Ms. Robertson states: "The AWA process is not the ADA Accommodation Request process.") *and* NX-1, Tr. 311 (Ms. Robertson believes Nuttall confused about AWA and ADA accommodation request and review processes); *see also* Tr. 177 (Mr. Florie advises Nuttall to go through the DISD

34. As of September 17, 2020, the DISD's date for all teachers to return to campus, Nuttall had no approved AWA and had not submitted an ADA request with supporting medical documentation. He also had no approved leave of absence. Nuttall did not report to work at Hillcrest on September 17, 2020. From September 17 to October 2, 2020, Nuttall continued to teach remotely without approval or authorization. Nuttall told the assistant principal, Mr. Terrence Florie, that he wanted to teach remotely even though the students were scheduled to return to campus. In an email, Nuttall laid out the reasons for his refusal to return to work. First, Nuttall claimed to have "Covid-like symptoms;" but he offered no evidence to corroborate this. Mr. Florie testified that based on his conversations with Nuttall about his symptoms, he believed that Nuttall was only saying he had symptoms to avoid returning to work. Second, Nuttall claimed to have requested an ADA accommodation; but there was no evidence the DISD Benefits Department ever received sufficient information to begin the ADA review process. Finally, Nuttall claimed the campus was not safe for him to return to work; however, there was no evidence establishing that Hillcrest was unsafe. Nuttall had no personal knowledge of the conditions on campus since he had not been there since March 13, 2020. 34

35. On September 30, 2020, Nuttall submitted an ADA request for accommodation using the DISD form along with a letter dated September 9, 2020 from Ari Levy, Ph.D., Director of the Antelope Valley Behavioral Health Clinic. The letter states that Nuttall received treatment at the clinic on seven visits between August 27, 2004 and June 6, 2006 for Bipolar Disorder II. According to the letter, he had been diagnosed with the condition on June 6, 2006. The letter only referenced the dates he had been seen and treated at the clinic. There were no medical records attached to the letter. The letter made no mention of the frequency, severity or duration of his impairments, the functional limitations the impairments caused, the extent to which the impairment could limit his ability to perform his job duties or any need for a reasonable accommodation. Nuttall personally filled out the Health Care Provider Form; his physician did not fill it out. Neither District policy nor the ADA allowed an employee to self-report a disability

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Benefits Department to get an ADA accommodation).

34 Tr. 97-105; *see* DX-34. Tr.168, 170-72. *See* Tr. 447 (Hillcrest had safety protocols and measures in place).

for purposes of making an ADA accommodation.<sup>35</sup>

36. Upon receiving the Nuttall's ADA Accommodation form, Ms. Robertson contacted Nuttall by email. She told him that what he had submitted was insufficient. She clearly explained that he needed to have his physician or health care provider fill out the ADA form. She told Nuttall that, without the physician's assessment, the DISD Benefits Review Committee could not assess what, if any, essential functions he could or could not perform and could not determine what reasonable accommodations may be needed. Ms. Robertson told him that he needed to have a physician submit a report on his behalf; Nuttall disagreed, and refused to supply any additional information, maintaining that what he had provided was sufficient. Ms. Robertson testified that Nuttall's situation was unique because he did nothing to assist his situation. Because of his failure to provide sufficient medical documentation, the Benefits Department could never really assess and evaluate Nuttall's accommodation request and determine if he had a disability or needed an accommodation.<sup>36</sup>

#### **Nuttall Fails to Report to Work**

37. Anticipating that Nuttall might not return to work, Mr. Sotelo sought guidance from the District's HR and Employee Relations team. October 2, 2020, Mr. Sotelo and Ms. Kimberly Kelly, DISD Director of Employee Relations, informed Nuttall that he needed to return to campus to provide in-person classroom instruction on October 5, 2020. After this conversation, Ms. Kelly disabled Nuttall's access to the District's PowerSchool and Zoom accounts to restrict him from continuing to work remotely. Her intent was to encourage him to return to work because he was not authorized to teach his students remotely. Nuttall did not respond. Immediately afterwards, the District also suspended his email account. In disabling

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<sup>35</sup> See DX-45 (DISD form requesting ADA accommodation submitted by Nuttall); DX-43 (Letter from Antelope Valley Behavioral Clinic) and Tr. 220 (Ms. Robertson testifies letter from Antelope Behavioral Health Clinic insufficient). Tr. 230.

<sup>36</sup> DX-46. Tr. 342-43 (Nuttall did nothing to assist his situation). Tr. 301 (Benefits Department could not assess Nuttall's ADA accommodation requests without proper and sufficient medical documentation); *see also* NX-10 (Nuttall's provider reinforced DISD's assessment that attached letter was insufficient to ascertain whether a disability existed or what, if any, reasonable accommodation might be necessary.).

this access to the District's systems, DISD acted within its discretion. 37

38. Mr. Sotelo and Mr. Florie followed up with Nuttall via Zoom and told him he needed to return to campus by October 5, 2020 unless he had an approved AWA or ADA accommodation to work remotely. Mr. Sotelo also sent Nuttall a Letter of Concern dated October 2, 2020. This Letter of Concern put Nuttall on notice that failure to comply with District policies and directives to return to work would constitute insubordination and could result in adverse action taken against him.<sup>38</sup>

39. Nuttall responded to Mr. Sotelo's Letter of Concern in an email dated October 4, 2020 by telling him he would not return to campus because he had no computer access, the campus was not safe, and he was on a "forced leave." Mr. Sotelo testified that upon returning to campus, the District would have reinstated Nuttall's computer access. Nuttall's subjective opinion that the campus was not safe is not supported by an evidence because he had not been on the campus since March 13, 2020. There is no evidence that any one from the DISD forced Nuttall to take any leave; the evidence established that Nuttall was not on any approved District leave.<sup>39</sup>

40. Nuttall did not report to work on October 5, 2020. Although he refused to report to work as directed, the District continued to pay Nuttall using his PTO account. On October 19, 2020, Mr. Sotelo emailed Nuttall asking him to return to campus. Nuttall responded saying he would not return to campus. At this point, Mr. Sotelo initiated a job abandonment process so that he could find a permanent replacement to teach Nuttall's classes.<sup>40</sup>

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37 DX-47, Tr. 104-08, DX48, Tr. 82 (March 13, 2020 was the last time Nuttall was on campus); *see also* Tr. 108-10 (Ms. Kelly deactivates Nuttall's access to District systems). Nuttall claims that by disabling his PowerSchool and Zoom accounts, he was not able to instruct his students. DISD reinstated his email account so that they could continue to communicate with him. The IHE finds that the District would have reinstated his accounts if he had reported back to work.

38 Tr. 107, 172-73.

39 DX-51; Tr. 82 (Last time Nuttall on Hillcrest campus was March 13, 2020); Tr. 115-16 (Nuttall does not return to campus and violates Mr. Sotelo's directive to return to work).

40 DX-52, Tr.115. DX-54 and DX-55, Tr 117-18, 120 and 156 (October 19, 2020 request by Mr. Sotelo).

41. The DISD Benefits Department notified Nuttall via letter sent electronically on October 27, 2020 that they could not approve his ADA accommodation request because he failed to provide adequate supporting documentation from his health care provider describing the severity, frequency and duration of his impairment, the job duties or activities his impairment limits, the extent to which the impairment limits his ability to perform the essential functions of his job and the need for an accommodation. Nuttall responded on October 29, 2020 stating that he would not provide further medical documentation or information.<sup>41</sup>

42. DISD sent Nuttall a Final Return to Work Letter on November 9, 2020. The letter notified Nuttall that he had been absent from work and had no authorized leave of absence. The letter also reminded Nuttall that the health care provider information he had submitted along with his ADA accommodation was insufficient. The letter directed him to return to work—or alternatively, apply for leave, submit the requested health care provider information or submit a separation form. The letter advised him that failure to initiate any of these options by November 16, 2020 could result in a recommendation for termination from the DISD. Nuttall did not respond. He did not return to work at Hillcrest, he did not apply for leave, he did not provide supplemental or adequate information from his health care provider and he did not submit a separation form.<sup>42</sup>

43. The DISD Benefits Review Committee considered Nuttall's situation on November 30, 2020 when he failed to return to work on November 16 or submit any further documentation in support of his ADA accommodation request. The BRC requested a legal review with a recommendation to terminate his employment with the District. The BRC sent Nuttall a letter notifying him of their recommendation on December 1, 2020.<sup>43</sup>

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<sup>41</sup> DX-56 (DISD Benefit Review Committee notifies Nuttall of denial of ADA accommodation request);DX-58 (Nuttall's response).

<sup>42</sup> DX-56, DX-59, DX-60 and DX-65. Tr. 243-44. *See* DX-61 *and* Tr. 247 (Nuttall did not return to work or provide supplemental or adequate information from his health care provider or physician).

<sup>43</sup> *See* DX-63 (Agenda items for November 30 meeting); DX-64 (Notification to Nuttall that Benefits Review Committee has recommended legal review for consideration of termination); DX-65. Tr. 249-51.

44. Nuttall had not returned to work since October 2, 2020. He had been absent for more than five consecutive days without authorization. Because he had been absent beyond five consecutive days, the District considered Nuttall to have abandoned his job. Sometime between December 16 and 19, 2020, Nuttall and his wife and son left their residence in Plano, Texas to live in China. Prior to moving, Nuttall submitted applications seeking teaching positions in China. He later secured a new teaching position in China starting in August 2021. Nuttall also switched his permanent residence from Texas to his parents' residence in California. Prior to going to China, Nuttall made it noticeably clear he would not report back to campus.<sup>44</sup>

45. The facts also establish that Nuttall did not fulfill his assigned job duties after October 2, 2030.<sup>45</sup>

46. Mr. Robert Abel, DISD Deputy Chief of Human Capital Management, served as a member of the District's Legal Review Committee ("LRC") that reviewed the BRC's recommendation to terminate Nuttall's term contract on December 9, 2020. After comparing the facts submitted by the BRC to applicable District policies, the LRC unanimously decided to recommend terminating Nuttall's term contract for several reasons:

- Nuttall failed to report to work at any time after October 5, 2020 after being directed to return to work.
- Nuttall did not have any authorization or approval to be absent from work.
- Nuttall was also in violation of several District policies, particularly DEC (Local), DEC (Regulation) and DAA (Regulation).
- Nuttall was absent from work without authorization or approval for more than five consecutive days. By being absent more than five consecutive days, the District also considered his absences to be excessive.

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<sup>44</sup> See DX-60 and DX-67; Tr. 99-100, 115-17, 244-51 (Nuttall did not return to work). Tr. 458-64 See also DX-34 and DX-35, Tr. 103, 107-10, 134-35, 177-82 (Nuttall opposed to returning to campus).

<sup>45</sup> Tr. 99-100, 115-18, 173 and 195.



- Because he was absent for more than five consecutive days without approval or leave, he was considered to have abandoned his job in accordance with District policy.
- Nuttall was also considered to have engaged in insubordination by refusing to comply with directives to return to work on multiple occasions.
- Nuttall, by his refusal to return to work, was considered to have engaged in conduct that adversely affected the District and engaged in conduct not in the District's best interest.
- By not returning to work on October 5, 2020, Nuttall was not fulfilling his assigned job duties.

The LRC recommended terminating Nuttall because he failed to return to work. In response to a cross-examination question from Nuttall, Mr. Abel stated:

The main thing is that you [Nuttall] weren't coming to work. We had kids on site. We needed teachers present to teach them and secure their safety, monitor them, deal...with our parents, all those kinds of things. The biggest issue, the deciding factor is that since October 5<sup>th</sup> you have not been to the campus.

In deciding to terminate Nuttall and his term contract, the LRC did not consider Nuttall's requests for AWAs or his request for an ADA accommodation. The deciding factor for the LRC was Nuttall's failure to return to work. On December 16, 2020, Ms. Cynthia Wilson, DISD Chief of Human Capital Management, sent Nuttall a letter informing him that the District was recommending that his contract and employment be terminated for good cause. 46

47. The DISD never approved any of his AWA requests. There are no facts that would indicate that the DISD's decision not to approve his AWA requests was motivated by bad faith or malice. The facts establish that the DISD declared teachers to be essential workers and that teachers were needed to facilitate in-person classroom learning. The District made it abundantly clear that Nuttall needed to return to Hillcrest to provide in-person learning to his students. There are no facts that indicate that the denial of the AWA was arbitrary or capricious.

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46 See DX-65 (DISD Legal Review file containing recommendation and supporting documentation). DX-1 (December 16, 2020 Letter Recommending Termination). Tr. 433-34 (LRC recommended termination because Nuttall failed to return to work). Tr 449 (LRC did not consider events that occurred prior to October 5, 2020).

Additionally, there are no facts that the DISD's decision to deny Nuttall's AWA requests were motivated by discrimination or retaliation.<sup>47</sup>

48. The DISD never approved any of Nuttall's ADA requests for accommodation because Nuttall failed to provide adequate supporting information from his health care provider. The letter dated September 9, 2020 from the Antelope Valley Behavioral Clinic Nuttall submitted was factually insufficient to support his request for an ADA accommodation. There are no facts that would indicate that the DISD Benefits Department's decision denying his ADA accommodation request was motivated by bad faith or malice or was arbitrary or capricious. Nuttall could have taken PTO to find a health care provider to assess him and submit a statement on his behalf. Additionally, there are no facts that the DISD's Benefit Department's decision to deny Nuttall's ADA requested accommodation was discriminatory or retaliatory.<sup>48</sup>

49. Nuttall believes that the District recommended terminating his contract because he had filed grievances in the past. There was no evidence that those grievances were considered by the District's BRC in making their recommendation to terminate or by the LRC in deciding to approve the recommendation to terminate Nuttall's term contract and his employment.<sup>49</sup>

50. DISD did not place Nuttall on administrative leave without pay or suspend him without pay. Since October 5, 2020, the District considered him to be on an unapproved leave. The District did not dock him for any workdays from the start of the 2020-21 school year through October 2, 2020. DISD charged Nuttall's available PTO for not reporting to work beginning on October 5, 2020 until he exhausted all his remaining PTO. Nuttall's pay was properly docked after he exhausted his available PTO and failed to report to work. Since that time, Nuttall has been and remains on an unapproved leave of absence without pay.<sup>50</sup>

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<sup>47</sup> Tr. 99, 172, 238-39.

<sup>48</sup> Tr. 301. Tr. 88-89 (Mr. Sotelo testified Nuttall could have taken PTO for physician evaluation). The DISD Benefits Department, particularly Ms. Robertson, exercised professional courtesy and patience with Nuttall. She explained the DISD process and what information and documentation he needed to submit for the Benefits Review Committee to make a complete assessment of his situation. *See also* Tr. 125, 157, 172-75, 251, 355, 394, 430-31.

<sup>49</sup> *See* NX-28 (Nuttall's grievances). It is also important to note that the circumstances giving rise to these grievances occurred in the 2019-20 school year and were not relevant to this proceeding.

<sup>50</sup> DX-67, Tr. 431-32.

## CONCLUSIONS OF LAW

After due consideration of the record, the evidence at the hearing, matters officially noticed, the arguments of counsel contained in their pre-hearing and post-hearing briefs and the Findings of Fact, in my capacity as Hearing Examiner, by a preponderance of the evidence, I make the following Conclusions of Law.

### Jurisdiction & Good Cause

51. Jurisdiction to hear this matter is proper under Section 21.251(a)(2) of the Texas Education Code.

52. Nuttall is a “teacher” as defined by Section 21.201 of the Texas Education Code.

53. Good cause for termination is a conclusion of law that may be adopted, rejected or changed by the board of trustees or board subcommittee. TEX. EDUC. CODE § 21.257(a-1); TEX. EDUC. CODE § 21.259(b)(1).

54. A teacher employed under a term contract may be discharged at any time for good cause as determined by the board of trustees. Specific conduct which constitutes “good cause” is determined by a district’s board of trustees. 51

55. Good cause for discharging an employee is defined as the employee’s failure to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances. An employee’s act constitutes good cause for discharge if it is inconsistent with the continued existence of the employer-employee relationship.<sup>52</sup>

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<sup>51</sup> TEX. EDUC. CODE § 21.211.

<sup>52</sup> *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 580 (Tex. App.—Houston, [1<sup>st</sup> Dist.] 1992, no writ).

56. Nuttall was recommended for termination of his employment by the DISD for good cause and was provided due process and a fair and impartial hearing process using the procedures in Chapter 21, Subchapter E of the Texas Education Code.

57. Nuttall's appeal was conducted pursuant to Section 21.256 of the Texas Education Code, and the standard of review in determining the findings of fact was based upon a "preponderance of the evidence."

58. Pursuant to Section 21.211 of the Texas Education Code, DISD's Board of Trustees has determined "good cause" for termination of a Chapter 21 contract employee, which is set out in Board Policy DF (Local). To establish good cause to terminate Nuttall's term employment contract, the District must show by a preponderance of the evidence that Nuttall engaged in any conduct identified in Board Policy DF (Local). 53

59. The evidence established that Nuttall failed to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances.<sup>54</sup> Nuttall engaged in acts which are inconsistent with the continued existence of the employer-employee relationship.<sup>55</sup>

61. Nuttall's conduct constitutes violations of Board Policy DF Local #1, #2, #3, #4, #5, #6, #21, and #39, which individually and/or collectively constitute good cause for termination of his Chapter 21 contract and employment with the District.

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53 See Findings of Fact, Paragraph 3, *supra*.

54 See Findings of Fact, Paragraphs 39, 40, 41, 42, 44 and 45, *supra*. In his Pre-Hearing Brief, Nuttall asks the IHE that based on "the complete circumstances," a reasonable employee would not have entered the campus on "October 3, 2019." Giving the Nuttall the benefit of the doubt that the date "October 3, 2019" is a typographical error and he meant, "October 3, 2020," his point still fails. There was no evidence that the Hillcrest campus was unsafe. See Findings of Fact, Paragraph 39, *supra*. The IHE concludes that Nuttall's argument on this point fails for lack of evidence.

55 *Id.*, see also Findings of Fact, Paragraph 44 (Nuttall's decision to seek a new teaching position in China and relocating his family to China in the middle of the contracted-for school year with the DISD demonstrates an intent inconsistent with a continued employer/employee relationship with the District), *supra*.

62. Nuttall was absent from work for more than five consecutive days and did not apply and was not approved for an ADA accommodation. Nuttall's absences were excessive and were not due to an approved leave or accrued compensatory or vacation time. Based on the facts enumerated above, Nuttall's absence from work beyond five consecutive workdays without approved leave or an ADA accommodation to work remotely violates District policy, and alone, constitutes good cause for terminating his contract and his employment.<sup>56</sup>

63. Because Nuttall was absent for more than five consecutive days and was not on an approved leave, he abandoned his job. His recent relocation to China further underscores his intent to abandon his teaching position with the DISD. Based on the facts enumerated above, Nuttall's absence from work beyond five consecutive workdays constitutes job abandonment and violates DISD policy and constitutes good cause for terminating his contract and ending his employment with the District.<sup>57</sup>

64. Nuttall failed to comply with multiple directives and instructions to return to work on campus, beginning, September 17, 2020. He also failed to comply with directives and instructions to return to work on campus by October 5, 2020. Nuttall failed to report to work on campus—for a significant period—without proper approval as required by the District through various instructions and directives identified above. His failure to report to work on campus constitutes insubordination and failure to comply with directives.<sup>58</sup> Additionally, on November 9, 2020, the District sent Nuttall a Final Return to Work Letter that required him to return to work, apply for a leave of absence, submit sufficient medical information from his health care provider or submit a separation form. Nuttall's failure to return to work on campus or submit the

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<sup>56</sup> *Johnson v. Houston ISD*, Docket 074-R2-402 (Tex.Comm'r Educ. 2002) (Finding excessive absences are those absences for which leave under federal and state law or district policy is not properly invoked).

<sup>57</sup> *Martin v. Dallas ISD*, Docket No. 059-R2-304 (Tex.Comm'r Educ. 2004) (Upholding good cause termination of a term contract where the employee was absent for a significant period of time during which she did not provide medical documentation for her absences; excessive absences constitute good cause for termination as being inconsistent with the continued existence of the employer/employee relationship; performance of contractual duties goes to the heart of the employment contract).

<sup>58</sup> *Matthews v. Winona ISD*, Docket No. 010-R2-1002 (Tex.Comm'r Educ. 2002) (Insubordination is good cause for termination of an employment contract with a school district in the State of Texas).

required documentation supporting his accommodation request constitute good cause for terminating his contract and ending his employment with the District.

65. By not returning to work, Nuttall failed to fulfill his job duties. Respondent's failure to report to work for a significant period, and failure to fulfill his job duties as a teacher, constitutes good cause for his termination.<sup>59</sup>

66. Based on the factual findings and matters enumerated in this Recommendation, the District's recommended termination of the District's term contract with Nuttall for good cause has been proven and established by a preponderance of the evidence.

67. Nuttall's conduct constitutes good cause for the termination of his term contract and his employment with the District.

#### **Nuttall's Pre-Hearing Motions & Claims of Mitigating Circumstances**

68. The IHE finds and concludes that the DISD acted within its discretion in denying Nuttall the AWAs he requested.

69. In his pre-hearing and post-hearing briefs, Nuttall argues that the District denied him a reasonable accommodation under the Americans with Disabilities Act.<sup>60</sup> The IHE lacks jurisdiction to make any findings of fact or conclusions of law regarding any alleged ADA violation.<sup>61</sup> But, the IHE finds and concludes that Nuttall did not completely cooperate with the DISD Benefits Department in submitting his ADA accommodation form. For purposes of this

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<sup>59</sup> *Skinner v. San Felipe Del Rio Consolidated ISD*, Docket No. 036-R2-203 (Tex.Comm'r Educ. 2003) (Upholding good cause termination of term contract where employee failed/refused to perform duties he was contractually obligated to perform and finding the termination was not in retaliation for the employee filing a lawsuit against the district).

<sup>60</sup> Americans with Disability Act prohibits discrimination against a qualified individual on the basis of disability. 42 U.S.C. § 12112(a).

<sup>61</sup> TEX. EDUC. CODE §§ 21.251 and 21.257; *Baines v. Dallas Independent School District*, Docket No. 002-R2-905 (Tex.Comm'r.Educ. 2002) (Holding that the Commissioner lacks jurisdiction over ADA claims in the context of a Chapter 21 employment case.); *see also Preston v. Victoria Indep. Sch. Dist.*, No. V-09-20, 2010 WL 2735729 (S.D.Tex. 2010) (Courts have jurisdiction over ADA statutes.).

review, the evidence established Nuttall failed to comply with the DISD Benefits Department in having a health care provider fill out the appropriate portion of the form and by failing to provide sufficient medical documentation. Without this information, the DISD Benefits Department was unable to assess whether he had a qualifying disability.<sup>62</sup> The IHE concludes that the DISD was within its legal bounds in asking Nuttall for more sufficient information from his health care provider.<sup>63</sup> The IHE concludes that the documentation Nuttall attached to his request for an ADA accommodation was insufficient; the documentation failed to provide the Benefits Department with enough information to properly assess and evaluate whether Nuttall had a current disability and what, if any, accommodation might be reasonably necessary.

70. The facts establish that Mr. Sotelo, Mr. Florie and Ms. Robertson worked in good faith to assist and guide Nuttall with regards to how the District processes worked.

71. Nuttall also argues in his pre-hearing brief that the DISD retaliated against him for (a) making a complaint to the EEOC on September 14, 2010, (b) filing a charge with the EEOC on December 1, 2020 and (c) filing suit in Texas court regarding compensation complaints.<sup>64</sup> He also argues that the District retaliated against him for filing an ADA accommodation. There was no evidence that any of the DISD actors in this matter had any knowledge of Nuttall's EEOC complaint, EEOC charge or his lawsuit in state court. The IHE concludes that there is no evidence of retaliation.

74. While Ms. Robertson clearly knew that Nuttall was attempting to file an ADA accommodation, there is no evidence that she or anyone else at DISD recommended or advocated suspending or terminating him simply because he was attempting to file an ADA accommodation. The IHE concludes there is no evidence that DISD retaliated against Nuttall for attempting to request an ADA accommodation.<sup>65</sup>

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<sup>62</sup> See *Findings of Fact*, Paragraphs 28-36, *supra*.

<sup>63</sup> See 29 C.F.R.Pt. 1630.9 App. (2016); also Enforcement Guidance: Disability Related Inquiries and Med. Examinations of Employees Under the ADA, U.S. EEOC Commission (July 26, 2000).

<sup>64</sup> See NX-52 (EEOC charge dated 21/01/2021); NX-49 (Plaintiff's Original Petition)

<sup>65</sup> The IHE makes this conclusion only as it applies as a possible defense against the District's good cause termination. Complete adjudication of any ADA retaliation claim is beyond the jurisdiction of the IHE. *Taylor v. Humble Indep. School Dist.*, Docket No. 181-R10-799 (Tex.Comm'r Educ. 2000).

75. All findings of fact should be interpreted, where appropriate, as conclusions of law and vice versa.

### **RECOMMENDATION**

After due consideration of the evidence, matters officially noticed, the arguments of counsel, the Findings of Fact and Conclusions of Law, the IHE makes the following final recommendation. The IHE *recommends* that the DISD Board of Trustees adopt the IHE's Findings of Fact and Conclusions of Law and enter an Order consistent therewith.

It is further recommended that the Dallas Independent School District's proposed termination of Luke Nuttall's term contract and employment is justified and with good cause.

Luke Nuttall's appeal of the recommended termination of his term contract is *denied*.

SIGNED AND ISSUED this 27<sup>th</sup> day of April, 2021.



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Diego J. Peña  
Independent Hearing Examiner



## CERTIFICATE OF SERVICE

I hereby certify that I have served this recommendation on the following parties and delivered the Record to the President of the District's Board of Trustees on this 21<sup>st</sup> day of April, 2021.

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