

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

**In the Matter of the Motion for Immediate Reversal of
Suspension of:**

GRISELDA REVOLLO, a Permanent Certificated Employee,

Moving Party,

and

RIVERSIDE UNIFIED SCHOOL DISTRICT

Responding Party

OAH No. 2022020862

**ORDER DENYING MOTION FOR IMMEDIATE REVERSAL OF
SUSPENSION**

Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on March 18, 2022.

Ilissa B. Gold of Reich, Adell & Cvitan, Attorneys at law, represented moving party Griselda Revolla (Employee).

Christopher D. Keeler of Fagen, Friedman & Fulfrost LLP, Attorneys at law, represented Riverside Unified School District (District).

Employee was served with the Board-approved Statement of Charges (Statement) and notified of her placement on unpaid suspension pending the outcome of the District's action to dismiss Employee.¹ Employee timely filed a request for hearing contesting her recommended termination and a Motion for Immediate Reversal of Suspension (MIRS) requesting reinstatement of Employee to paid status, with benefits and reimbursement for any back pay, plus interest she is owed, pursuant to Education Code section 44939, subdivision (c)(5).² District filed its opposition to the MIRS, and Employee filed a reply. The ALJ denied Employee's request for official notice of a MIRS order issued by an ALJ in another matter on the grounds it did not constitute precedent and was irrelevant.

District's statutory causes for the dismissal under Code section 44932 include immoral conduct, dishonesty, evident unfitness for service, and persistent violation of or refusal to obey school laws or reasonable regulations. Under Code section 44939, subdivision (b), the District's statutory bases for dismissal is willful refusal to perform regular assignments without reasonable cause.

Having considered the Statement, exhibits attached to the Statement and incorporated by reference therein, and the moving, opposing and reply papers filed by

¹ The dismissal action bears OAH No. 22030425.

² All further references are to the Education Code (Code) unless otherwise indicated.

the parties, and the oral argument of the parties, the ALJ hereby makes the following findings and orders.

Legal Basis for Suspension Without Pay

Code section 44939, subdivision (c)(1), allows a suspended employee to file a motion for review of the suspension, and review of that motion "shall be limited to a determination as to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension under this section."

Although well-pleaded facts must be accepted as true for purposes of the Motion, the ALJ need not accept "contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A motion such as this is analogous to a demurrer. A demurrer can be sustained when, e.g., a plaintiff's "conclusory characterization of defendant's conduct as intentional, willful and fraudulent" was "patently insufficient." (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

IMMORAL CONDUCT

As stated in *Board of Ed. of San Francisco Unified Sch. Dist v. Weiland* (1960), 179 Cal.App. 2d 808, 811 (*Weiland*), conduct which is "immoral" has "been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare." The Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 223-224, further defined immoral conduct, in quoting from *Jarvella v. Willoughby-Eastlake City School Dist.* (1967) 12

Ohio Misc. 288: “[Immoral conduct] must be considered in the context in which the Legislature considered it, as conduct which is hostile to the welfare of the general public; more specifically in this case, conduct which is hostile to the welfare of the school community. . . . In providing standards to guide school boards in placing restraints on conduct of teachers, the Legislature is concerned with the welfare of the school community. Its objective is the protection of students from corruption.”

Code section 44939, subdivision (c)(1), mandates that the ALJ look to the alleged conduct to determine whether, on its face, it is immoral.

WILLFUL REFUSAL TO PERFORM REGULAR ASSIGNMENTS WITHOUT REASONABLE CAUSE

Although there are no cases interpreting the term “willful refusal to perform regular assignments without reasonable cause” under Code section 44939, case law from related settings reflects that the term “willful” “carries a volitional coloration which excludes the notion of accidental or even negligent conduct.” (*Coomes v. State Personnel Bd.* (1963) 215 Cal.App.2d 770, 775; see also *Peters v. Mitchell* (1963) 222 Cal.App.2d 852, 862 [“Willful disobedience connotes a specific violation of command or prohibition.”].)

A comparison of Code sections 44932, subdivision (a), and 44939, subdivision (b), is illuminating. Pursuant to Code section 44932, subdivisions (a)(2) and (a)(5), unprofessional conduct or unsatisfactory performance warrants discipline, but not unpaid suspension. More importantly, under Code section 44932, subdivision (a)(8), while a teacher's persistent violation of a school district's reasonable regulations is grounds for discipline, it is not an authorized basis for unpaid suspension. Rather, unpaid suspension is authorized only for a willful refusal to perform regular

assignments "without reasonable cause," pursuant to Code section 44939, subdivision (b).

This comparison indicates the cause of discipline for willful refusal to perform a regular assignment is more akin to the traditional labor charge of insubordination, i.e., an intentional, willful, volitional refusal to perform any part of a particular regular assignment. A charge of willful refusal to perform a regular assignment must be more than unsatisfactory, unprofessional, negligent, or even persistent failure to perform a regular assignment. Willful disobedience is volitional and excludes accidental or negligent conduct. (*Coomes v. State Personnel Bd.* (1963) 215 Cal. App. 2d 770, 775; *Peters v. Mitchell* 222 Cal.App.2d 852, 862 (it "connotes a specific violation of command or prohibition."))

Contentions

DISTRICT'S POSITION

District maintains it set forth sufficient facts of conduct under Code section 44939 that if taken as true substantiate Employee's immediate suspension without pay under two alternative grounds: immoral conduct and willful refusal to perform regular assignments without reasonable cause.

As set forth in the Statement, Employee is an Early Childhood Special Education Preschool Teacher at a District early childhood center with job duties inclusive of providing age-appropriate instruction and activities directed to the "development of basic physical, emotional, academic and cognitive skills for pre-school age students," participating in Individualized Education Program (IEP) team meetings to determine the instructional program and goals and objectives; and coordinating and consulting with staff for the integration of pupils into regular classes and instruction in areas

where pupils can meet success. As alleged, Employee is required to “maintain professional and positive relationships with students” and “read, interpret and apply rules, regulations, policies and procedures.”

District incorporated by reference into the Statement pertinent rules, regulations, policies and procedures for which the Statement alleges Employee obtained. The rules and regulations appended to the Statement included: Early Childhood Special Education (ECSE) Preschool Teacher published by the District, which included a description of the position and general needs of preschool students with disabilities (Exhibit 1); Employee’s 2019-2020 training schedule including restraint workshop and curriculum (Exhibit 2); mandated reporter witness e-mail regarding withholding of food pending wrist tapping (Exhibit 3); speech pathologist signed statement regarding ski chair and face masks (Exhibit 4); and another witness e-mail statement regarding milk request, Employee’s insistence pupil use the Picture Exchange Communication System (PECS) icon, throwing milk in trash, removal from circle area to adaptive chair and witness to actions of Employee’s staff (Exhibit 5); and Confidential Report of Investigation by independent investigator, Liberatti & Associates, for District dated December 5, 2021 including use of instructional and behavioral management strategies inconsistent with students’ IEP. (Exhibit 6).

Specific allegations included in the Statement pertinent to the MIRS include the following:

Allegation 5: During lunchtime on or about October 15, 2021, Student N was attempting to grab his lunch, but you moved the lunch away from him, indicating that he could not have his food until he tapped his finger to his wrist. You refused to give Student N his food for approximately 17 minutes (citing Exhibit 3 email).

Allegations 6 & 22 regarding behavior interventions and food reinforcers with Student N: Then, in the afternoon on October 15, 2021, you refused to provide Student N with his snack because he did not complete the hand gesture that you were directing him to make. In fact, when snack time ended at 2:00 p.m. you still refused to provide Student N with his snack (citing Exhibit 3). Employee insisted Student A point to a milk icon in order to receive milk, and when he did not, Employee threw the milk away.

Allegation 7 regarding restraint using a special chair referred to as the ski chair: On October 14, 2021, Student N was visibly upset and refusing to sit down. Student N was subsequently placed in a ski chair, which is a chair with metal arms and a flat bottom, and he started to immediately pull on his mask.

Allegation 8: This concerns the action of one of the Intensive Behavior Intervention Assistants (IBIA) in Employee's class who allegedly restrained Student N after telling him to "stop it" by holding both of his arms down on the table. The speech pathologist asked why he was wearing three masks and the response from the IBIA was because he "won't keep his masks on." Another teacher responded to the speech pathologists question as to why other students were wearing two masks to the other teacher responded, "One to eat and one to wear." Employee allegedly smiled at the remark and added "They always want to stick it in their mouth, so they get two." (Citing exhibit 4.)

Allegations regarding protective face masks: "Alarminglly, Student N was wearing three face masks over his nose and mouth and a fourth mask was around the back of his head keeping all the other masks tied together" (allegation 7); Speech pathologist explains all the masks on Student N were covering his nose and mouth. "Wearing multiple masks presents potential choking and suffocating hazards."

(allegation 9). Speech pathologist witnesses students in Employee's class "being forced to wear masks and then being physically restrained when they tried to remove the masks" (allegation 10); admitted never considered whether wearing multiple masks posed a choking and/or suffocating hazard and admitted was unable to see whether the student had swallowed or was still chewing on the first mask (allegation 33).

Allegations regarding the use PECS or hand gestures and using food as a behavior reinforcer include allegations 11, 16, 18, 19, 23, 27. (Citing Exhibits 5 and 6.) The allegations include the following incidents: when a student used the word "milk" instead of PECS, Employee insisted he use the icon and refused to provide the student milk until he did so. An IBIA intervened and gave the student the milk at which time Employee threw the milk in the garbage (allegation 11); After being told by the Principal it was unacceptable to use food as an enforcer for any reason, including communication and behavior, and should always receive their entire school lunch and snack, Employee still used food as a reinforcer (allegation 16); despite training to the contrary, Employee requires students to point to icons for each food item in their lunch or walk across the room to retrieve them instead of retrieving their lunch at one time (allegation 18); Despite training to the contrary, Employee and her staff fail to use PECS appropriately for students to properly communicate and as required by their IEPs (19); and withholding food from student if they did not use the correct hand gestures to request the food item (allegation 27).

Allegations regarding physical abuse through restraints, verbal abuse, and overly restrictive practices include or were supported by the following:

- Statement of a teacher in an adjoining room (allegations 12 and 13);

- Summary of Dr. Liberati investigation, attached as Exhibit 6, of inappropriate, harmful and dangerous conduct (allegation 14);
- Failure to correct other employees (allegation 15);
- Disregard of directive from the principal never to use the ski chairs to restrain children or to force them to sit at a table and continuing to withhold food from students and use the ski chair to restrain them (allegation 17);
- Overly restrictive and rigid practice of failing to use free play and use the free play area after training (allegation 20);
- Forcing pupil to sit in ski chair multiple times in the 2020-2021 school year (allegation 21);
- frequent yelling at Student A, grabbing him forcefully, purposely provoking him, holding his hands and arms to the table during snack times when he was having behavior difficulties and insisting students point to an icon each time they wanted a bite of some food (allegation 23);
- Refusing to allow Student AA to stand, his preferred position, while doing table activities, purposely triggering his adverse behaviors (allegation 24);
- Purposefully triggering Student E by playing audiobooks she disliked resulting in her crying and covering her ears when Employee played the audiobooks (25); general "expectation" (reported by an IBIA) "if a student does not listen, they are going to be picked up, placed in a chair, and be

yelled at until they cry and are spoken to in an excessive harsh and loud manner (allegation 26)";

- Aggressive to students "by grabbing their hands and forcing them to hit themselves with their own hands while asking, 'how do you like it?' (allegation 27);
- Aggressively forcing students to eat and directing aides to do the same by, for example, directing an aide to hold Student L's arms down and stating "and you put on gloves and stuck a piece of meatball in the student's cheek" (28); ski chair used to restrain Student E on a daily basis (allegation 29);
- Use of ski chair pushed against the table to prevent Student E and Student N from getting out of their chairs (allegation 30); and
- Using ski chair on a daily basis for Student E because he does not "sit well" in the chairs (allegation 35).

EMPLOYEE'S POSITION

Immoral Conduct

Employee contends the Statement does not contain sufficient, if true, facts to constitute a basis for immediate suspension under Code section 44939. In particular, Employee contends the facts alleged are akin to "contentions, deductions or conclusions of law," not well-pleaded facts which must be accepted as true. (citing *Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.) Overall Employee contends District failed to provide a nexus between Employee's conduct and either immoral conduct or willful refusal on the face of the Statement.

Employee asserts the Statement does not meet the threshold of immoral conduct alleged because the Statement “makes no effort to explain how her alleged “actions meet the above-described legal standards for immoral conduct,” under various decisions which address a narrow set of issues such as sexual harassment or sexual activity, drug use or possession, or theft of property or compensation. Employee considers the Statement “vague” as to actions constituting “corruption, depravity, indecency, dissoluteness or the “moral indifference to opinions.”

Employee notes that “restraints” are not “uncommon” and are “recognized that it may be appropriate to protect the safety of students, especially within a special education classroom.” Employee cites to Code section 49005 for the proposition that there are some circumstances where restraints are justified and as such, the Statement does not give rise to facts which on their face would be grounds for dismissal as immoral conduct.

Employee insists District is required to expressly provide facts of the exact context of the conduct alleged, to sufficiently plead immoral conduct. Employee claims District failed to account for “the specifics of each situation” and instead relied upon the shocking description of the purported conduct.

Employee further critiques charges of immoral conduct which rely on witnesses from another classroom, and a mix of charges against Employee and classroom aides under her control.

Willful Refusal

Employee critiques District’s application of the legal principle of “willful refusal” to the charges in the Statement. According to Employee there are no facts supporting Employee’s willful refusal to perform her regular assignments, other than comments

regarding her being “irritated” or “unreceptive.” District appended its trainings to the Statement. Employee maintains there are no facts supporting the proposition Employee “affirmatively or intentionally failed to implement these trainings.”

Analysis

Not all the charges in the Statement provide a foundation for Employee’s suspension without pay. For example, charges pertaining to the conduct of aides in the classroom, and the opinions, as opposed to direct observations of Employee’s conduct, were not considered. Nevertheless, District pleaded sufficient facts of immoral conduct to support unpaid suspension pending the outcome of the proceeding based upon a wealth of charges that were considered, sufficiently pled and set forth above; e.g. the use of restraints, the ski chair, the forced eating, the insistence on the use of PECS when a verbal request was made, throwing out food, or forcing students to hit themselves. Contrary to Employee’s claim, District provided sufficient context of a preschool special education environment from the words on the face of the pleading and the exhibits incorporated by reference therein, to support the charges of immoral conduct. In view of Covid-19, allegations concerning masks did not provide a basis for suspension without pay on the grounds of either immoral conduct or “willful refusal.”

Employee’s reference to Code section 49005 to dispute the sufficiency of the charge of immoral conduct is misplaced and does not convert the charges from facts, which if true substantiate a basis for dismissal, to unsupported or vague opinion or conjecture.

Code section 49005 includes Legislative Findings and Declarations and expressly states the intent of the Legislature is to prohibit “dangerous practices” and “restraint and seclusion” as described, which “do not further a child’s education.” The Legislature

recognizes exceptions where “an emergency situation arises, the ability of education personnel to act in that emergency to safeguard a pupil or others from imminent physical harm should not be restricted” (subdivision j). While acknowledging certain emergency situations require interventions to prevent pupils from harming themselves or others, Code section 49005 states restraints or seclusions should only be used as a safety measure of last resort, never as punishment or discipline or for staff convenience, because there is no evidence restraint is effective to reduce problem behaviors and pupils with disabilities are “disproportionately” subject to restraint and seclusion. Code section 49005.2 provides in pertinent part: “A pupil has the right to be free from the use of seclusion and behavioral restraints of any form imposed as a means of coercion, discipline, convenience, or retaliation by staff.”

Exhibit 6 appended to the Statement references both Code section 49005 and 49005.2 and the limitations of restraints in the special education setting.

District did not adequately plead sufficient facts to support suspension without pay on the ground of “willful refusal.” District provided many charges referencing the policies of the District, the training provided to Employee, and even a warning by the Principal. However, as pled, the charges do not adequately distinguish between the intention required for “willful refusal” and other grounds for dismissal which do not require intent, such as evident unfitness for service, and persistent violation of or refusal to obey school laws or reasonable regulations.

Based on the foregoing, the ALJ finds that the facts alleged in the Statement, if

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true, are sufficient to establish a basis for Employee's immediate suspension under section 44939 on the ground of immoral conduct. The MIRS shall be denied.

ORDER

Employee Griselda Revollo's Motion for Immediate Reversal of Suspension is denied.

DATE: 04/07/2022

Eileen Cohn

EILEEN COHN

Administrative Law Judge

Office of Administrative Hearings