

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

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

DAVID HARTLOFF, A Permanent Certificated Employee.

Moving Party,

and

SUTTER COUNTY SUPERINTENDENT OF SCHOOLS,

Responding Party.

OAH No. 2022070716

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

On August 12, 2022, Carmen D. Snuggs-Spraggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, telephonically heard oral argument on the Motion for Immediate Reversal of Suspension (Motion), filed by David Hartloff.

Katrina Gould and Eric Lindstrom, Attorneys at Law, Langenkamp, Curtis, Price, Lindstrom & Chevedden, LLP, represented the moving party, David Hartloff (Employee).

Courtney de Groof and Erin M. Hamor, Attorneys at Law, Lozano Smith, represented the responding party, Sutter County Superintendent of Schools (Sutter County).

District Charges

On July 22, 2022, Sutter County filed a Notice of Intent to Dismiss; Placement on Immediate Unpaid Suspension Pending Outcome of Disciplinary Proceedings, and Statement of Charges (SOC) against Employee and placed him on unpaid suspension pending the outcome of its action to dismiss Employee. The basis for the suspension under Education Code section 44939 is the allegation that Employee engaged in immoral conduct and willfully refused to perform regular assignments without reasonable cause. (The SOC also alleges the following grounds for dismissal under Education Code section 44932: evident unfitness for services; dishonesty; and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed by the government of the public schools by the State Board of Education or the governing board of the school district employing him.)

The SOC alleges that Employee's title is Teacher of Autism Spectrum Disorder (ASD). On March 11, 2021, Employee was issued a Notice of Unsatisfactory Performance and Letter of Reprimand (Notice) regarding performance deficiencies. The Notice included directives requiring Employee to respond to emails within 24 hours on work days; submit complete Individualized Education Programs (IEP) with minimal errors on Thursday of the week prior to the following week's IEP meeting;

correct IEP errors noted by Employee's administrator prior to presenting the IEP at scheduled meetings; enter student attendance information into Sutter County's computer system daily prior to Employee leaving for the work day; execute and submit the week's attendance records to Sutter County's School Secretary by the end of the day each Friday; report any need to leave campus or be absent and contact his administrator prior to leaving his classroom; and timely appear at regularly scheduled IEP meetings.

The SOC further alleges that Employee failed to follow safety directives and endangered student and staff health and safety as follows:

- On February 18, 2021, Employee left his classroom of special education students attended for a period of time without a credentialed teacher and without notifying the principal;
- On August 30, 2021, Jason Gilbert (Gilbert), Sutter County's Behaviorist and Program Specialist directed all staff, including Employee, to wear Kevlar gloves and personal protective equipment (PPE), including bite sleeve protection, provided by Sutter County when interacting with A.J., a student in Employee's class. Approximately 15 minutes after receiving this direction, A.J. became agitated and bit Employee, breaking the skin. Employee was not wearing Kevlar gloves or bite sleeves.
- On September 17, 2021, Gilbert was called to Employee's classroom after Employee was bitten by a student. Despite the student's escalating behavior, Employee did not put on Kevlar gloves or bite sleeves. The student's bite broke Employee's skin and drew blood, requiring Employee to leave the

classroom and seek treatment. The paraprofessionals in the classroom were wearing bite sleeves at the time Employee was bitten.

- On October 1, 2021, Employee met with the principal to discuss Employee's conduct. The principal directed Employee to wear Kevlar gloves and PPE when a student's behavior becomes escalated. The principal explained to Employee the hygiene, blood borne pathogen, and related concerns caused by Employee's failure to wear PPE when managing student behavior.
- On October 7, 2021, Sutter County's Licensed Vocational Nurse (LVN) observed a bloody bite mark on Employee's arm. Employee stated student A.J. bit Employee earlier that morning, drawing blood. Employee admitted that he did not clean A.J.'s mouth, notify A.J.'s parents or the school nurse of the incident, nor submit required student behavior or injury reports. Employee told the LVN that he never reported students' exposure to blood to their parents.
- Also on October 7, 2021, Employee notified the LVN that he received a health alert stating student S.K. is allergic to peanuts. When the LVN reminded Employee that Employee was reminded of and alerted to S.K.'s peanut allergy the previous year, Employee said "oh" and stated that he had given S.K. peanut butter on crackers as a snack the past month and a half.
- On October 11, 2021, Sutter County received a complaint from student L.P.'s parents that L.P. was bitten and scratched on two separate occasions while in Employee's care, but Employee did not notify L.P. parents of the incidents. Employee also failed to submit required student behavior and incident reports. On October 12, 2021, the principal informed Employee of the

complaint and directed Employee to provide her with the reports. On October 12, 2021, Employee submitted six student behavior and injury reports to the principal for August and September.

- On October 12, 2021, Employee failed to attend a staff meeting conducted by the principal to discuss student data collection, and parent and safety concerns regarding student, including student A.J. Employee did not respond to a call to determine why he did not attend. After the meeting, Employee told the principal that he forgot. The principal sent Employee an email summarizing the meeting and directing Employee to attend future meetings on Employee's schedule.
- On October 19, 2021, a Sutter County staff member found Employee's personal medication in the student medication box and reported it to the principal and Lead School Nurse (LSN). Other Sutter County staff reported seeing Employee's personal medications left out on Employee's desk where students could access them.

With respect to student medication administration and medication logs, the SOC alleges on September 15, 2021, Sutter County received a complaint from student J.C.'s parents that Employee failed to give J.C. his medication for over one week. The principal asked for J.C.'s medication logs for the months of August and September. When the principal went to Employee's classroom on September 16, 2021, to retrieve the medication logs, Employee stated that he put them in the district mail that morning. The medication logs the principal received in the mail on September 17, 2021, were copies rather than the originals. When the principal went to Employee's classroom that same day to retrieve the original student medication logs, Employee stated that an LVN picked them up, but could not tell the principal who the LVN was.

The original medication logs requested by the principal were found in a pile of papers on Employee's desk on October 19, 2021. Employee had completed some of the entries in pen although all entries must be in pen. The entries on the original medication log did not match the entries on the copy Employee submitted to the principal. Entries for J.C. from August 12, 2021, through August 31, 2021, is missing dosage and administration time information as well as staff initials. Moreover, the log indicate that J.C. was given two different amounts of the medication for the same day, and Employee initialed the log to indicate J.C.'s medication was administered on August 15, 2021, although that date fell on the weekend. Because Employee maintained inconsistent logs, it is unclear when or the amount of medication J.C. was given or if J.C. was receiving the proper dosage of the medication.

The SOC alleges that Employee was deficient in reporting student attendance. In March 2021, student J.C.'s parents reported J.C.'s attendance records were inaccurate and that they had not been contacted by a teacher for months. The principal discussed the complaints with Employee on March 4, 2021, and the next day emailed Employee summarizing their discussion and reminding Employee that attendance was to be recorded daily and attendance records submitted every Friday with Employee's signature. Employee was directed to follow these protocols in February 2021. On March 5, 2021, Employee was also directed to notify administration if he had not heard from a parent for three days. As of March 5, 2021, Employee had not taken attendance since February 16, 2021. The further alleges that Employee failed to accurately and timely report attendance as follows:

- Employee did not submit attendance records for the week of March 29, 2021 through April 2, 2021. As result, the Interim Secretary of Special Education had to manually enter student attendance.

- Employee did not submit attendance records for the week of April 20, 2021 through April 23, 2021, by April 23, 2021.
- Employee failed to report any attendance on May 11, 2021.
- As of June 10, 2021, Employee did not report student attendance for June 3 and 4 2021, although the school year had ended, and Employee was required to submit attendance reports by June 4, 2021.
- Employee's failure to adhere to attendance reporting could result in accounting errors, Sutter County's funding, billing for services provided to Sutter County, and other operational impacts.

With respect to IEPs, the SOC alleges that parents must sign IEPs, and Employee must affirm them, within three days of an IEP meeting. On April 1, 2021, the principal directed Employee to resolve two unaffirmed IEPs and seven unsigned IEPs prior to April 5, 2021, when Spring Break began. Employee did not do so until August 2021. Employee is also alleged to have failed to submit lesson plans for several students despite directives to submit lesson plans every Thursday.

The SOC further alleges on April 26, 2021, Employee failed to report his absence in Sutter County's online system for reporting absences and requesting substitutes, despite the principal's direction to do so. As a result, the computer system did not timely alert staff of the need for a substitute and staff was forced to manually contact substitute teachers to cover Employee's class. On April 30, 2021, Employee failed to respond to two emails regarding whether Employee notified parents of a minimum day and Employee's lesson plans.

Employee is alleged to have been 16 minutes late to a “high stakes” IEP meeting on April 30, 2021, after multiple calls and text messages were sent to Employee regarding his whereabouts. The principal sent an email to Employee reminding him of the importance of timely attendance and how Employee’s tardiness negatively affects student, staff, and rapport with families. Employee was late to an IEP meeting on May 29, 2021, and during the meeting the parent informed the principal that Employee gave her an IEP signature page for a different student. Employee failed to submit eight IEP request forms due on August 30, 2021, although reminded by staff that they were past due. Employee did not submit them until September 13, 2021. Staff sent the forms back to Employee on September 13, 2021, because they needed to be corrected. As of September 29, 2021, Employee failed to submit the corrected forms, and the principal had to correct the forms for Employee. As of September 23, 2021, Employee had one unaffirmed and four unsigned IEPs. The principal reminded Employee that he should affirm IEPs within three days of an IEP meeting. The meeting for the unaffirmed IEP had been held four weeks prior.

Sutter County alleges that on September 29, 2021, student A.J.’s parent complained to the principal that A.J. was being prohibited from using their Augmentative and Alternative Communication (ACC) speech communication device as required by A.J.’s IEP. The parent was unable to reach Employee to discuss the issue. Staff advised the principal that Employee kept the ACC locked in Employee’s desk drawer. Employee is alleged to have failed to ensure A.J.’s access to speech services and her ACC device in violation of A.J.’s IEP. Employee missed the staff meeting held on October 12, 2021, to discuss supports and services provided to A.J.

Finally, the SOC alleges that Employee submitted three incomplete or inaccurate IEPs on October 7, 2021; failed to update an IEP for student I.B. due on October 7, 2021, and in October 2021, submitted an IEP for student L.P. with numerous errors.

The Motion and Opposition

On July 22, 2022, Employee filed the Motion. Employee contends: the charges in the SOC do not constitute immoral conduct or willful refusal to perform his regular assignments without reasonable cause, and that his conduct does not demonstrate intentional misconduct; and his suspension should be immediately reversed.

On August 2, 2022, District filed its opposition to the Motion in support of its suspension order. Employee filed his reply brief.

The ALJ reviewed and considered the SOC, the written submissions of the parties, and oral argument made during the hearing. The Motion is denied as set forth below.

Applicable Statutes

Education Code section 44939, subdivision (b), provides that a school district may immediately suspend a permanent certificated employee who has been charged with, among other things, immoral conduct or willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the the employing school district. Education 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."

A motion made pursuant to Education Code section 44939, subdivision (c)(1), like the current Motion, is analogous to a demurrer because the properly-pleaded facts must be accepted as true for purposes of resolving the motion. However, the ALJ need not accept "contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Additionally, as with a demurrer, the Motion can be granted if the District's "conclusory characterization of [Employee's] conduct as intentional, willful and fraudulent" is "patently insufficient." (See e.g., *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Immoral Conduct

"Immoral conduct" has been defined as conduct "which is hostile to the welfare of the general public and contrary to good morals. [It] 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." (*Board of Education of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811 [*Weiland*].)

The SOC alleges:

You behaved immorally when you jeopardized the health and safety of students, including when you disregarded a student's health alert and admitted to providing peanut butter to a student that is allergic to peanuts on several occasions; when you failed to treat a bite injury and failed on multiple occasions to wear proper PPE to protect both

you and the student from blood borne pathogens and other injury; when you repeatedly failed to report student related injuries; when you failed to communicate with one or more parents for months; when you left your personal medication out on your desk in reach of students; when you failed to ensure one or more students received their prescribed medications for days in a row; when you told Principal Judeen that you had provided a nurse with the original medication logs, but the medication logs were later found on your desk; when you provided medication logs that were inconsistent with one another, suggesting that you were not properly logging medication each time you administered it to a student, and suggesting you changed one or more of the medication logs; when you failed to follow students' IEPs or ensure students receive services and supports they are entitled to under their IEPs, including AAC supports; when you fail to timely or accurately complete IEPs; when you fail to perform your assigned job duties; and when you repeatedly failed to comply with [Sutter County's] safety and other policies and procedures. You do not provide appropriate and equitable education to all of your students.

(Ex. A, pp. 15-16.)

Employee's alleged conduct evidences a moral indifference to the opinions of others and demonstrates an inconsiderate attitude towards good order and the public

welfare. As defined in general, Employee's alleged conduct especially as it relates to his failure to wear PPE and follow Sutter County's policies and procedures concerning exposure to blood and failure to notify parents regarding injuries sustained by students, constitutes immoral conduct.

The determination of what constitutes immoral conduct must be contextual. As noted in *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 224 (*Morrison*), "immoral conduct" is not "considered in the abstract. It must be considered in the context in which the Legislature considered it, as conduct which is hostile . . . to the welfare of the school community." The *Morrison* court determined a teacher's actions cannot constitute immoral conduct or conduct involving moral turpitude unless those actions indicate his unfitness to teach. Given the Education Code's additional due process protections and higher threshold to justify immediate suspension, the SOC should be required to sufficiently allege facts demonstrating a nexus to teaching, just as would be required for dismissal.

The *Morrison* Court provided a list of possible factors to aid in the analysis as follows:

In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct,

the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach.

(1 Cal. 3d 214, 229-230. Emphasis added.)

Employee argues that his conduct does not constitute immoral conduct as defined by the law and is reserved for extreme circumstances and is generally applied to conduct constituting sexual misconduct or a crime, involving drugs, or intentional discrimination against a protected class. However, the SOC alleges conduct that fits squarely within the definition of immoral conduct to *Weiland*. Taken as true, Employee's conduct was hostile to the public welfare and contrary to good morals. Employee's conduct also showed a disregard for the impact on students and Sutter County, demonstrating an unfitness to teach.

The allegations in the SOC satisfy enough of the Morrison factors to further demonstrate an unfitness to teach. Employee works with students who have ASD. The SOC alleges activity that is recent, hostile to the welfare of the school community, in particular Employee's special needs students, may have negatively affected his students, specifically students A.J. who was exposed to Employee's blood and deprived of her ACC device, may have negatively affected his fellow teachers, and shows a disregard for the impact of his conduct on students and Sutter County. Moreover, there is nothing praiseworthy, instead only blameworthy, about Employee's alleged conduct.

Based on the foregoing, the facts alleged in the SOC, if true, are sufficient to establish a basis for Employee's immediate suspension under Education Code section 44939, subdivision (b), for immoral conduct.

Willful Refusal to Perform Regular Assignments without Reasonable Cause

In analyzing whether cause exists for Employee's immediate suspension under Education Code section 44939, subdivision (b), for "willful refusal to perform regular assignments without reasonable cause," a comparison to Education Code section 44932, subdivision (a), is informative. Education Code section 44932, subdivision (a)(8) (persistent violation of, of or refusal to obey, school laws or the district's reasonable regulations), authorizes a teacher's dismissal, but not immediate unpaid suspension. Education Code section 44939, subdivision (b), allows immediate suspension only if the refusal to perform regular assignments was "willful." The statute's use of the words "willful refusal" rather than "persistent violation" indicates that, although repeated performance failures may establish grounds for dismissing a teacher under Education Code section 44932, such continuing failures are not grounds for immediate suspension under Education Code section 44939.

The Education Code, in creating the separate grounds and procedures for dismissal versus immediate suspension, contemplates a distinction between two types of cases. In narrowing the substantive grounds for immediate suspension and creating additional due process protections for the employee, Education Code section 44939, subdivision (b), requires a higher threshold to justify immediate suspension higher than the threshold for dismissal set forth in Education Code section 44932, subdivision (a).

To establish grounds for immediate suspension under Education Code section 44939, Employee's refusal to perform his regular assignment must have been "willful." In the context of a public employee's engaging in insubordination or "willful" misconduct, the term insubordination "carries a volitional coloration which excludes the notion of accidental or even negligent conduct. . . [and] insubordination, equally with willful misconduct, requires proof of intent or willfulness. The latter elements imply that the person knows what he is doing and intends to do what he is doing." (*Coomes v. State Personnel Bd.* (1963) 215 Cal. App. 2d 770, 775.) Consequently, a willful refusal to perform a regular assignment must be more than an unsatisfactory, unprofessional, negligent, or even persistent failure to perform a regular assignment; instead, it must be an intentional, volitional refusal to perform any part of a regular assignment.

The SOC alleges:

Since at least the 2020-2021 school year, you have demonstrated deficiencies in the areas of: (1) ensuring the safety, medical, and educational needs of students are met and associated protocols adhered to; (2) timely and professional communication with parents, staff, and others; (3) documenting student attendance; and (4) job performance and attendance. You have not corrected these deficiencies despite repeated admonitions. Along with this, you have engaged in conduct that has placed the health and safety of the special education students you serve at risk, on multiple occasions; you have refused to comply with SCSOS's safety procedures and protocols despite repeated

directives; you have failed to follow students' IEPs; you have failed to adequately or accurately engage in the legally mandated IEP process; and you have failed to follow protocols for properly administering medication to students.

(Motion, Ex. A, p. 19.)

The facts alleged by the SOC demonstrate unsatisfactory, unprofessional, negligent, or even persistent failure by Employee to perform his regular assignments, but do not demonstrate an intentional or volitional refusal by Employee. Consequently, the SOC does not sufficiently plead Employee's "willful refusal to perform regular assignments without reasonable cause."

Based on the foregoing, the facts alleged in the SOC, if true, are insufficient to establish a basis for Employee's immediate suspension under Education Code section 44939, subdivision (b), for willful refusal to perform regular assignments.

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Disposition

Since Sutter County has pleaded facts which, if true, support a cause for immediate unpaid suspension for immoral conduct, the Motion is denied.

IT IS SO ORDERED.

DATE: 08/25/2022

Carmen Snuggs-Spraggins

CARMEN D. SNUGGS-SPRAGGINS

Administrative Law Judge

Office of Administrative Hearings