

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

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

**IDOLINA RIVAS, Moving Party**

**A Permanent Certificated Employee**

**and**

**LOS ANGELES UNIFIED SCHOOL DISTRICT, Responding Party**

**OAH No. 2019101087**

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

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on November 22, 2019. Rosty G. Gore, Attorney at Law, represented Idolina Rivas (Rivas), the moving party. Susan Hyman, Assistant General Counsel II, represented the Los Angeles Unified School District (District), the responding party.

Pursuant to Education Code<sup>1</sup> section 44939, subsection (b), the District immediately suspended Rivas from her duties upon its filing of a Statement of Charges containing allegations charging her with immoral conduct in violation of section 44939, unprofessional conduct in violation of section 44932, subdivision (a)(2), unsatisfactory performance in violation of section 44932, subdivision (a)(5), evident unfitness for service in violation of section 44932, subdivision (a)(6), persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the governance of the public schools by the State Board of Education or by the governing board of the District in violation of section 44932, subdivision (a)(8), and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the District in violation of section 44939.

Pursuant to section 44939, subdivision (c)(1), Rivas served and filed with the Office of Administrative Hearings a Motion for Immediate Reversal of Suspension. Pursuant to section 44939, subdivision (c)(2), the District filed an opposition, to which Rivas filed a reply.

Having considered the parties' written submissions and oral arguments, pursuant to section 44939, subdivision (4), the Administrative Law Judge issues the following Order granting the Motion for Immediate Reversal of Suspension.

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Education Code.

## **Standard for Conducting Review of Section 44393 Motion for Immediate Reversal of Suspension**

1. The governing board of a school district has the authority to suspend immediately a permanent employee without pay upon its filing of written charges for dismissal on grounds of immoral conduct, conviction of a felony or of any crime involving moral turpitude, incompetency due to mental disability, willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations, or violation of section 51530.<sup>2</sup> (§ 44939, subd. (b).) Reviewing the statutory scheme for tenured teacher dismissal, the California Supreme Court, in *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 207, 215-216, has affirmed if one of the grounds for dismissal pursuant to section 44932 is also one of those specified in section 44939, the school district may immediately suspend the employee without pay pending disposition of the dismissal proceeding.

2. Review of a motion for immediate reversal of suspension is "limited to a determination whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension under this section." (§ 44939, subd. (c)(1).)

3. Thus, review of a motion for immediate reversal of suspension is analogous to a demurrer, which tests the sufficiency of the allegations in a complaint. (*Pacifica Homeowners' Ass'n v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1151.) Facts properly pleaded are accepted as true, but contentions, deductions, or conclusions of fact or law should be disregarded. (*Blank v. Kirwan*

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<sup>2</sup> Section 51530 prohibits advocacy of communism with intent to indoctrinate.

(1985) 39 Cal.3d 311, 318.) Conclusory characterizations of conduct as intentional, willful, or fraudulent are “patently insufficient.” (*Brousseau v. Jarrett* (1997) 73 Cal.App.3d 864, 872.) Where reading the allegations reveals the existence of an affirmative defense, the complaining party must plead around the defense by alleging specific facts that would avoid the apparent defense. (*Kirwan, supra*, 39 Cal.3d at 318.)

## **Immediate Suspension Based on Allegation of Immoral Conduct**

4. As acknowledged in *Board of Education of the City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 552, “A teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under . . . [the teacher’s] care and protection. [Citation.] In this connection the following language used in *Johnson v. Taft School Dist.* [1937] 19 Cal.App.2d 405, at page 408[,] is pertinent: ‘A board of education is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though . . . [the teacher’s] other qualifications may be sufficient. ‘Book learning’ is only a phase of the important lessons a child should learn in a school.’”

5. With that understanding of the regard for teachers in the public school system, “immoral conduct” in teacher dismissal cases 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 a 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 the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

6. In several of the 103 charges set forth in the Statement of Charges in this matter the District alleges Rivas engaged in immoral conduct during her interactions with several first grade students. For example, charge 13 alleges, "On April 18, 2017, the mother of D■■■■ M. reported that her daughter D■■■■ M. was made to run after the student had stated she wasn't able to run due to a medical condition." Charge 14 alleges "Student, D■■■■ M. reported that on or about April 17<sup>th</sup> during PE, she told RIVAS that she could not run because she has asthma. RIVAS then told her that if she didn't run, she would be sent to another school. She ran as RIVAS directed her to do so." Charge 83 alleges Rivas, on September 13, 2018, "Grabbed C■■■■ by the arm," and "Stated the following with her face in close proximity to C■■■■'s face: . . . 'Do you need a moment? Sit in your seat' . . . 'You have a time-out in your seat, or do you need other consequences?'" Charges 84 through 86 allege Rivas, on September 13, 2018, "Grabbed A■■■■ by the arm," "Pulled A■■■■ up," "Stated 'Stand up. You are going to help me read,'" "Turned A■■■■ in a full circle to face his classmates," "Stated to A■■■■: 'You can't be my helper' when A■■■■ was not complying with a pointer stick in his hand," "Led A■■■■ to the rug by the arm," and "Stated to A■■■■ in a raised voice: 'Sit down.'" Charge 87 alleges Rivas, on September 13, 2018, "Tapped C■■■■ on the knee with a pointer stick" and "Stated to C■■■■ 'We are waiting,' resulting in C■■■■ pushing the pointer stick off and responding: 'Hey, get that thing away from me!'"

7. These alleged interactions between Rivas and her first grade students, if true, evince no hostility, meaning menacing or adversarial attitude; no corruption, meaning fraudulent or dishonest conduct; no indecency, meaning offensive or improper behavior; no depravity, meaning perverted; or otherwise willful, flagrant, or shameless conduct showing moral indifference. At most, the allegations, if true, reveal Rivas' approach and response, however imperfect or deficient, to challenges she confronted in the classroom during her interactions with certain students.

8. The pleaded facts in the Statement of Charges, if true, are insufficient to sustain Rivas's immediate suspension on the basis of immoral conduct.

### **Immediate Suspension Based on Allegation of Willful Refusal to Perform Regular Assignments**

9. The willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. (*Swan, supra*, 41 Cal.2d at 552, citing *Harrison v. State Board of Education* (1946) 134 N.L.J. 502 and *State ex rel. Steele v. Board of Education of Fairfield* (1949) 252 Ala. 254.) The term "willful" carries a volitional determination that excludes the notion of accidental or even negligent conduct. (*Coomes v. State Personnel Board* (1963) 215 Cal.App.2d 770, 775.)

10. In this matter, the Statement of Charges alleges Rivas "willfully refused to comply with the directives provided to her [.]" (See Charges 9, 12, 20, 40, 48, 60, 73, 82, and 97.) The District maintains it provided Rivas with directives, assistance, and guidance for improving her teaching, but despite its efforts Rivas's performance as a teacher, which is alleged throughout the Statement of Charges, has not improved. The District argued:

From September 2017, the District provided [Rivas] with assistance and guidance to improve her performance on her regular assignments as a teacher to help her meet the requirements of District policies and teaching standards. Despite assistance, guidance, and directives, [Rivas] did not improve as a teacher, receiving three Below Standard Evaluations for the academic years of 2016/2017, 2017/2018, and 2018-2019 as well as Notices of Unsatisfactory Service issued with suspensions in September 2018 and May 2019. Consequently, the Board determined that [Rivas's] conduct rose to the level of a willful refusal and found it necessary to impose an immediate suspension pending her dismissal.

*(Los Angeles Unified School District's Memorandum of Points and Authorities in Opposition to Motion for Immediate Reversal of Suspension at pp. 3-4.)*

11. The District inappropriately conflates dismissal based on unsatisfactory performance with dismissal based on willful refusal to perform regular assignments without reasonable cause. Poor performance of the instructional and non-instructional duties of a teacher is different in both kind and degree from an intentional disobedience of the District's reasonable rules and regulations. The former is a matter of incompetence or inability, while the latter is a matter of defiance or insubordination, as the California Supreme Court recognized in *Swan, supra*, 41 Cal.2d at 552.

12. Dismissal of a teacher on the basis of unsatisfactory performance is governed by section 44932. Unsatisfactory performance is not one of the specified grounds for immediate suspension set forth in section 44939.

13. The pleaded facts in the Statement of Charges, if true, are insufficient to sustain Rivas's immediate suspension on the basis of willful refusal to perform regular assignments.


14. Based on the foregoing, good cause exists to grant the Motion for Immediate Reversal of Suspension.

15. Pursuant to section 44939, subdivision (c)(5), the Order below shall become effective within five (5) days of service, and the District shall make Idolina Rivas, a permanent certificated employee of the District, whole for any lost wages, benefits, and compensation within fourteen (14) days after service of the Order.

## **ORDER**

The Motion for Immediate Reversal of Suspension in OAH case number 2019101087 is granted.

DATE: December 6, 2019

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JENNIFER M. RUSSELL  
Administrative Law Judge  
Office of Administrative Hearings