

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Motion for Immediate
Reversal of Suspension Filed by:

JEFFREY BUDD,
A Permanent Certificated Employee,

Moving Party,

and,

EAST WHITTIER CITY SCHOOL
DISTRICT,

Responding Party.

OAH No. 2018060551

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

(Ed. Code, § 44939, subd. (c)(4))

Chantal M. Sampogna, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), heard this matter on July 13, 2018, in Los Angeles, California.

Hannah Weinstein, Attorney at Law, represented Jeffrey Budd (Budd), moving party.

Eric Bathen, Attorney at Law, represented the East Whittier City School District (District).

District's Immediate Suspension of Mr. Budd

On May 2, 2018, District filed a Statement of Charges (SOC) against Budd, in which it alleged facts which it asserted constituted immoral conduct as defined in Education Code sections 44939, subdivision (b), and 44932, subdivision (a)(1), and immediately suspended Budd from his duties without pay.

Budd timely filed a Motion for Immediate Reversal of Suspension (MIRS) with OAH, pursuant to Education Code section 44939, subdivision (c)(1). District filed an opposition, and Budd filed a reply. Counsel for both parties presented oral argument at the motion hearing, and the matter was submitted.

//

Facts as Alleged in the Statement of Charges

District's SOC alleges Budd, in his capacity as a special education case manager, falsified documents required for District compliance with the Individuals with Disabilities Education Act (IDEA), and made related false statements to parents protected by the IDEA, and to district employees required to comply with the IDEA. District alleges these were multiple dishonest statements that rose to the level of immoral conduct. The following are examples of the specific factual content the District alleged in the SOC and attached documents:

STUDENT G.A.

Budd intentionally falsified documents related to G.A.'s 2017 Individualized Education Program (IEP) by creating a document which falsely attested that an April 7, 2017, IEP meeting was held; providing an opening and closing time for the meeting; stating that five identified IEP team members were present; d) and that team members spoke about challenges presented with the academic calendar. On the signature page for the April 7, 2017, IEP meeting, Budd indicated it was part one of G.A.'s IEP meeting.

On May 16, 2017, after recently convening G.A.'s May 12, 2017, IEP meeting, Budd made the following false statements: he provided the falsified April 7, 2017, part one IEP meeting notes to IEP team members and obtained their signatures indicating the meeting had occurred and they were present; he documented on the May 12, 2017, IEP that IEP team member and school counselor Cecelia Joseph-Palencia was present, though she was not; he documented statements allegedly made by Ms. Joseph-Palencia at this meeting, though she was not present; and in response to parent's question if the IEP meeting should have been held before May 12, 2017, he stated to parent that part one of the IEP meeting had taken place during parent conferences, though it had not. Budd identified on the signature page for this meeting, that it was part two of the IEP meeting.

Between the first and second semesters of the 2016-2017 academic year, Budd unilaterally moved G.A. to a general education math class, changing G.A.'s placement without holding an IEP Amendment meeting and without parent's approval.

On January 18, 2018, Budd admitted the foregoing information. When Assistant Superintendent, Personnel Services, Doug Staine met with Budd on February 9, 2018, to review due process challenges brought by G.A., Budd did not demonstrate any appreciation for the gravity of the situation or any remorse for falsifying documents, the liability exposure he created for the district, or how his conduct affected G.A. or parent. Justin Mayernik, Principal Granada Middle School, explained that after meeting with legal counsel regarding G.A.'s Due Process Hearing request, counsel informed Mr. Mayernik the District could not defend against G.A.'s due process claim, and had \$80,000 in estimated settlement and legal fees.

//

PATTERN AND COURSE OF CONDUCT

SOC paragraph 14 alleges Budd repeated this pattern and course of conduct of documenting a part one of an IEP team meeting at or near the IEP due date, and a part two of the IEP team meeting held after the due date, in over nine other student's IEP files. Examples of these allegations are found in paragraphs 14b (student J.G.), and 14d (student R.G.). For these two students, Budd created documents indicating these students' IEP meetings were opened via email or phone through contact with the parent, and documented this as part one of the IEP meeting; Budd held the IEP team meetings several weeks later with members present and documented this as part two of the IEP team meetings.

Affected Rights of Student and Parent

The District attached to the SOC regulations and citations which identified the special education laws Budd was responsible for upholding. These requirements add to the gravity of Budd's alleged actions and inform how these actions adversely affected the students, parents, and District.

Under both the IDEA and State law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. §§ 1400 *et seq.*, at 20 U.S.C. § 1400(d)(1)(A); Ed. Code, § 56000¹.)

An IEP must be reviewed at least annually to determine whether the student's annual goals are being met (34 C.F.R. § 300.324(b)(1); § 56343, subd. (d)), and an IEP team meeting must be held at a time and place mutually agreeable to the parties (34 C.F.R. 300.322(a)(2); § 56345.1, subd. (c).) (See SOC at 173-175.)

A procedural violation denies a FAPE if it impedes the child's right to a FAPE, significantly impedes a parent's opportunity to participate in the FAPE decision-making process, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (1992) 960 F.2d 1479, 1484.)

Applicable Law

Section 44939, subdivision (b), provides that a school district may immediately suspend a permanent certificated employee who has been charged with immoral conduct. Section 44932, subdivision (a), provides that the District may dismiss a permanent employee for immoral conduct, including egregious misconduct, as described in sections 44010 and 44011, and Penal Code sections 11165.2 and 11165.6, relating to acts and crimes constituting specified sex offenses, abusing controlled substances, and child abuse and neglect.

//

¹ Further statutory references are to the Education Code, unless otherwise designated.

At a MIRS hearing, the ALJ must decide “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).) Although well-pleaded facts must be accepted as true for purposes of a MIRS, the ALJ need not accept “contentions, deductions or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The SOC is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.)

“The term ‘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.” (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811-812, citing *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740.)

In *Morrison v. State Board of Education*, (1969) 1 Cal.3d 214, (*Morrison*) the California Supreme Court established the following seven factors to be considered when determining if a teacher’s conduct is immoral, making the teacher unfit to teach: 1) the likelihood and degree that the conduct may have adversely affected students or fellow teachers; 2) the proximity or remoteness in time of conduct; 3) the type of certificate held by the teacher; 4) extenuating or aggravating circumstances; 5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; 6) the likelihood of the recurrence of the questioned conduct; and 7) the nexus between the conduct and the ability to teach. (*Morrison* at 229.)

The Court in *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, held the *Morrison* factors apply when assessing whether to discipline a teacher for dishonest acts. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 221.) “Not every impropriety will constitute immoral or unprofessional conduct, and not every falsehood will constitute ‘dishonesty’ as a ground for discipline.” (*Id.* at 220 n.12).

The court must base its decision on all of the evidence, after conducting a thorough inquiry and consideration of the *Morrison* factors, and may not consider a single act alone, when considering a teacher’s fitness to teach. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 561.)

Analysis

Budd argues the following: that District failed to sufficiently describe how most of Budd’s actions constituted “falsifications” of IEP documents, and only pled factual conclusions; that District only pled between one and three dishonest acts, an insufficient number to rise to the level of immoral conduct; and that because case law finding immoral acts can be categorized as acts constituting sexual harassment or public sexual activity, drug

use or possession, or theft, Budd's actions cannot be found to immoral.² (See Respondent's Memorandum of Points and Authorities in Support of Motion for Immediate Reversal of Suspension, page 8, fns. 1-3.)³ Despite Budd's assertions, in its SOC, supportive documents, and citation references, the District specifically identified the due process rights and responsibilities Budd was charged with upholding, pled Budd's multiple false statements and falsification of documents, effectively denying these rights from student and parents, and pled Budd's failure to uphold his responsibilities to the district, which exposed it to liability. The allegations were not vague, conclusory and devoid of factual content.

The District pled with specificity that Budd performed multiple acts of dishonesty, which, if true, would constitute immoral conduct as defined in sections 44939 and 44932, subdivision (a). Applying the *Morrison* factors the allegations pled demonstrate the following: Budd's conduct carried a high likelihood and a significant degree that the conduct would adversely affect students, parents, and the District as the alleged behavior could deny a student of a FAPE, deny a parent's right to meaningfully participate in a student's education, and subject District to liability; Budd repeatedly behaved this way just one year ago; Budd is a permanent certificated employee assigned to teach special education and act as a special education case manager; though allegations relating to Budd's motivations were not pled in the SOC, it did allege Budd's lack of remorse and any appreciation for the gravity of the situation, the liability exposure he created for the district, or how his conduct affected G.A. or G.A.'s parent; there is a nexus between Budd's conduct and his ability to perform as a special education case manager and teacher, as in this capacity he is charged with adhering to students and parents rights, and upholding the District's responsibilities, under the IDEA. Budd's pattern of behavior is indicative of corruption, was willful, flagrant, and shameless conduct showing moral indifference to the opinions of respectable members of the community, and displayed an inconsiderate attitude toward good order and the public welfare.

//

//

//

² Though Budd cites to the MIRS Order *In the Matter of the Motion for Immediate Reversal of Suspension of David Suavage, a Permanent Certificated Employee, and Elk Grove Unified School District* (Order), involving allegations of a teacher failing to comply with IEP protocols, this Order is not precedential, and the facts are distinguishable as provided above. (See Gov. Code, § 11425.60.)

³ Budd mistakenly concludes that the referenced case law means that only acts relating to sexual harassment or public sexual activity, drug use or possession, or theft, can constitute immoral conduct. The fact that these cases can be grouped in to these categories, does not warrant such a conclusion. There is no statute, regulation, or case law so limiting the finding of immoral conduct in teacher discipline matters.

Conclusion

The ALJ considered the written submissions of the parties and oral argument made during the hearing. Based upon a review of the SOC filed in the instant matter, and the record during the motion hearing, Budd's motion for immediate reversal of suspension is denied.

DATED: July 20, 2018

DocuSigned by:
Chantal Samfogna
EFCE61A19557459...

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings