

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

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

LUCIA VELLEMA, Moving Party

**A Permanent Certificated Employee and
Newport-Mesa Unified School District, Responding Party.**

OAH No. 2022090443

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

On October 14, 2022, Carmen D. Snuggs-Spraggins, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, held a telephonic hearing on the motion filed by Lucia Vellema for immediate reversal of suspension (Motion).

Tamra M. Smith, Attorney at Law, with Equality Law LLP, represented moving party Lucia Vellema (Employee or Respondent).

Anthony P. De Marco, Attorney at Law with Atkinson, Andelson, Loya, Ruud & Romo represented responding party the Newport-Mesa Unified School District (District).

District Charges

On August 18, 2022, the District filed a Statement of Charges (SOC) against Employee and thereafter placed her on unpaid leave pending the outcome of its action to dismiss her. The basis for the suspension under Education Code section 44939 is immoral conduct. (The SOC also alleges the following grounds for dismissal under Education Code section 44932: dishonesty; evident unfitness for service; and persistent violation of or refusal to obey school laws of the state or reasonable regulations prescribed by the State Board of Education or the school district.)

The SOC alleges Employee mocked a student's speech impediment by responding "'ba, ba, ba' or 'da, da, da'" in response to the student's stuttering. (SOC, ¶ 8.) The SOC also alleges Employee admitted saying "uh, uh, uh. Use your words" during an investigation of her conduct and asserted the District's speech pathologist had suggested using that technique when dealing with the student. (*Ibid.*) The SOC alleges the speech pathologist denied making the recommendation.

Paragraph 16 of the SOC states:

16. From June 2021 to November 2021, you exhibited immoral conduct and displayed an evident unfitness for service by explicitly discussing your private dating life with instructional aides on a regular basis. You used the dating application Tinder during work hours, showed your aides male dating profiles, and shared when you were texting a potential date. You made statements with sexual innuendos and showed your instructional assistants pictures of yourself in lingerie, pictures of men on Tinder, and a picture of a

nude male taking a shower. You made inappropriate sexual comments after hearing non-sexual statements, such as laughing and emphasizing the word "balls" after an individual stated, "Get your balls." Moreover, after someone made a statement about a cucumber, you inappropriately stated, "That's a big one," with sexual undertones. During the course of the investigation of your conduct, you admitted to engaging in conversations about your dating life. You further acknowledged discussing lingerie with an instructional aide and explained that you bought it at T.J. Maxx. You also shared improper details about your dating life and engaged in other inappropriate and immoral conduct, including but not limited to the following:

A. In or about June 2021, you asked an instructional aide to take a picture of you in the classroom because a man you were speaking to on Tinder did not believe you were a teacher.

B. In or about September 2021, you described a sexual experience to your instructional aides, which involved a shower curtain and coconut oil.

C. In or about September to October 2021, you showed an instructional aide a male's dating profile, used Google to search where he worked, and called him at his place of business. You became upset when the man told you, "I don't know who you are. Don't call me."

D. In or about October or November 2021, you showed your instructional aides a picture of you wearing a black negligee with silver sparkles and another picture of you wearing a pink negligee.

E. In or about October or November 2021, you shared a picture of a fully nude male in the shower and told an instructional aide, "This is what he sent me."

F. In or about November 2021, you shared that you went to a house where the women lined up and the men picked who they would have sex with. The men then selected the next woman they would have sex with.

Although you denied showing instructional assistants pictures of yourself in lingerie and denied calling a potential date at his place of business among other reports of misconduct, your denials were deemed not credible.

The District alleges Employee engaged in immoral conduct by allowing students to use her personal iPad, which was linked to her iCloud account. A picture of Employee wearing lingerie appeared when an instructional aide was preparing the iPad for student use. The SOC alleges that three pictures of Employee wearing lingerie, including one where Employee's nipples can be seen, were maintained in the iPad's photo app and could be accessed by students. (SOC, ¶ 24.)

The Motion and the Opposition

On September 15, 2022, Employee filed the Motion, seeking immediate reversal of District's unpaid suspension order. Employee contends the charges in the SOC do not constitute immoral conduct and her suspension should be immediately reversed.

On about October 4, 2022, after receipt of the Motion, District served an Amended Statement of Charges (ASOC) on Employee. The ASOC includes the same bases of dismissal and factual allegations in the SOC with added factual allegations. Specifically, the ASOC alleges Employee prepared a letter of recommendation for herself, forged the signature of a District employee, and sent the letter to two school districts. (ASOC, ¶ 25.) The District learned of the letter of recommendation after the SOC was filed.

On October 11, 2022, the District filed its opposition to the Motion, citing both the new allegations of the ASOC and the original allegations of the SOC (as re-alleged in the ASOC) in support of its suspension order. In addition, the District argued Employee's conduct alleged in paragraph 19 of the SOC constitutes immoral conduct. Paragraph 19 alleges on November 26, 2021, Employee purchased an iPad for \$538 for use in the classroom and submitted a receipt for reimbursement from grant funds; however, Employee left the new iPad at home and brought her older personal iPad to her classroom for student use. In her reply filed on October 13, 2022, Employee argued the District lacks authority to base Employee's unpaid suspension on the ASOC, dishonesty is not a grounds for unpaid suspension under the Education Code, and Employee's conduct regarding the iPad and her response to the stuttering student do not constitute immoral conduct, thus failing to satisfy Education Code section 44939, subdivision (b), requirements for immediate suspension.

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 immoral conduct. 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.)

New Allegations Brought after SOC and Motion

The new allegations contained in the ASOC should not be considered in determining whether District's suspension of Employee met the statutory requirements of Education Code section 44939, subdivision (b), because the District's suspension order was based on the allegations in the SOC, not the new allegations contained in

the ASOC. Nothing in Education Code section 44939 permits the retroactive application of new allegations made after the initial statement of charges to support the original suspension order. (*Board of Trustees of Placerville Union School Dist. v. Porini* (1968) 263 Cal.App.2d 784, 789 [statutes pertaining to teacher discipline should be "strictly construed"].) The appeal procedures set forth in Education Code section 44939, subdivision (c), are predicated on service of the "initial pleading" in the matter. (Ed. Code, § 44939, subd. (c)(2) ["The motion shall be served upon the governing board of the school district and filed with the Office of Administrative Hearings within 30 days after service upon the employee of the *initial pleading* of the matter." (Emphasis added).]) Any other result would allow a school district to continually amend its charges to address any pleading deficiencies pointed out by Employee and maintain a teacher's suspension indefinitely. Such action would contravene the apparent intent behind Education Code section 44939 to provide an efficient, cost-effective, and quick procedure to litigate unpaid suspensions.

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*]; *Palo Verde etc. Sch. Dist. v. Hensey* (1970) 9 Cal. App.3d 967, 972 [*Hensey*].) The term "immoral conduct" has been used interchangeably with the term

“moral turpitude” which in turn is sometimes used as synonymous with dishonesty or a high degree of unfairness. (*Ibid.*)

Since the conduct attributed to Employee in paragraph 19 of the SOC was alleged as dishonest conduct, which is a separate ground for dismissal under Education Code section 44932, subdivision (a)(5), the allegations contained in paragraph 19 are not analyzed here as to whether they satisfy Education Code section 44939, subdivision (b), requirements for immediate suspension for immoral conduct.

The facts alleged in paragraphs 8, 16, and 24 of the SOC, if true, are sufficient to justify Employee’s immediate suspension under Education Code 44939 for immoral conduct. In May 2019, Employee assigned harsher consequences to a student and made fun of his speech impediment. The allegation the speech pathologist never recommended that Employee respond to the student by repeating the stuttered words must be accepted as true for purposes of this motion. Between June 2021 and November 2021, Employee showed a picture of a naked man in the shower and pictures of herself in lingerie to her instructional aides, and she made statements with sexual undertones and inuendoes to instructional aides and described to them a sexual experience she had. In the fall of 2021, Employee brought her iPad, which contained pictures of herself in lingerie, including one where her nipples were exposed, to the classroom for student use. The photo app where the pictures were stored was easily accessible to students. The totality of the allegations in the SOC, which must be accepted as true, establish grounds for Employee’s immediate suspension for immoral conduct.

In the Motion, Employee contends that allegations of the SOC are insufficient to establish “immoral conduct” because Employees discussions with the instructional aides were “private, consensual conversations” that had no adverse impact on students

or colleagues (Motion, p. 7). In addition, Employee argues there was no “quid pro quo” harassment of the aides and the SOC fails to allege Employee’s comments were unwelcome, intimidating or coercive (Reply, p. 10.) Employee also argues Employee’s act of allowing student access to her personal iPad containing the photos did not constitute immoral conduct because the District did not allege Employee did so intentionally or assert any student saw them. (Motion, p. 7.)

Employee’s contentions are without merit. Neither the Motion nor the Reply cites any legal authority for the proposition that conduct must be intentional in order to constitute immoral conduct. Further, Employee’s conversations about her dating and sex life as well as showing racy photographs of herself and a picture of a naked man would undoubtedly constitute immoral conduct had she engaged in this same conduct with students. That Employee engaged in the alleged conduct with instructional aides does not erase the fact that the conduct demonstrates an inconsiderate attitude towards good order and the public welfare. The allegations as to the repeated and pervasive nature of Employee’s conduct, taken as a whole, support the charge of immorality. Teacher immorality is a broad, factually dependent concept because the calling of a teacher “is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment.” (See *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 812.)

However, 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 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.

In conducting this analysis, it is important to note that teachers act as role models for students. As noted in *Board of Education v. Swan*, 41 Cal.2d 546, at 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 (students) coming under her care and protection Lessons are learned from example as well as from precept."

The SOC's allegations sufficiently demonstrate an unfitness to teach. Employee's conduct was antithetical to her role as an example for students, was hostile to the welfare of the school community, and shows a disregard for the impact of her conduct on students and the District.

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 such matters 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.)

The allegations in the SOC satisfy enough of the *Morrison* factors to further demonstrate an unfitness to teach. The SOC alleges activity occurring on a District campus, involving Employee's inappropriate interaction with a student who stutters and Employee's repeated conduct and use of language with instructional aides that is sexual in nature and indecent, which may have adversely impacted students and instructional aides. In addition, her alleged conduct is likely to recur and proximate in time. 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.

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Disposition

Since the District 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: 10/27/2022

Carmen Snuggs-Spraggins

CARMEN D. SNUGGS-SPRAGGINS

Administrative Law Judge

Office of Administrative Hearings