

December 3, 2013

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative related to the dismissal of school employees for egregious misconduct (A.G. File No. 13-0032).

BACKGROUND

School districts must follow certain procedures when school employees—including certificated staff (primarily teachers) and classified staff (primarily support staff)—are accused of serious offenses, as described below.

School Districts Must Place Employees Charged With Serious Offenses on Leave. School districts must place employees on immediate leave if they are charged with the following offenses:

- Sex crimes including rape, prostitution, child molestation, and child pornography.
- Drug crimes that involve the provision of certain drugs, including heroin and other opiates, to minors. (Marijuana, mescaline, peyote, and tetrahydrocannabinols are specifically exempted.)

School Districts May Place Employees on Leave for Certain Other Offenses. Though not mandatory, a school district may immediately suspend employees or place them on leave if they are convicted of a felony; charged with murder; charged with the unlawful possession, sale, transport, or use of certain drugs or drug paraphernalia; or otherwise deemed unfit to teach. School districts can also place employees on paid leave if they have been accused of a serious offense but have not been formally charged or convicted.

School Districts Must Comply With Certain Notification Requirements. Even though school employees charged with serious offenses are immediately removed from the classroom, districts must provide adequate notice and file written charges if they wish to dismiss them permanently. Districts must provide 30 days notice to teachers and generally cannot notify teachers of their dismissal during the summer.

State Law Sets Forth Hearing Process for Tenured Teachers Dismissed for Cause. After receiving a dismissal notice, a tenured teacher can request a hearing. According to state law, the hearing must take place within 60 days of the teacher's written request. In practice, however, hearings typically take place at least nine months after teachers' written requests because of the large backlog of cases. The following rules govern dismissal hearings for tenured teachers:

- ***Dismissal Panel.*** The case is heard by a Commission on Professional Competence (CPC)—a three-person panel that consists of one administrative law judge (ALJ) from the Office of Administrative Hearings (OAH), one person selected by the teacher, and one person selected by the school district. The panelists selected by the teacher and district must hold a valid credential and must have worked in the same field as the teacher for five of the previous ten years.
- ***Evidence.*** Districts cannot introduce evidence of employee misconduct that occurred more than four years before the date of the dismissal notice.
- ***Cost of ALJ and Panelists.*** Generally, the district bears the costs of the ALJ and the panelists if held during the school year. If the hearing occurs during summer recess or vacation, the state must pay the wages and expenses of the panelists selected by the teacher and district. The district remains responsible for covering the cost of the ALJ.
- ***Attorney Fees.*** School districts must pay their own attorney fees regardless of the outcome of the case. School districts must also pay a teacher's attorney fees if the court rules in favor of the teacher.
- ***Appeals.*** The parties can appeal the decision of the CPC to a higher court.

Hearing Process Different for Non-Tenured Teachers and Support Staff. Typically, school districts can avoid the dismissal process for non-tenured teachers by informing them they will not be retained for the following year. If districts choose to use the dismissal process for non-tenured teachers, state law allows districts to determine the hearing process. Districts can appoint an ALJ to hear the case, but the ruling is not binding on the governing board. Support staff must be granted a hearing upon request. The specific details of the hearing process are determined by the governing board.

School Districts Not Required to Report Serious Offenses in Some Cases. Current law does not always require school districts to disclose information about employees dismissed for serious offenses. For example, a school district could agree to remove evidence of serious offenses from an employee's personnel records. A district also could agree not to disclose any change in employment status (for example, a leave of absence or suspension), when it is related to misconduct, to other school districts.

Districts Required to Report Some Offenses to Commission on Teacher Credentialing (CTC). State law requires districts generally to report any change in an employee's employment status as a result of alleged misconduct to the CTC within 30 days (ten days in some cases). The CTC is required to investigate alleged misconduct and has the authority to revoke a teacher's credentials if charges are substantiated. The CTC is required to disclose most adverse actions it takes (including revoking or suspending a credential). It discloses this information in a quarterly

bulletin to schools and through a public, searchable online database of California teachers. The CTC cannot disclose any further information about an employee discipline case unless required to do so by court order.

Districts Can Recover Wages Paid During Some Dismissal Proceedings. Employees who are suspended or placed on leave for serious offenses must be paid pending the resolution of their cases if they provide security as a guarantee of ability to repay. However, districts can recover these wages if the employees are subsequently dismissed.

Certain Retirement Benefits Forfeited for Serious Offenses. School employees convicted of felonies under state or federal law for actions taken while in performance of official duties, including felony offenses involving children at a school where they work, forfeit any retirement benefits earned from the date of their offense to the date of their conviction. Any contributions made to a public retirement system by the employees on or after the date of the first offense is returned to them without interest. The employees retain any benefits earned before the first offense but cannot earn any additional benefits after a conviction. If the conviction is reversed, employees can recover the benefits and interest forfeited.

Dismissal Process Described Above Affects Very Small Number of Employees. The number of employees who are dismissed for serious offenses each year represents a very small percentage of total school employees. For example, the CTC revoked the credentials of about 360 employees during the 2012-13 school year, about one-tenth of 1 percent of the 284,000 certified school employees working in the state that year. (These revocations are typically for serious offenses for which districts likely would seek to dismiss an employee.)

PROPOSAL

For certificated and classified school employees, the measure creates a new category of serious offenses (“egregious misconduct”), changes the timing of the dismissal process for those accused of these offenses, modifies the associated hearing and appeals process, limits removal of egregious misconduct allegations from personnel records and reports to other agencies, and further limits wages and retirement benefits for employees who are dismissed for egregious misconduct.

Defines New Category of Egregious Misconduct. The measure defines egregious misconduct as including:

- Sex offenses that result in a mandatory leave of absence under current law, including rape, prostitution, child pornography, and child molestation.
- Drug crimes that result in a mandatory leave of absence under current law, which include the provision of certain drugs to minors.
- Drug crimes that may result in a leave of absence under current law, including the unlawful possession, sale, transport, or use of certain drugs. Marijuana is exempted, although provision of marijuana to a minor is considered egregious misconduct.
- Certain non-sexual offenses involving children, including child abuse.

Changes Timing of Dismissal Process for Egregious Misconduct. School districts would be able to permanently dismiss a school employee charged with egregious misconduct at any time during the calendar year.

Changes Hearing and Appeals Process for Egregious Misconduct. The measure would make the following changes to the hearing and appeals process for egregious misconduct.

- ***Written Charges.*** Although school districts would still have to file written charges at least 30 days before dismissing a teacher, districts would be able to amend written charges for an employee charged with egregious misconduct without limitation. This is consistent with current law.
- ***ALJ.*** All dismissal hearings for teachers accused of egregious misconduct would be conducted solely by an ALJ.
- ***Prioritization of Cases.*** The OAH would have to hear cases involving egregious misconduct sooner than less serious cases. An ALJ could delay hearings for egregious misconduct only for good cause. The chief ALJ could prohibit a judge from hearing a case if he or she believes there has been “undue delay or excessive granting of continuances” when that judge has presided over egregious misconduct cases in the past.
- ***Evidence.*** No limitation would be placed on the types and amount of evidence related to egregious misconduct that could be presented at a dismissal hearing. Employers would be able to introduce evidence that occurred any time prior to the date of the dismissal notice at an employee’s dismissal hearing.
- ***Legal Costs.*** If a dismissal case is appealed to a higher court, the prevailing party is entitled to attorney fees, as determined by the higher court.

Prohibits Agreements That Would Limit Disclosure of Employee Misconduct. The measure prohibits agreements that would limit disclosure of school employee misconduct as follows.

- School districts would be prohibited from entering into any agreement that would remove credible evidence of egregious misconduct from an employee’s records. Districts could remove unfounded or false allegations.
- A district could not enter into an agreement that prevents it from reporting a change in employment status for an employee accused of egregious misconduct to law enforcement agencies, school districts, or others.
- In response to a California Public Records request, the CTC would have to disclose changes in employment status when they are related to egregious misconduct. Currently, CTC is only required to disclose final adverse actions taken by CTC.

Limits Wages and Retirement Credit for Employees Dismissed for Egregious Misconduct. The measure places the following limitations on wages and retirement benefits for employees dismissed for egregious misconduct.

- Districts could recover any wages paid to an employee dismissed for egregious misconduct starting 30 days after a termination notice is issued. A district would have to adopt a resolution at a public meeting that it intends to exercise this right, notify all affected employee groups in writing, and include a copy of the resolution in its termination notice. A district may request that the Franchise Tax Board (FTB) assist the district in recovering the wages. The FTB can seek reimbursement from the district for its expenses in collecting wages from a dismissed employee.
- Employees dismissed for egregious misconduct would not be able to earn credit in a state retirement system beginning 30 days after receiving a termination notice until their dismissal. (Under current law, employees are prohibited from earning retirement benefits only if they are convicted of a felony offense.)

FISCAL EFFECTS

Because few school employees likely would be charged with egregious misconduct and the state already has certain provisions in place to address serious offenses, this measure would have only a minor fiscal effect on the state and school districts, as discussed below.

Minor Fiscal Effect on State

State Could See Minor Savings in Two Areas. The state would realize minor savings because it would not have to pay the salaries of teachers who serve on the CPC. (Currently, the state is responsible for these costs if a dismissal hearing is held during vacation or summer recess.) In addition, the state would be able to avoid making new retirement contributions for school employees who are terminated for egregious misconduct. Because the number of employees affected under the measure likely would be small, the state contribution rate is low, and state law already denies retirement benefits to certain offenders, the savings to the state, however, likely would be minimal.

The CTC May Incur Minor Costs. The commission may incur minor costs to comply with California Public Records requests relating to egregious misconduct. This is because CTC might have to invest additional staff time in editing records to protect the privacy of children and others named in documents relating to egregious misconduct.

Minor Fiscal Effect on School Districts

Districts Entitled to Award of Attorney Fees. Districts would be able to recover attorney fees if they prevailed in an appeal of an egregious misconduct case. However, given that the number of such cases likely would be small, the savings to districts would be small.

Districts Can Recover Wages and Other Payments During Lengthy Dismissal Process. School districts would be able to recover wages of employees charged with egregious misconduct starting 30 days after serving a termination notice. Additionally, school districts would be able to recover other payments, including retirement contributions, paid on behalf of employees charged with egregious misconduct starting 30 days after serving a termination notice. Given the small number of employees that likely would be affected and the fact that

current law already enables districts to recover wages and retirement contributions for certain serious offenses, the savings to a district likely would be small.

Summary of Fiscal Effects

We estimate that this measure could have the following fiscal effects:

- Minor net annual effect on the state, as small additional administrative costs would be offset by small savings related to dismissal hearings and retirement credit.
- Small annual savings to school districts because of reduced legal expenses, wages, and pension costs.

Sincerely,

Mac Taylor
Legislative Analyst

Michael Cohen
Director of Finance