
SENATE COMMITTEE ON EDUCATION

Senator Benjamin Allen, Chair

2017 - 2018 Regular

Bill No: AB 2234 **Hearing Date:** June 20, 2018
Author: Jones-Sawyer
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Urgency: No **Fiscal:** Yes
Consultant: Ian Johnson

Subject: School districts: employees: dismissal or suspension administrative proceedings: testimony of minor witnesses: pupil contact information.

NOTE: This bill has been referred to the Committees on Education and Judiciary. A "do pass" motion should include referral to the Committee on Judiciary.

SUMMARY

This bill changes various aspects of dismissal proceedings related to egregious misconduct cases for school district employees.

BACKGROUND

Existing law related to classified employee dismissal at merit system districts:

- 1) Authorizes, for reasonable causes, an employee may be suspended without pay for not more than 30 days, or may be demoted or dismissed. In this case, the school district shall, within 10 days of the suspension, demotion, or dismissal, file written charges with the personnel commission. The personnel director shall give to the employee or deposit in the United States registered mail with postage prepaid, addressed to the employee at his or her last known place of address, a copy of the charges and inform the employee of his or her appeal rights.
- 2) The personnel commission shall investigate the matter on appeal and may require further evidence from either party, and may, and upon request of an accused employee shall, order a hearing. The accused employee shall have the right to appear in person or with counsel and to be heard in his own defense. The decision shall not be subject to review by the governing board.

Existing law related to certificated employee dismissal:

- 1) Prohibits the dismissal of permanent employees except for one or more of the following causes:
 - a) Immoral conduct, including, but not limited to, egregious misconduct;
 - b) Unprofessional conduct;
 - c) Commissioning, aiding or advocating the commission of acts of criminal syndicalism;

- d) Dishonesty;
 - e) Unsatisfactory performance;
 - f) Evident unfitness for service;
 - g) Physical or mental condition unfitting him or her to instruct or associate with children;
 - h) Persistent violation of or refusal to obey the school laws of the state by the State Board of Education or by the local governing board employing him or her;
 - i) Conviction of a felony or any crime involving moral turpitude;
 - j) Advocating for or teaching communism with the intent of indoctrinating the mind of any pupil; or,
 - k) Alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children.
- 2) Defines “egregious misconduct” exclusively as immoral conduct that is the basis for sexual misconduct, controlled substances, child abuse and neglect offenses.

Existing law related to child witness testimony in criminal proceedings:

- 1) Authorizes, notwithstanding any other law, the court in a criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court’s own motion, to order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:
- a) The minor’s testimony will involve a recitation of the facts of any of the following:
 - i) An alleged sexual offense committed on or with the minor.
 - ii) An alleged violent felony, as defined in subdivision (c) of Section 667.5.
 - iii) An alleged felony offense specified in Section 273a or 273d of which the minor is a victim.
 - b) The impact on the minor of one or more of the following factors is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used.

- i) Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness. Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness.
 - ii) The defendant used a deadly weapon in the commission of the offense.
 - iii) The defendant threatened serious bodily injury to the child or the child's family, threatened incarceration or deportation of the child or a member of the child's family, threatened removal of the child from the child's family, or threatened the dissolution of the child's family in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding, or to prevent the minor from reporting the alleged sexual offense, or from assisting in criminal prosecution.
 - iv) The defendant inflicted great bodily injury upon the child in the commission of the offense.
 - v) The defendant or his or her counsel behaved during the hearing or trial in a way that caused the minor to be unable to continue his or her testimony. In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor's testimony.
- 2) Specifies, if the court orders the use of closed-circuit television, two-way closed-circuit television shall be used, except that if the impact on the minor of one or more of the factors enumerated above is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness even if two-way closed-circuit television is used, one-way closed-circuit television may be used. The prosecution shall give the defendant or defendants at least 30 days' written notice of the prosecution's intent to seek the use of one-way closed-circuit television, unless the prosecution shows good cause to the court why this 30-day notice requirement should not apply.
- 3) Authorizes, in determining whether the impact on an individual child of one or more of the five factors enumerated above is so substantial that the minor is unavailable as a witness unless two-way or one-way closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or

defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

- 4) Requires, when the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person, a nonuniformed bailiff, any technicians necessary to operate the closed-circuit equipment, and, after consultation with the prosecution and the defense, a representative appointed by the court, to be physically present for the testimony. A video recording device shall record the image of the minor and his or her testimony, and a separate video recording device shall record the image of the support person.
- 5) Requires, when the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or defendants or any of the facts of the case with the minor during this meeting.
- 6) Requires the examination to be under oath, and the defendant or defendants shall be able to see and hear the minor witness, and if two-way closed-circuit television is used, the defendant's image shall be transmitted live to the witness.
- 7) Specifies that nothing in Penal Code section 1347 affects the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

Existing law related to witness questioning requires, with a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court to take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness.

Existing law related to victim advocates specifies a victim of sexual assault has the right to have victim advocates and a support person of the victim's choosing present at any interview by law enforcement authorities, district attorneys, or defense attorneys. A victim retains this right regardless of whether he or she has waived the right in a previous medical evidentiary or physical examination or in a previous interview by law enforcement authorities, district attorneys, or defense attorneys. However, the support person may be excluded from an interview by law enforcement or the district attorney if the law enforcement authority or the district attorney determines that the presence of that individual would be detrimental to the purpose of the interview. Defines "victim

advocate” to mean a sexual assault counselor, as defined in Section 1035.2 of the Evidence Code, or a victim advocate working in a center established under Article 2.

ANALYSIS

This bill changes various aspects of dismissal proceedings related to egregious misconduct cases for school district employees. Specifically, this bill:

- 1) Authorizes, in an administrative proceeding involving an alleged egregious misconduct offense involving a minor that meets the definition of egregious misconduct, counsel for a school district to apply for an order that the minor's testimony be taken in a room outside the hearing room and be televised by two-way closed circuit television and bears the burden of proving that such an order is justified. Specifies the person seeking such an order shall apply for the order at least seven days before the hearing date, unless the judge finds on the record that the need for such an order was not reasonably foreseeable.
- 2) Authorizes the judge to order that the testimony of the minor be taken by closed-circuit television if the judge finds that the minor is unable to testify in the hearing room in the presence of the respondent for any of the following reasons:
 - a) The minor is unable to testify because of emotional distress, established by a written statement of the minor, the minor's parent or guardian, the minor's support person, or a mental health professional who has evaluated the minor.
 - b) There is a substantial likelihood, established by expert testimony, that the minor would suffer emotional distress from testifying.
 - c) According to expert testimony, the minor suffers from a medical condition, mental condition, or other infirmity.
 - d) The judge finds that conduct of the respondent or his or her representative causes the minor to be unable to continue testifying.
- 3) Requires the judge to rule on the application, and support a ruling on the minor's inability to testify with findings on the record. Specifies, in determining whether the impact on an individual minor is so substantial as to justify an order, the judge may question the minor in his or her office, or at some comfortable place other than the hearing room, on the record for a reasonable period of time in the presence of the minor's parent or guardian, support person, counsel for the school district, and representative of the respondent.
- 4) Specifies, if the judge orders the taking of testimony by television, counsel for the school district and representative of the respondent, not including a respondent represented pro se, shall be present in a room outside the hearing room with the minor, and the minor shall be subjected to direct and cross-examination. The following are the only other persons who may be permitted in the room with the minor during the minor's testimony:

- a) Any persons necessary to operate the closed-circuit television equipment.
 - b) The parent or guardian of the minor.
 - c) Any other persons whose presence is determined by the judge to be necessary to the welfare and well-being of the minor, including, but not necessarily limited to, a judicial officer or support person.
- 5) Requires, in making the determination, the judge to consider the age, maturity, and cognitive ability of the minor compared with other minors of the same age, the relationship between the minor and the respondent, any handicap or disability of the minor, and the nature of the acts alleged to have been committed by the respondent. The minor's testimony shall be under oath and transmitted by closed-circuit television into the hearing room for viewing and hearing by the respondent, the judge, and any members of the public in attendance. The respondent shall be provided with the means of private, contemporaneous communication with his or her representative during the testimony. The closed-circuit television transmission shall relay into the room in which the minor is testifying the respondent's image, and the voice of the judge.
- 6) Authorizes, in an administrative proceeding involving an alleged egregious misconduct offense involving a minor, counsel for the school district to apply for an order that a deposition be taken of the minor's testimony and that the deposition be recorded and preserved on videotape based upon the same criteria that would allow a minor's testimony to be taken in a room outside the hearing room and be televised by two-way closed circuit television.
- 7) Requires, upon timely receipt of an application for a deposition, the judge to make a preliminary finding regarding whether at the time of deposition the minor is likely to be unable to testify in the hearing room in the physical presence of the respondent, the judge, and the public for any of the following reasons:
- a) The minor is unable to testify because of emotional distress, established by a written statement of the minor, the minor's parent or guardian, the minor's support person, or a mental health professional who has evaluated the minor.
 - b) There is a substantial likelihood, established by expert testimony, that the minor would suffer emotional distress from testifying.
 - c) According to expert testimony, the minor suffers from a medical condition, mental condition, or other infirmity.
 - d) The judge finds that conduct of the respondent or his or her representative causes the minor to be unable to continue testifying.
- 8) Specifies that if the judge finds that the minor is likely to be unable to testify in open hearing for any of the reasons stated in 9) above, the judge shall order that the minor's deposition be taken and preserved by videotape.

- 9) Requires the judge to preside at the videotaped deposition of a minor, and to rule on all questions as if at the hearing. The following are the only other persons who shall be permitted to be present at the videotaped deposition:
 - a) Counsel for the school district.
 - b) Representative of the respondent.
 - c) Any persons necessary to operate the videotape equipment.
 - d) The respondent, unless the judge excludes the respondent from the hearing room.
 - e) The parent or guardian of the minor.
 - f) Any support persons appointed pursuant to Section 44993 to protect the mental health, welfare and well-being of the minor.
- 10) Requires the respondent to be afforded the rights applicable to respondents during trials, including the right to be confronted with the witness against the respondent and the right to cross-examine the minor.
- 11) Authorizes, if the minor is unable to testify in the physical presence of the respondent, the judge to order that the respondent, including a respondent represented pro se, be excluded from the room in which the deposition is conducted. If the judge orders that the respondent be excluded from the deposition room, the judge shall order that two-way closed-circuit television equipment relay the respondent's image into the room in which the minor is testifying, and the minor's testimony into the room in which the respondent is viewing the proceeding, and that the respondent be provided with a means of private, contemporaneous communication with his or her representative during the deposition.
- 12) Requires the complete record of the examination of the minor, including the image and voices of all persons who in any way participate in the examination, to be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the judge's office, and shall be made available for viewing by counsel for the school district, representative of the respondent, and the respondent during ordinary business hours.
- 13) Authorizes, if at the time of trial the judge finds that the minor is unable to testify in an open hearing, the judge to admit into evidence the minor's videotaped deposition in lieu of the minor's testifying at the hearing. The judge shall support any ruling made with findings on the record.
- 14) Authorizes, upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during the hearing, the judge, for good cause shown, to order an additional videotaped deposition. The testimony of the minor shall be restricted to the matters specified by the judge as the basis for granting the order.

- 15) Authorizes, in connection with the taking of a videotaped deposition, the judge to enter a protective order for the purpose of protecting the privacy of the minor.
- 16) Requires, with a witness under 18 years of age, or a dependent person with a substantial cognitive impairment, the judge to take special care to protect the witness from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The judge shall also take special care to ensure that questions are stated in a form that is appropriate to the age, maturity or cognitive level of the witness. The judge may, in the interests of justice, on objection by a party, forbid the asking of a question that is in a form that is not reasonably likely to be understood by a person of the age, maturity or cognitive level of the witness.
- 17) Authorizes, when a minor testifies, the judge to order the exclusion from the hearing room of all persons, including members of the press, who do not have a direct interest in the case. This order may be made if the judge determines, on the record, that requiring the minor to testify in the open hearing room would cause substantial psychological harm to the minor or would result in the minor's inability to effectively communicate. Such an order shall be narrowly tailored to serve the specific compelling interest of the school district.
- 18) Requires a support person selected by the minor to be appointed for the minor witness at the onset of the hearing, unless that person does not have the education, experience, and familiarity with the minor witness to protect the minor's mental health, welfare, and well-being. A parent or guardian of the minor witness shall be presumed to be qualified to serve as the support person for the minor. If the minor witness does not make a selection, or does not select a person who is able, because of education, experience or familiarity with the minor, to ensure that the minor's health, welfare, and well-being are protected, or the judge determines that the minor's parent or guardian is not qualified to serve as the support person for the minor witness, the judge shall select and appoint a support person for the minor. The support person shall be present during all stages of the hearing to provide support to the minor. If the respondent wants to contact the minor witness, the respondent shall contact the support person to coordinate any legal contact, including, but not necessarily limited to, an interview, deposition, or other hearing preparation task. The respondent may not use a private investigator or similar professional to make contact with the minor.
- 19) Authorizes the judge, at his or her discretion, to allow the support person to remain in close physical proximity to or in contact with the minor while the minor testifies. A support person shall not provide the minor with an answer to any question directed to the minor during the course of the minor's testimony or otherwise prompt the minor.
- 20) Requires a support person appointed by the judge to assist the minor to express the minor's views concerning the personal consequences of the minor's victimization, at a level and in a form of communication commensurate with the minor's age, maturity and cognitive ability.

- 21) Specifies that this measure shall apply to hearings conducted by an administrative law judge in any dismissal or suspension hearing involving an alleged offense involving a minor where the proceedings are based solely on charges of egregious misconduct.
- 22) Requires an administrative law judge to conduct a classified employee suspension or dismissal hearing involving allegations of egregious misconduct involving a minor, and to conduct that hearing in accordance with Article 3.3 of Chapter 4 and Section 49077, related to minor witness testimony.
- 23) Specifies that the judge's ruling shall be binding among all parties.
- 24) Requires an administrative law judge to conduct a classified employee suspension or dismissal hearing involving allegations of egregious misconduct involving a minor, and to conduct that hearing in accordance with Article 3.3 of Chapter 4 and Section 49077, related to minor witness testimony.
- 25) Specifies that the judge's ruling shall be binding among all parties.

STAFF COMMENTS

- 1) ***Need for the bill.*** According to the author, “Currently, school districts can dismiss an employee for egregious actions through an administrative hearing process. During these hearings, a school employee accompanied by counsel can make their case to an administrative law judge.

It is common during these procedures for students to provide testimony against alleged perpetrators. Testifying as a witness can be stressful and potentially traumatic for a child. This is particularly true when a child has been the subject of an alleged abuse.

Protections for minor witnesses exist in almost every legal forum including family, immigration, civil and criminal court. Examples of these protections include alternatives to live-court testimony, the exclusion of repetitive and uncomprehensive questions and the right of a child to have a victim advocate present throughout the process. Yet, these protections do not exist in administrative courts adjudicating the Education Code despite a large proportion of witnesses being underage.”

- 2) ***Arguments in support:*** Los Angeles Unified School District (LAUSD) supports the bill and argues, "AB 2234 would provide administrative law judges the discretion to apply special protections for student witnesses, similar to protections available to minors in other legal settings, when adjudicating teacher and school staff dismissal hearings involving egregious actions. Currently, school districts can dismiss an employee for immoral and unprofessional conduct through an administrative hearing process. During these hearings, a school employee accompanied by counsel can make their case to an administrative law judge. It is common during these procedures for students who have been the subject of egregious acts to testify against alleged perpetrators. Protections for minor witnesses exist in almost every legal forum, including family, immigration,

civil and criminal court. Examples of these protections include alternatives to live-court testimony, the exclusion of repetitive and uncomprehensive questions and the right of a child to have a victim advocate present throughout the process. Yet, these protections do not exist in administrative courts adjudicating the Education Code despite a large proportion of witnesses under the age of 18."

Further LAUSD argues, "AB 2234 would provide administrative law judges discretion to apply comprehensive protections for student witnesses during dismissal hearings dealing with egregious acts. Specifically, this bill would allow the use of a two-way closed circuit television or videotaped student testimony if a judge determines that a student is unable to testify due to fear, a mental condition, or if there is a likelihood that testifying will result in emotional trauma. This bill would also require administrative law judges to protect witnesses under the age of 14 from undue harassment or embarrassment and ensure that questions asked to the student witness are appropriate for the child's age and cognitive level. Finally, AB 2234 would also require that an adult attendant or victim advocate be appointed to student witnesses to accompany the child at every stage of the process."

- 3) **Technical amendment.** Concerns have been raised that, as currently drafted, this bill could result in the student advocate and private investigator provisions being applied to any and all minor witnesses. For example, a teacher who breaks up a fight between two students may face a dismissal for corporal punishment if one of the students felt that the teacher used excessive force. If there were 20 student witnesses to the fight, this bill could be interpreted as requiring all 20 student witnesses to be represented by student advocates.

Given that the intent of this bill is to only apply these protections to minor witnesses that are the subject of allegations of egregious misconduct, **staff recommends** that the bill be amended to specify that, notwithstanding (a), a support person may, but need not, be assigned to a minor witness if that minor witness was not a direct victim of the alleged egregious misconduct.

SUPPORT

Los Angeles Unified School District (sponsor)
Association of California School Administrators
California Police Chiefs Association
California State PTA
Los Angeles County Office of Education
Riverside County Office of Education
School Employers Association of California

OPPOSITION

California Teachers Association

-- END --