SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 272 (Kiley)
Version: January 19, 2021
Hearing Date: June 15, 2021
Fiscal: No
Urgency: No
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SUBJECT

Enrollment agreements

DIGEST

This bill authorizes a minor to disaffirm a provision in an educational institution's enrollment agreement that purports to waive a legal right, remedy, forum, proceeding, or procedure, arising out of a criminal sexual assault or criminal sexual battery, as defined, on that minor regardless of whether a parent or legal guardian has signed the enrollment agreement on the minor's behalf.

EXECUTIVE SUMMARY

Four elements are essential to the existence of a contract: parties capable of contracting; their consent; a lawful object; and a sufficient cause or consideration. As to consent, the law requires it to be free, mutual, and communicated by each to the other. A minor cannot make a contract relating to real property or relating to any personal property not in the immediate possession or control of the minor. However, a minor may otherwise make a contract in the same manner as an adult, subject to the power of disaffirmance. A minor may disaffirm the contract any time before reaching the age of majority or within a reasonable time afterwards, with limited exceptions.

This bill allows a minor to disaffirm a provision in an educational institution's enrollment agreement that purports to waive a legal right, remedy, forum, proceeding, or procedure, regardless of whether a parent or legal guardian has signed on the minor's behalf, to the extent that the provision is construed to require the minor to waive a legal right, remedy, forum, proceeding, or procedure arising out of a criminal sexual assault or criminal sexual battery on that minor.

This bill is author-sponsored. It is supported by the Children's Advocacy Institute at the University of San Diego, School of Law, the Consumer Attorneys of California, and the Capitol Resource Institute. It is opposed by the California Chamber of Commerce.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that a contract must include parties capable of contracting, their consent, a lawful object of the contract, and a sufficient cause or consideration. (Civ. Code § 1550.)

2) Provides that a minor may make a contract in the same manner as an adult, subject to the power of disaffirmance. (Fam. Code § 6700.) The only exceptions are that a minor cannot give a delegation of power; make a contract relating to real property or any interest therein; or make a contract relating to any personal property not in the immediate possession or control of the minor. (Fam. Code § 6701.)

3) Provides that, except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before the age of majority or within a reasonable time afterwards or, in case of the minor's death within that period, by the minor's heirs or personal representative. (Fam. Code § 6710.)

4) Prohibits a contract, otherwise valid, entered into during minority, from being disaffirmed on that ground either during the actual minority of the person entering into the contract, or at any time thereafter, if all of the following requirements are satisfied:
    a) the contract is to pay the reasonable value of things necessary for the support of the minor or the minor's family;
    b) these things have been actually furnished to the minor or to the minor's family; and
    c) the contract is entered into by the minor when not under the care of a parent or guardian able to provide for the minor or the minor's family. (Fam. Code § 6712.)

5) Provides that if, before the contract of a minor is disaffirmed, goods the minor has sold are transferred to another purchaser who bought them in good faith for value and without notice of the transferor's defect of title, the minor cannot recover the goods from an innocent purchaser. (Fam. Code § 6713.)

6) Establishes various matters involving medical treatment to which a minor may consent and which are not subject to disaffirmance. (Fam. Code § 6920 et seq.)

7) Provides that, if the court as a matter of law finds a contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any

unconscionable clause as to avoid any unconscionable result. (Civ. Code § 1670.5.)

8) Provides, pursuant to the Federal Arbitration Act (FAA), that agreements to arbitrate shall be valid, irrevocable, and enforceable, except on such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2.)

9) Establishes the California Arbitration Act, which provides that agreements to arbitrate shall be valid, irrevocable, and enforceable, except on such grounds as exist at law or in equity for the revocation of any contract. (Code Civ. Proc. § 1280 et seq.)

This bill:

1) Provides that, notwithstanding Family Code Section 6710 et seq., a provision in an educational institution's enrollment agreement that purports to waive a legal right, remedy, forum, proceeding, or procedure may be disaffirmed by the minor, regardless of whether a parent or legal guardian has signed the enrollment agreement on the minor's behalf, to the extent that the provision is construed to require the minor to waive a legal right, remedy, forum, proceeding, or procedure arising out of a criminal sexual assault or criminal sexual battery on that minor.

2) Clarifies that the fact that a provision in an enrollment agreement has been disaffirmed by the minor does not affect the validity or enforceability of any other provision of the enrollment agreement.

3) Defines the following terms:
    a) "criminal sexual assault" means an act that was perpetrated against a person under 18 years of age and that would be a crime under Section 261.5, 286, 287, 288, 288.7, or 289 of the Penal Code, or any predecessor statute;
    b) "criminal sexual battery" means an act that was perpetrated against a person under 18 years of age and that would be a crime under Section 243.4 of the Penal Code;
    c) "educational institution" means a public or private school maintaining a kindergarten or any of grades 1 through 12; and
    d) "enrollment agreement" means a written contract between a student and institution concerning an educational program.
4) States the Legislature finds and declares that it is unconscionable for a parent, on behalf of the parent's minor child, to be required to waive a legal right, remedy, forum, proceeding, or procedure, including the right to file and pursue a civil action, belonging to that minor child with respect to claims arising out of a

criminal sexual assault or criminal sexual battery as a condition of enrollment in an educational institution.

COMMENTS

1. Brentwood School

Dr. Aimee Palmitessa was a chemistry teacher at Brentwood School in Los Angeles, when, in 2017, she allegedly began an illegal sexual relationship with a student at the school.[1] She was arrested after the student's parents became aware of the relationship and notified authorities, and was indicted by a grand jury on 12 felony counts of unlawful sex with a child, sodomy and other sexual abuse. In April 2019, Palmitessa was sentenced to three years in prison after pleading no contest to three counts of unlawful sexual intercourse.[2]

The student later filed a lawsuit against Brentwood School for their failure to prevent or adequately respond to the sexual abuse. The lawsuit alleged that it was well known that the teacher inappropriately interacted with students and that school employees were aware of her relationship with the student. In fact, the lawsuit alleged that the student reached out to the school counselor, who encouraged the student to engage in the relationship. In the wake of the revelations, the head of Brentwood School emailed parents, urging them to avoid talking to the media, and although he hired an investigator to review the case, he did not release the independent investigator's report.[3]

Relevant here, the school responded to the lawsuit by seeking to compel arbitration:

> Brentwood School quietly went to work trying to kill the lawsuit. Tucked into the school's enrollment agreement is a single paragraph about mandatory arbitration. According to the agreement, any "controversy or claim" related to the school must be dealt with in arbitration, a secretive process with no jury, little oversight and limited options for obtaining information from the other party or appealing decisions.
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> If Doe's case were allowed to move forward in civil court, his lawyers would have plenty of ways to get more information about how much the

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[1] Richard Winton, *Ex-student sues elite Brentwood School after teacher is charged with sexually abusing him* (August 7, 2018) Los Angeles Times, https://www.latimes.com/local/lanow/la-me-brentwood-school-sex-abuse-lawsuii-20180806-story.html.
[2] Sanestina, *Aimee Palmitessa Sentenced For Having Sex With Student* (April 23, 2019) Canyon News, https://www.canyon-news.com/aimee-palmitessa-sentenced-for-having-sex-with-student/91506.
[3] Jessica Schulberg, *How An Elite Private School Is Dodging Blame For Sexual Assault Of A Student* (May 18, 2019) Huff Post, https://www.huffpost.com/entry/student-rape-private-school-brentwood-arbitration_n_5cde1300e4b09e057800f679.

> school knew about Palmitessa's interactions with Doe and other students. They would have the right to request internal communications through discovery, the pretrial process of obtaining evidence, and to call witnesses to testify under oath. In civil court, Doe could be kept anonymous, but much of the information uncovered in the case would be made public. A jury would get to decide if he deserved compensation for his ordeal.
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> Instead, the elite private school has fought a nearly yearlong effort to eliminate Doe's civil court case and deal with his allegations against Brentwood in a private arbitration process.[4]

A judge ruled in favor of Brentwood School, and the holding was upheld on appeal. The California Supreme Court denied the petition for review.[5]

2. Empowering minors in connection with school enrollment agreements

This bill was introduced to prevent the type of forced arbitration at issue in the Brentwood School case. The bill authorizes a minor to disaffirm a provision in an educational institution's enrollment agreement that purports to waive a legal right, remedy, forum, proceeding, or procedure, to the extent that the provision is construed to require the minor to waive a legal right, remedy, forum, proceeding, or procedure arising out of a criminal sexual assault or criminal sexual battery on that minor. This applies regardless of whether a parent or legal guardian has signed the agreement on the minor's behalf. It applies to a public or private school maintaining a kindergarten or any of grades 1 through 12. The bill makes clear that the disaffirmance of such a provision does not affect the validity or enforceability of any other provision of the enrollment agreement.

As discussed above, generally a minor may make a contract in the same manner as an adult, however, such contracts are subject to the power of disaffirmance by the minor. In situations such as in the Brentwood School case, parents or guardians can sign on behalf of children. This bill narrowly addresses the situation where enrollment agreements signed by parents or guardians are construed to require the minor at issue to waive legal rights in connection with specified sexual crimes perpetrated against the minor.

According to the author:

> Assembly Bill 272 clarifies that a person should not be required to waive their right to recourse as part of a school enrollment agreement in respect to claims of childhood sexual assault. Students in California should expect

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[4] *Ibid.*
[5] *Doe v. Superior Court* (May 22, 2019, No. S254875) ___Cal.5th___ [2019 Cal. LEXIS 3583, at *1].

> a safe learning environment. AB 272 furthers this right and ensures that students will no longer be silenced by educational institutions meant to protect them.

The Children's Advocacy Institute writes in support:

> If our child-serving institutions always elevated the interests of children above all other interests, your bill would not be necessary. It should go without saying -- or legislating -- that our schools should [not] aggressively seek to obtain tactical legal advantage over children who are sexually abused by adults in their employ.
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> But, for example, when a chemistry teacher at a Los Angeles School was indicted for felony counts of sexual assault and rape, the school successfully brought a motion to compel arbitration of the child's claims based on a clause in the enrollment agreement.
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> It has long been the law that while children may sign contracts [those] contracts may not be enforced against minors. (*See* Family Code section 6710.) Parents signing a contract allegedly waiving the right of a child who has been the victim of criminal sexual assault or criminal sexual battery to have the child's claims heard in court should be subject to the same ability of the child to disaffirm the contract as if the child had signed it.
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> That is what your bill does in the narrow circumstances of school employees sexually assaulting and battering children.
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> Holding schools accountable to the maximum extent permitted by the law, and preventing them from unilaterally in boilerplate enrollment agreements achieving tactical legal advantage over sexually abused children, laudably motivates schools to take maximum care in their treatment of the vulnerable children under their care.

The Consumer Attorneys of California writes in support:

> AB 272 is an important measure to protect victims of childhood sex abuse in our schools. When a chemistry teacher at a Los Angeles School was indicted for twelve felony counts including sex assault and rape, the school successfully brought a motion to compel arbitration based on a clause in the enrollment agreement. Parents signing an arbitration agreement in an enrollment clause could not have anticipated that they would be waiving their child's right to justice after suffering sex abuse at school.

> Forced arbitration denies your constitutional right to a trial by jury. Forced arbitration agreements can be found in just about every contract a consumer signs these days – even educational enrollment agreements. These mandatory arbitration agreements force individuals to give up the right to file a lawsuit and instead letting arbitrators, typically paid by the wrongdoer, settle disputes. The arbitrator's decision is binding on all parties, is not subject to any established rules of court or existing law, and cannot be appealed for legal or factual errors.
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> AB 272 will ensure victims of childhood sex abuse in our schools do not have their right to justice stripped away.

3. Arbitration laws

Arbitration is an alternative method for resolving legal disputes. Instead of going through the formal, public court process, the parties to the dispute submit their evidence and legal arguments to a private arbitrator (or a panel of arbitrators) who decides the case. Critics of arbitration point out that it can be one-sided, especially when forced upon parties with less bargaining power, and that it lacks the transparency of the public court system, among other things.

The Federal Arbitration Act (FAA) provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[6]

The concept of preemption derives from the "supremacy clause" of the federal Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land."[7] Courts have typically identified three circumstances in which federal preemption of state law occurs:

> (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where

[6] 9 U.S.C. § 2.
[7] U.S. Const., art. VI, cl. 2.

> state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[8]

In assessing whether a state law is preempted by the FAA, three key aspects of the law surrounding arbitration and preemption are especially relevant. First, the federal courts have ruled that the FAA was intended to promote arbitration.[9] Second, state laws or rules that interfere with the enforcement of arbitration agreements are preempted, except on such grounds as exist at law or in equity for the revocation of any contract.[10] Third, state laws that explicitly or covertly discriminate against arbitration agreements as compared to other contracts are also preempted.[11]

Writing in opposition, the California Chamber of Commerce argues the bill is likely preempted by the FAA:

> As the Supreme Court made clear in *Concepcion*, states cannot utilize state contract law to attempt to create defenses to a contract that apply only to arbitration. In *Concepcion*, the Court discussed explicitly whether, under the FAA's so called "savings clause", a state law relating to a contract defense could render arbitration agreements invalid. The court was explicit:
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> "[The FAA] permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."
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> Here, AB 272 does just that – it provides that a generally applicable contract defense (unconscionability) applies specifically to arbitration clauses in otherwise valid enrollment agreements. As a result, AB 272, if passed, would be preempted. In case that was not clear enough, AB 272's specific mechanism underlies this discrimination against arbitration. It would allow individuals to disaffirm any arbitration provision – but no other types of provisions – which their parents signed on their behalf in an enrollment agreement. In other words: no generally applicable changes are being made to state contract law related to parents' ability to contract for their children – an arbitration-specific contract defense is being created. That is exactly what the Supreme Court made clear was unacceptable in Concepcion.

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[8] *English v. Gen. Elec. Co.* (1990) 496 U.S. 72, 78-80.
[9] *Epic Sys. Corp. v. Lewis* (2018) ___U.S.___ [138 S.Ct. 1612, 1621].
[10] 9 U.S.C. Sec. 2; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.
[11] *Epic Sys. Corp.*, 138 S.Ct. at 1645-1646.

The author disagrees. He argues that "*Concepcion* made it clear that rules generally applicable to contracts (and not only to arbitration agreements) are allowable under the FAA, even where there is a disproportionate effect on arbitration agreements." The author also points to case law strongly supporting the operation of this bill. For instance, in *In re Marriage of Bereznak* (2003) 110 Cal.App.4th 1062, 1069, the California Appellate Court found:

> Children have the "right to have the court hear and determine all matters [that] concern their welfare and they cannot be deprived of this right by any agreement of their parents." (*In re Marriage of Lambe & Meehan* (1995) 37 Cal.App.4th 388, 393 [44 Cal. Rptr. 2d 641].) Thus, these agreements are not binding on the children or the court . . . .

There is no doubt that the reach of the FAA's preemptive effect is vast and that a bill such as this is likely to be challenged on such grounds. However, the savings clause of the FAA provides some room that this bill arguably finds itself. The clause provides that arbitration provisions are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." California law has long held that contracts involving minors are subject to the power of disaffirmance. This bill simply extends this right of affirmance to an extremely limited circumstance where a school enrollment agreement is construed to require the minor to waive legal rights arising out of a criminal sexual assault or criminal sexual battery on that minor. It puts such agreements on equal footing with agreements that a minor enters into themselves, regardless of whether they involved an arbitration agreement.

In addition, the bill states the following findings and declaration:

> The Legislature finds and declares that it is unconscionable for a parent, on behalf of the parent's minor child, to be required to waive a legal right, remedy, forum, proceeding, or procedure, including the right to file and pursue a civil action, belonging to that minor child with respect to claims arising out of a criminal sexual assault or criminal sexual battery as a condition of enrollment in an educational institution.

The bill thus urges that it does not run afoul of the FAA because its enforcement would simply be applying a well-recognized ground for the revocation of a contract, unconscionability, in the very limited circumstances laid out in the bill. The author writes:

> Unlike contracts for services or other business ventures, a student does not have the ability to opt-out of their education. California law requires minors to attend school, and education is crucial to their future success. The Federal Arbitration Act does not speak to the issue of a parent's capacity to contractually bind a minor. Further, childhood sexual assault

is an unconscionable and unforeseeable circumstance during the signing of a contract. The unconscionable standard is continually upheld even after *Concepcion*. Thus, this is an issue that we can act on at the state level.

SUPPORT

Capitol Resource Institute
Children's Advocacy Institute at the University of San Diego, School of Law
Consumer Attorneys of California

OPPOSITION

California Chamber of Commerce

RELATED LEGISLATION

Pending Legislation: SB 762 (Wieckowski, 2021) requires arbitration providers in consumer or employee arbitrations to send invoices, at specified times and setting forth amounts due and due dates, for costs and fees required to be paid by the business or employer who drafted the contract. This bill is currently in the Assembly Judiciary Committee.

Prior Legislation:

AB 3271 (Kiley, 2020) was identical to the current bill. It was never heard in the Senate Judiciary Committee due to the COVID-19 pandemic.

AB 51 (Gonzalez, Ch. 711, Stats. 2019) prohibits requiring applicants for employment or employees to waive their right to a judicial forum as a condition of employment or continued employment.

AB 2617 (Weber, Ch. 910, Stats. 2014) imposed specified, prospective restrictions on the contractual waivers of rights under the Ralph Civil Rights Act and the Tom Bane Civil Rights Act. A California Court of Appeals struck down AB 2617 on preemption grounds. (*Saheli v. White Memorial Medical Center* (2018) 21 Cal.App.5th 308.)

AB 1715 (Committee on Judiciary, 2003) would have provided that any waiver of rights or procedures under FEHA must be knowing, voluntary, and not made as a condition of employment or continued employment. AB 1715 also would have invalidated arbitration agreements between employers and employees that relate to employment practices covered by FEHA that are required as a condition of employment or continued employment. Governor Davis vetoed AB 1715, expressing concern about adversely affecting the ability of California business to resolve disputes in a cost-effective manner.

PRIOR VOTES:

Assembly Floor (Ayes 72, Noes 0)
Assembly Judiciary Committee (Ayes 11, Noes 0)

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