

Date of Hearing: April 11, 2018

ASSEMBLY COMMITTEE ON EDUCATION
Patrick O'Donnell, Chair
AB 2128 (Kiley) – As Amended March 22, 2018

[Note: This bill is double referred to the Committee on Judiciary and will be heard by that committee as it relates to issues under its jurisdiction.]

SUBJECT: School employees: dismissal or suspension: hearings: evidence

SUMMARY: Includes sexual harassment in the definition of egregious misconduct for purposes of permanent employee dismissal; and, authorizes a decision relating to the dismissal or suspension of an employee to be made based on evidence of specified allegations more than four years in the past. Specifically, **this bill:**

- 1) Authorizes, for purposes of permanent employee dismissal hearings, testimony and evidence relating to matters that occurred more than four years before the date of the filing of the notice, for allegations of inappropriate physical contact, an inappropriate verbal remark, sending a sexually suggestive or inappropriate communication to a pupil, or sexual harassment.
- 2) Authorizes, for purposes of permanent employee dismissal hearings, evidence of records regularly kept by the governing board of the school district concerning the employee to be introduced, and authorizes a decision relating to the dismissal or suspension of an employee to be made based on charges or evidence of any nature relating to matters occurring more than four years before the filing of the notice, for allegations of inappropriate physical contact, an inappropriate verbal remark, sending a sexually suggestive or inappropriate communication to a pupil, or sexual harassment.

EXISTING LAW:

- 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. (Education Code 44932)

- 2) Defines “egregious misconduct” exclusively as immoral conduct that is the basis for sexual misconduct, controlled substances, child abuse and neglect offenses. (Education Code 44932)
- 3) Prohibits a witness to testify at an employment dismissal hearing except upon oath or affirmation. Testimony shall not be given or evidence shall not be introduced relating to matters that occurred more than four years before the date of the filing of the notice, except allegations of sexual misconduct and child abuse and neglect offenses. (Education Code 44944)
- 4) Evidence of records regularly kept by the governing board of the school district concerning the employee may be introduced, but no decision relating to the dismissal or suspension of an employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years before the filing of the notice, except allegations of sexual misconduct and child abuse and neglect offenses. (Education Code 44944)

FISCAL EFFECT: Unknown

COMMENTS: This bill adds sexual harassment to the definition of egregious misconduct, allowing a school district to use an expedited dismissal process when a teacher sexually harasses a student or a fellow employee. The bill further authorizes a decision relating to the dismissal or suspension of an employee to be made based on evidence of specified allegations more than four years in the past. Specifically, the bill authorizes evidence that is more than four years old to be presented for allegations of inappropriate physical contact, an inappropriate verbal remark, sending a sexually suggestive or inappropriate communication to a pupil, or sexual harassment.

The author's intent is to allow evidence of inappropriate sexual behavior on the part of a teacher directed at a student to be considered in a dismissal hearing, when that evidence is more than four years old. While existing law authorizes this evidence if it relates to child abuse or sexual misconduct, the law does not allow evidence of less explicit, yet still unequivocally inappropriate behavior. As an example, a teacher that gives back rubs to students or makes remarks about a student's body that are sexual in nature is clearly demonstrating inappropriate behavior. If that behavior does not rise to the level of the definition of child abuse in the penal code, then districts cannot use that evidence if it is more than four years old. This bill would allow such evidence to be presented at a dismissal hearing.

Broad Terminology. This bill uses broad terminology such as "inappropriate physical contact," "inappropriate verbal remark" and "sending a sexually suggestive or inappropriate communication to a pupil." These terms can be interpreted in many ways. To clarify the author's intent with regard to inappropriate physical contact, the committee should consider amending the bill to clarify these terms and add references to penal code sections that describe this behavior in detail, such as lewd and lascivious acts in Penal Code Section 288 with a student of any age.

"Sexting" and Communication of a Sexual Nature to a Student. Penal code sections 288.2 and 228.3 describe communication with pupils depicting a minor engaging in sexual conduct and communication with pupils with the intent to commit lewd and lascivious acts (penal code 288). These code sections require that a person either send sexual images of a minor to another person, or they communicate with a minor with the intent to touch the minor in an arousing manner. The author's intent is for any communication with a student of a sexual nature to stay in the personnel file of a classified employee for more than four years, not just those communications with the

intent to touch a student. To clarify this intent, the committee should consider amending the bill to include "behavior or communication of a sexual nature with a pupil that is beyond the scope or requirements of the educational program, which may constitute misconduct" and reference to penal code section 288.3 (communication with pupils with the intent to commit lewd and lascivious acts). This will allow school districts to keep all allegations of behavior or communication of a sexual nature between a teacher and a pupil in the personnel file. However, the language is narrow enough so that it will not include appropriate academic conversations that may contain sexual content that might happen within the scope of the educational program such as sexual health education or biology class.

Past Evidence in a Dismissal Hearing. This bill authorizes testimony and evidence relating to matters that occurred in the past to be used for a dismissal decision if the testimony and evidence is related to allegations of inappropriate physical contact, an inappropriate verbal remark, sending a sexually suggestive or inappropriate communication to a pupil, or sexual harassment. Current law does not allow testimony about or evidence relating to these specific matters more than four years old during a suspension or dismissal hearing. Further, current law prohibits this information from being the basis of a decision relating to the dismissal or suspension of a certificated employee. Questions about this prohibition, however, have recently surfaced. There have been cases of immoral conduct by teachers where evidence older than four years, if it had been presented during the hearing, could have demonstrated a pattern of behavior and could have potentially given the school district and the Commission on Professional Competence a clearer picture of the ongoing inappropriate nature of the behavior.

This bill would allow for past evidence and testimony to be used to make a decision about whether or not to suspend or dismiss a certificated employee if that evidence is related to allegations of inappropriate physical contact, an inappropriate verbal remark, sending a sexually suggestive or inappropriate communication to a pupil, or sexual harassment. It seems that having all possible evidence to help illuminate patterns of behavior is reasonable during a dismissal hearing related to inappropriate physical and verbal contact between a teacher and a student.

According to the author, "Teacher dismissal policy in California was most recently updated in 2014 with the passage of AB 215 (Buchanan). This bill made a number of changes to teacher dismissal policy, including the following:

- Created an expedited process for removal of teachers who have committed "egregious misconduct"
- Revised the process for all other cases so that hearings are required to end within 7 months
- Created more transparency and accountability with regard to disclosing and reporting egregious misconduct and maintaining evidence in a teacher's file

Since the bill went into effect in 2015, a number of concerns have been raised that AB 215 did not allow administrators and local boards enough flexibility to deal teachers accused of inappropriate sexual misconduct with students. In many cases, teachers could not be dismissed because it was difficult to develop a pattern of behavior, due to the 4-year limitation on testimony and evidence for most allegations of misconduct."

Committee Amendment: Clarify the author's intent by removing the references "inappropriate physical contact," "inappropriate verbal remark" and "sending a sexually suggestive or

inappropriate communication to a pupil" and instead specify "behavior or communication of a sexual nature with a pupil that is beyond the scope or requirements of the educational program, which may constitute misconduct" shall be kept in a personnel file more than 4 years and may be used in a dismissal hearing and add references to Penal Code sections 288 with respect to a pupil of any age, and 288.3.

REGISTERED SUPPORT / OPPOSITION:

Support

Association of School Administrators
School Employers Association of California
Small School Districts Association

Opposition

None on file

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