

Date of Hearing: April 11, 2018

ASSEMBLY COMMITTEE ON EDUCATION  
Patrick O'Donnell, Chair  
AB 2234 (Jones-Sawyer) – As Amended April 3, 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 districts: certificated employees: dismissal or suspension proceedings: testimony of child witnesses: pupil information

**SUMMARY:** Specifies the following for purposes of a certificated or classified employee dismissal hearing: authorizes child witness testimony under 18 years of age, in egregious misconduct cases, be taken in a room outside the hearing room and be televised by two-way closed circuit television; requires a witness under 14 years of age or a dependent with cognitive impairment be protected from undue harassment or embarrassment; requires an adult attendant or victim advocate to be appointed for a child witness; and, requires a court order or subpoena to obtain pupil contact information. Specifically, **this bill:**

- 1) Expresses Legislative intent to provide the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the respondent, and the integrity of the judicial process. In exercising its discretion, the administrative law judge necessarily shall be required to balance the rights of the respondent against the need to protect a child witness and to preserve the integrity of the truth-finding function. This discretion is intended to be used selectively when the facts and circumstances in an individual case present compelling evidence of the need to use these alternative procedures.

***Child Witness Testimony***

- 2) Defines the following:
  - a) “Child” means any person under 18 years of age.
  - b) “Judge” means the administrative law judge presiding over the dismissal or suspension hearing.
  - c) “Respondent” means the party against whom a petition has been filed.
- 3) Authorizes, in an administrative proceeding involving an alleged egregious misconduct offense involving a child, counsel for a school district to apply for an order that the child’s testimony be taken in a room outside the hearing room and be televised by two-way closed circuit television. Specifies the person seeking such an order shall apply for the order at least seven days before the hearing date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.
- 4) Authorizes the judge to order that the testimony of the child be taken by closed-circuit television if the judge finds that the child is unable to testify in the hearing room in the presence of the respondent for any of the following reasons:

- a) The child is unable to testify because of fear.
  - b) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
  - c) The child suffers from a mental condition or other infirmity.
  - d) The conduct of the respondent or his or her counsel causes the child to be unable to continue testifying.
- 5) Requires the judge to support a ruling on the child's inability to testify with findings on the record. Specifies, in determining whether the impact on an individual child is so substantial as to justify an order, the judge may question the child 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 child's attendant, counsel for the school district, and counsel for the respondent.
- 6) Specifies, if the court orders the taking of testimony by television, counsel for the school district and counsel for the respondent, not including an attorney pro se for a party, shall be present in a room outside the hearing room with the child, and the child shall be subjected to direct and cross-examination. The following are the only other persons who may be permitted in the room with the child during the child's testimony:
- a) Any persons necessary to operate the closed-circuit television equipment.
  - b) Any other persons whose presence is determined by the judge to be necessary to the welfare and well-being of the child, including, but not necessarily limited to, a judicial officer or an adult attendant.
- 7) Requires, in making the determination, the judge to consider the age of the child, the relationship between the child and the respondent, any handicap or disability of the child, and the nature of the acts alleged to have been committed by the respondent. The child'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 counsel during the testimony. The closed-circuit television transmission shall relay into the room in which the child is testifying the respondent's image, and the voice of the judge.
- 8) Authorizes, in an administrative proceeding involving an alleged egregious misconduct offense involving a child, counsel for the school district to apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.
- 9) Requires, upon timely receipt of an application for a deposition, the court to make a preliminary finding regarding whether at the time of trial the child 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 child will be unable to testify because of fear.

- b) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
  - c) The child suffers from a mental condition or other infirmity.
  - d) The conduct of respondent or counsel for the respondent causes the child to be unable to continue testifying.
- 10) Specifies that if the judge finds that the child is likely to be unable to testify in open court for any of the reasons stated in #9 above, the judge shall order that the child's deposition be taken and preserved by videotape.
- 11) Requires the judge to preside at the videotaped deposition of a child, 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) Counsel for 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) Any other persons whose presence is determined by the judge to be necessary to the welfare and well-being of the child.
- 12) Requires the respondent to be afforded the rights applicable to respondents during trial, including the right to be confronted with the witness against the respondent and the right to cross-examine the child.
- 13) Authorizes, if the child 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 child is testifying, and the child'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 counsel during the deposition.
- 14) Requires the complete record of the examination of the child, 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, counsel for the respondent, and the respondent during ordinary business hours.
- 15) Authorizes, if at the time of trial the judge finds that the child is unable to testify, the judge to admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The judge shall support any ruling made with findings on the record.

- 16) Authorizes, upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the judge, for good cause shown, to order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the judge as the basis for granting the order.
- 17) 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 child.

#### ***Undue Harassment or Embarrassment***

- 18) Requires, with a witness under 14 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 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 or cognitive level of the witness.
- 19) Authorizes, when a child 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 child to testify in the open hearing room would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the specific compelling interest of the school district.

#### ***Victim Advocate***

- 20) Requires an adult attendant or victim advocate to be appointed for the child witness at the onset of the hearing. The adult attendant or victim advocate shall be present during all stages of the hearing to provide support to the child. If the respondent wants to contact the child witness, the respondent shall contact the adult attendant or victim advocate to coordinate any legal contact, including, but not necessarily limited to, an interview, deposition, or other trial preparation task. The respondent may not use a private investigator or similar professional to make contact with the child.
- 21) Authorizes the judge, at his or her discretion, to allow the adult attendant or victim advocate to remain in close physical proximity to or in contact with the child while the child testifies. An adult attendant or victim advocate shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child.
- 22) Requires an adult attendant or victim advocate, or other witness support person appointed by the judge, to assist the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

#### ***Evidence***

- 23) Specifies that evidence of a statement in a hearing to which this article is applicable is not made inadmissible by the hearsay rule when offered for purposes pursuant to Section 1220,

1221, 1222, 1226, 1228, 1228.1, 1230, 1231.3, 1235, 1236, 1237, 1238, 1241, 1250, 1251, 1252, 1253, 1280, 1284, 1291, 1293, 1294, 1310, 1324, 1370, or 1390 of the Evidence Code.

### ***Classified Employees***

- 24) Requires a hearing officer or other representative authorized to conduct a classified employee dismissal hearing at a merit system school district to conduct that hearing in accordance with Article 3.3 of Chapter 4 and Section 49077, related to child witness testimony.

### ***Court Order***

- 25) Specifies, once a court order or lawfully issued subpoena is issued to obtain pupil contact information, the school district shall make a reasonable effort to enter into an agreement with the entity that obtained the court order or subpoena requiring that the pupil contact information be maintained in a confidential manner.

### **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. (Education Code 45304)
- 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. (Education Code 45306)

### **EXISTING LAW related to *Certificated Employee Dismissal:***

- 3) 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)
- 4) Defines “egregious misconduct” exclusively as immoral conduct that is the basis for sexual misconduct, controlled substances, child abuse and neglect offenses. (Education Code 44932)

**EXISTING LAW** related to *Child Witness Testimony in Criminal Proceedings*:

- 5) 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.

- 6) 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.
- 7) 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.
- 8) 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.
- 9) 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.
- 10) 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.
- 11) Specifies that nothing in Penal Code section 1347 affects the disqualification of witnesses pursuant to Section 701 of the Evidence Code. (Penal Code 1347)

**EXISTING LAW** related to *Witness Questioning*:

- 12) 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. (Evidence Code 765)

**EXISTING LAW** related to *Victim Advocates*:

- 13) 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 (commencing with Section 13835) of Chapter 4 of Title 6 of Part 4. (Penal Code 679.04)

**FISCAL EFFECT:** Unknown

**COMMENTS:** *Certificated and Classified Dismissal Process and Child Witness Testimony:*

Existing law allows a school district to dismiss a certificated employee for egregious misconduct through an administrative hearing process. After the school board votes to dismiss a certificated employee, the teacher is notified and they have the right to demand a hearing. Egregious misconduct cases are processed on an expedited timeline. Counsel for both the school district and the teacher who is the subject of dismissal present evidence, including student testimony at a hearing presided by an administrative law judge (ALJ) and two teachers, known as the commission on professional competence. This bill would authorize an ALJ to allow minor witnesses to testify by closed-circuit television instead of being present in the hearing room with the teacher.

The dismissal process for classified employees at merit system school districts is similar to that of teachers. If the school board votes to dismiss a classified employee, the employee has 30 days to request a hearing before the personnel commission, which is a three member body. The case is then presented with witness testimony and evidence presented. This bill would authorize the personnel commission to allow minor witnesses to testify by closed-circuit television instead of being present in the hearing room with the employee. This bill only applies to merit system districts and does not apply to non-merit system districts that do not have personnel commissions. In non-merit school districts, a classified employee can appeal the school board's decision and request a hearing. The committee should consider whether this bill should apply to non-merit system school district appeal hearings. Further, the committee should recognize that often a classified employee is represented at the appeal hearing by a labor union representative, and is not represented by counsel. The committee should consider specifying that the labor union representative has the same duties as counsel, for purposes of this bill.



The authorization for child witnesses to testify by closed-circuit television instead of being present in the hearing room with the employee, is loosely modeled after the process in the criminal court system. A comparison of the specific requirements in Penal Code Section 1347 compared to this measure shows that some of the specific terminology is different. For example, this measure allows children to testify in this manner, if "the child is unable to testify because of fear," whereas Penal Code Section 1347 says a child may testify in this manner if, the testimony "would result in the child suffering serious emotional distress so that the child would be unavailable as a witness." The committee should note the differences in the specific language used to describe the necessity of using closed-caption television as a method for providing testimony.

Additionally, Penal Code Section 1347 applies to children 13 years old or younger, while this measure applies to children 18 years old or younger. It is unclear why there is a difference in age. The committee should consider whether to streamline the bill and have all the provisions apply to students of the same age.

***Victim Advocates:*** This bill requires minor witnesses to be assigned a victim advocate to be present with them at all proceedings. It is modeled after the victim advocates available to sexual assault victims in the criminal court system. It is unclear who will employ the victim advocates necessary during classified and certificated employee dismissal hearings. Will the victim advocates be employed and provided by the Office of Administrative Hearings? Will they be appointed by a non-profit organization?

***Undue Harassment or Embarrassment:*** This bill requires the judge to take special care to protect witnesses under 14 years of age, or a dependent person with a substantial cognitive impairment, from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The bill also requires the judge to take special care to ensure that questions are stated in a form that is appropriate to the age or cognitive level of the witness. This is modeled after similar provisions in the Evidence code. The committee should note that this provision applies to minors 14 years old and younger while the authorization to provide testimony via closed caption television applies to minors 18 years old and younger. The committee should consider whether to streamline the bill and have all the provisions apply to students of the same age.

***Court Order:*** This bill specifies, once a court order or lawfully issued subpoena is issued to obtain pupil contact information, the school district shall make a reasonable effort to enter into an agreement with the entity that obtained the court order or subpoena requiring that the pupil contact information be maintained in a confidential manner. Existing law for egregious misconduct cases requires contact information to be provided early in the process. It is unclear whether this requirement would add additional requirements before student contact information can be shared between the school district and the attorney representing the employee.

According to the author, "Testifying as a witness can be a stressful and potentially traumatic for a child. This is particularly true when the child has been the subject of alleged abuse. Almost every legal forum acknowledges the need to apply special protections for child witnesses, including family court, immigration court, as well as state and federal civil and criminal courts:

- Alternatives to live-court testimony, whether two-way closed circuit testimony, one-way closed circuit testimony, or a videotaped deposition are afforded under 18 U.S.C. § 3509(b), (e), (f), (h)-(i) and the California Penal Code § 1347 (criminal court).
- The ability of judges to exclude repetitious or incomprehensible questions that are inappropriate for the cognitive level of the witness is afforded under California Family Court Rule 5.250 and California Evidence Code § 765(b).
- The ability of a judge to appoint a victim advocate or of an adult attendant to a child witness at the onset of the proceeding is afforded in California Penal Code § 679.04 and § 679.08.

These protections do not exist in the administrative courts adjudicating the Education Code despite a large portion of the witnesses being under the age of 18. A comprehensive reform that provides administrative judges the ability to use these tools at their discretion and based on their assessment of the student victim/witness, is desperately needed."

**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."

**Committee Amendments:** Staff recommends the following amendments:

- 1) Clarify that the bill applies only to cases involving allegations of egregious misconduct.
- 2) For consistency, specify that the entirety of the bill shall apply to children age 18 and younger.
- 3) Specify that the bill shall apply to dismissal appeal hearings for merit based and non-merit based classified employees based on allegations as described in Education Code Sections 44010 or 44011, or in Sections 11165.2 to 11165.6 of the Penal Code.
- 4) Specify that the term "counsel for the respondent" shall also include an exclusive labor representative.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Association of California School Administrators  
Los Angeles Unified School District

**Opposition**

None on file

**Analysis Prepared by:** Chelsea Kelley / ED. / (916) 319-2087