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School Employees. Homosexuality

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Official Title and Summary Prepared by the Attorney General

SCHOOL EMPLOYEES. HOMOSEXUALITY. INITIATIVE STATUTE. Provides for filing charges against school teachers, teachers' aides, school administrators or counselors for advocating, soliciting, imposing, encouraging or promoting private or public sexual acts defined in sections 286(a) and 288a(a) of the Penal Code between persons of same sex in a manner likely to come to the attention of other employees or students; or publicly and indiscreetly engaging in said acts. Prohibits hiring and requires dismissal of such persons if school board determines them unfit for service after considering enumerated guidelines. In dismissal cases only, provides for two-stage hearings, written findings, judicial review. Financial impact: Unknown but potentially substantial costs to State, counties and school districts depending on number of cases which receive an administrative hearing.

Analysis by Legislative Analyst

Background:

Current law designates school district employees as either "certificated" or "classified". *Certificated* employees are teachers, counselors, administrators, and certain types of teacher aides. *Classified* employees include janitors, cafeteria workers, clerical employees, and most teacher aides. Both certificated and classified school employees may be dismissed for reasons set forth in state law.

Certificated employees may be dismissed for incompetency, insubordination, unfitness of service, immoral or unprofessional conduct, and conviction of a felony. The law does not specifically list homosexual behavior as a reason for dismissal. However, existing law provides for dismissal in cases where such behavior has led to (1) a felony conviction for crimes such as solicitation, sodomy or perversion, or (2) proven immoral conduct which results in a reduction of the employee's ability to perform effectively.

The law provides that a certificated employee charged with immoral conduct may be dismissed by a majority vote of the district school board following 30 days' notice. If the employee requests a hearing within this period a special commission called the Commission on Professional Competence is directed to hear the dismissal charges. This commission consists of (a) a person appointed by the employee, (b) a person appointed by the district school board, and (c) a state administrative hearing officer. The commission may uphold either the school board or the employee by a majority vote.

Proposal:

This proposition applies to all "certificated" employees and teacher aides, and would revise existing law as follows:

1. A district school board would be *required* to dismiss, or refuse to hire, any person who has engaged in homosexual *activity or conduct* if the board believes such activity renders the person unfit for service.

The proposition defines homosexual *activity* as the public or indiscreet commission of an act of sodomy or perversion (Penal Code Sections 286, 299a).

Homosexual *conduct* is defined as the "advocating, soliciting, imposing, encouraging or promoting private or public homosexual activity directed at, or likely to come to the attention of school children and/or other

employees." It is not clear how far the proposition's definition of homosexual conduct would extend current law. This would depend on how broadly or narrowly the "advocacy" or "promotion" of homosexual behavior is interpreted by school boards and the courts.

2. The district school board, rather than the Commission on Professional Competence, would hear the charges and could dismiss the employee by a majority vote of its members. Any judgment by the school board could be appealed to the courts.

Fiscal Effect:

According to the State Office of Administrative Hearings, the cost of a teacher dismissal hearing under existing law has averaged approximately \$5,000. This cost is based on all dismissal cases heard in 1976-77, and includes salaries of the hearing officer and court reporter, expenses of the other members of the Commission on Professional Competence, legal fees, and reimbursements to witnesses for lost time. These expenses are shared by the state, the school board, and the employee if the employee's dismissal is upheld. If the employee is reinstated, however, the board pays all expenses. Certain of these expenditures, particularly hearing officer costs and commission expenses, would be eliminated by the simplified hearing procedures contained in this proposal. This would reduce the average cost of dismissal proceedings involving homosexual employees to \$3,000-\$4,000.

The fiscal impact of the proposition would depend on the total number of hearings initiated. Lacking a precise definition of what constitutes "homosexual conduct", we have no basis on which to make an estimate. Actions by school boards and the courts, especially those that determine what constitutes "homosexual conduct", will play important roles in determining the fiscal effect of this measure. Because the proposition could legalize dismissal for any public homosexual activity or conduct regardless of its criminality, it might result in the initiation of many dismissal proceedings. We thus conclude that the proposition could result in substantial costs to the state, school districts, and school employees due to an increase in dismissal hearings, plus additional court costs to the state and county governments.

Text of Proposed Law

This initiative measure proposes to add sections to the Education Code. It does not expressly amend any existing law; therefore, the provisions to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Section 44837.5 is added to the Education Code, to read:

44837.5 One of the most fundamental interests of the State is the establishment and the preservation of the family unit. Consistent with this interest is the State's duty to protect its impressionable youth from influences which are antithetical to this vital interest. This duty is particularly compelling when the state undertakes to educate its youth, and, by law, requires them to be exposed to the state's chosen educational environment throughout their formative years.

A schoolteacher, teacher's aide, school administrator or counselor has a professional duty directed exclusively towards the moral as well as intellectual, social and civic development of young and impressionable students.

As a result of continued close and prolonged contact with schoolchildren, a teacher, teacher's aide, school administrator or counselor becomes a role model whose words, behavior and actions are likely to be emulated by students coming under his or her care, instruction, supervision, administration, guidance and protection.

For these reasons the state finds a compelling interest in refusing to employ and in terminating the employment of a schoolteacher, a teacher's aide, a school administrator or a counselor, subject to reasonable restrictions and qualifications, who engages in public homosexual activity and/or public homosexual conduct directed at, or likely to come to the attention of, schoolchildren or other school employees.

This proscription is essential since such activity and conduct undermines that state's interest in preserving and perpetuating the conjugal family unit.

The purpose of sections 44837.6 and 44933.5 is to proscribe employment of a person whose homosexual activities or conduct are determined to render him or her unfit for service.

SECTION 2. Section 44837.6 is added to the Education Code, to read:

44837.6 (a) The governing board of a school district shall refuse to hire as an employee any person who has engaged in public homosexual activity or public homosexual conduct should the board determine that said activity or conduct renders the person unfit for service.

(b) For purposes of this section, (1) "public homosexual activity" means the commission of an act defined in subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such act, at the time of its commission, constituted a crime;

(2) "Public homosexual conduct" means the advocating, soliciting, imposing, encouraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees; and

(3) "Employee" means a probationary or permanent certificated teacher, teacher's aide, school administrator or counselor.

(c) In evaluating the public homosexual activity and/or the public homosexual conduct in question for the purposes

of determining an applicant's unfitness for service as an employee, a board shall consider the factors delineated in Section 44933.5(f).

SECTION 3. Section 44933.5 is added to the Education Code, to read:

44933.5 (a) In addition to the grounds specified in Sections 44932, 44948 and 44949, or any other provision of law, the commission of "public homosexual activity" or "public homosexual conduct" by an employee shall subject the employee to dismissal upon a determination by the board that said activity or conduct renders the employee unfit for service. Dismissal shall be determined in accordance with the procedures contained in this section.

(b) For the purposes of this section, (1) "public homosexual activity" means the commission of an act defined in subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such act, at the time of its commission, constituted a crime;

(2) "public homosexual conduct" means the advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other employees; and

(3) "Employee" means a probationary or permanent certificated teacher, teacher's aide, school administrator or counselor.

(c) Notwithstanding any other provision of law regarding dismissal procedures, the governing board, upon the filing of written charges that the person has committed public homosexual activity or public homosexual conduct, duly signed and verified by the person filing the charges, or upon written charges formulated by the governing board, shall set a probable cause hearing on the charges within fifteen (15) working days after the filing or formulation of written charges and forward notice to the employee of the charges not less than ten (10) working days prior to the probable cause hearing. The notice shall inform the employee of the time and place of the governing board's hearing to determine if probable cause exists that the employee has engaged in public homosexual activity or public homosexual conduct. Such notice shall also inform the employee of his or her right to be present with counsel and to present evidence which may have bearing on the board's determination of whether there is probable cause. This hearing shall be held in private session in accordance with Govt. Code § 54957, unless the employee requests a public hearing. A finding of probable cause shall be made within thirty (30) working days after the filing or formulation of written charges by not less than a simple majority vote of the entire board.

(d) Upon a finding of probable cause, the governing board may, if it deems such action necessary, immediately suspend the employee from his or her duties. The board shall, within thirty-two (32) working days after the filing or formulation of written charges, notify the employee in writing of its findings and decision to suspend, if imposed, and the board's reasons therefor.

(e) Whether or not the employee is immediately suspended, and notwithstanding any other provision of law, the governing board shall, within thirty (30) working days after the notice of the finding of probable cause, hold a hearing on the

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Argument in Favor of Proposition 6

Your rights as a parent, a citizen, and a taxpayer are under attack.

A coalition of homosexual teachers and their allies are trying to use the vast power of our school system to impose their own brand of non-morality on your children. Recently a quarter of a million of these "gay rights" activists demonstrated in San Francisco on behalf of allowing homosexuality to be taught in the classroom.

This year, we taxpayers are paying \$11 billion to support our schools. That is more money than we spend on police, fire protection, hospitals, or any other service of government. We have a right to demand that those schools teach our children that there really *is* a difference between right and wrong.

This measure will provide for the removal of any teacher, teacher's aide, school administrator or counselor who advocates, solicits, encourages, or promotes homosexual behavior. In the case of *Gaylord vs. Tacoma 1977*, the Supreme Court of the United States upheld the right of a local school board to dismiss a homosexual teacher by refusing to review the case.

As parents, we see the symptoms of moral decay all around us: children hooked on hard drugs, sex and violence glorified in the mass media, gang wars, casual pre-marital sex among teenagers, and all the rest.

It is not enough to merely tolerate the family, we must create an atmosphere in which it will flourish.

We want to protect our children against these things, but without the help of the schools, we are helpless. Our teachers spend more time with our children than we do, and if they fail to do the job, what can we do?

We know that the example of an admired teacher can influence an impressionable young mind more than a library full of books. If that teacher respects the essential decencies of American life, he can set the feet of our children on the path of moral responsibility, but if that teacher questions the most elementary truths of our society, his influence can lead to tragedy.

We know that the undermining of traditional values which began in the '60's has left many Americans in a moral vacuum which they attempt to fill with drugs, alcohol, and "alternative life styles". We don't question the right of adults to solve their problems as they see fit, but we do object to their imposing their solutions on our children.

In June, we Californians gave the nation a new idea. The Jarvis Amendment has made fiscal responsibility respectable again and is serving as a model and inspiration for the rest of the nation.

Now the nation is watching us again. We're going to put America back on the high road, not because the politicians want it, but because the people demand it.

Your YES vote on Proposition 6 is a vote for the rights of the next generation of Americans.

JOHN V. BRIGGS
Senator, State of California
35th District

DOCTOR RAY BATEMA
Pastor, Central Baptist Church

F. LA GARD SMITH
Professor of Law

Rebuttal to Argument in Favor of Proposition 6

SENATOR BRIGGS suggests that all of our social evils—drugs—violence—immorality—will be eliminated by his elixir—PROPOSITION 6. THIS IS RIDICULOUS! Shifting the burden of curing society's ills to our teachers is unwarranted and unfair.

SENATOR BRIGGS and his followers would have you believe that teachers are promoting homosexuality in the classroom. THIS IS NONSENSE! Any teacher who did so would be fired, and we have the laws to do so right now.

SENATOR BRIGGS attempts to link his scheme with Proposition 13.

THIS IS A CONTRADICTION! PROPOSITION 6 would add another layer of unneeded and costly bureaucratic procedure to the system. Jarvis/Gann sought to eliminate such unnecessary government interference.

THESE ARE THE FACTS ABOUT PROPOSITION 6:

PROPOSITION 6 IS NOT NEEDED.
PROPOSITION 6 WILL CAUSE PROBLEMS IN SCHOOLS AND COMMUNITIES.
PROPOSITION 6 WILL COST TAXPAYERS MONEY.
PROPOSITION 6 IS BAD LAW.
VOTE NO ON PROPOSITION 6.

JANE MCKASKLE MURPHY
San Francisco Police Commissioner

RAOUL TEILHET
President, California Federation of Teachers,
AFT, AFL-CIO

EDMUND D. EDELMAN
Los Angeles County Supervisor, 3rd District

Argument Against Proposition 6

PROPOSITION 6 WOULD LEGISLATE INTOLERANCE AND HARASSMENT, unnecessarily increasing the power of government to invade the privacy of many of our citizens. If enacted, it would misuse tax dollars and force school boards to ignore educational needs to spend time and money on enforcement of this discriminatory legislation.

Proponents of this initiative mislead the public when they claim legislation must be enacted to protect students against the possibility of educational personnel advocating a particular way of life. The State Department of Education says unequivocally that sufficient and effective laws and regulations now exist to safeguard any student from misconduct by any teacher—homosexual or heterosexual.

Although they are aware that new laws are unnecessary, sponsors of this legislation seek to fire every homosexual teacher, aide, administrator or counselor, no matter how competent, because of some aspect of his or her *private* life. This law will require school boards to invade the privacy and threaten the careers of thousands of teachers and other school employees. Rumors will lead to investigations of families, friendships, home

lives, not only of teachers but also of students. As a result the educational process will be severely disrupted.

Not content to legislate such discriminatory power and waste tax dollars, initiative sponsors want to limit the free speech and objective teaching of *all* educators, of any sexual preference.

This proposed law ignores the wishes of those who seek less government in their lives and stifles the voices of those who believe in the right to privacy and civil liberties. *It legislates repression that threatens every individual and group.*

We don't need to squander tax dollars to invade privacy and disrupt school systems. Fair and effective laws now exist to protect our students. **DON'T INSTITUTE WITCH HUNTS.**

VOTE NO ON SIX.

JANE MCKASKLE MURPHY
San Francisco Police Commissioner

RAOUL TEILHET
*President, California Federation of Teachers,
AFT, AFL-CIO*

EDMUND D. EDELMAN
Los Angeles County Supervisor, 3rd District

Rebuttal to Argument Against Proposition 6

The homosexuals and their supporters tell us the present law is just fine.

Well, let them tell that to the citizens of Healdsburg, California. They know better.

This quiet little town in the Sonoma wine country has been fighting unsuccessfully to remove a second grade teacher who has openly admitted his homosexuality and has campaigned publicly to keep homosexual teachers in our public schools.

School officials tell parents their hands are tied; the existing law leaves them powerless to deal with the problem.

In desperation, twelve families have removed their children from the school rather than expose them to the example of an openly homosexual teacher.

Four of the five members of the Healdsburg school board have voted to support Proposition 6. They see it as the last hope for restoring to parents the freedom to control their own schools.

A small but powerful group of militant homosexuals is determined to impose its lifestyle on the majority of

decent citizens. Just who is really being harassed, the homosexual advocates or the public?

According to homosexual leaders many homosexual teachers have kept silent until now but if Proposition 6 fails they will "go public" and announce their lifestyle to the world, thus providing their students with a living example of the acceptability of the homosexual way of life.

So the next time someone tells you "It can't happen here" tell him to talk to the parents of Healdsburg. Those parents know we need Proposition 6.

VOTE YES ON PROPOSITION 6.

JOHN V. BRIGGS
*Senator, State of California
35th District*

DOCTOR RAY BATEMA
Pastor, Central Baptist Church

F. LA GARD SMITH
Professor of Law

(g) "Fully Enclosed" means closed in by a ceiling or roof and by walls on all sides.

(h) "Health Facility" has the meaning set forth in Section 1250 of the Health and Safety Code, whether operated by a public or private entity.

(i) "Place of Employment" means any area under the control of a public or private employer which employees normally frequent during the course of employment but to which members of the public are not normally invited, including, but not limited to, work areas, employee lounges, restrooms, meeting rooms, and employee cafeterias. A private residence is not a "place of employment."

(j) "Polling Place" means the entire room, hall, garage, or other facility in which persons cast ballots in an election, but only during such time as election business is being conducted.

(k) "Private Hospital Room" means a room in a health facility containing one bed for patients of such facility.

(l) "Public Place" means any area to which the public is invited or in which the public is permitted or which serves as a place of volunteer service. A private residence is not a "public place." Without limiting the generality of the foregoing, "public place" includes:

(i) arenas, auditoriums, galleries, museums, and theaters;

(ii) business establishments dealing in goods or services to which the public is invited or in which the public is permitted;

(iii) instrumentalities of public transportation while operating within the boundaries of the State of California;

(iv) facilities or offices of physicians, dentists, and other persons licensed to practice any of the healing arts regulated under Division 2 of the Business and Professions Code;

(v) elevators in commercial, governmental, office, and residential buildings;

(vi) public restrooms;

(vii) jury rooms and juror waiting rooms;

(viii) polling places;

(ix) courtesy vehicles.

(m) "Restaurant" has the meaning set forth in Section 28522 of the Health and Safety Code except that the term "restaurant" does not include an employee cafeteria or a tavern or cocktail lounge if such tavern or cocktail lounge is a "bar" pursuant to Section 25939(a).

(n) "Retail Tobacco Store" means a retail store used primarily for the sale of smoking products and smoking accessories and in which the sale of other products is incidental. "Retail tobacco store" does not include a tobacco department of a retail store commonly known as a department store.

(o) "Rock Concert" means a live musical performance commonly known as a rock concert and at which the musicians use sound amplifiers.

(p) "Semi-Private Hospital Room" means a room in a health facility containing two beds for patients of such facility.

(q) "Smoking" means and includes the carrying or holding of a lighted cigarette, cigar, pipe, or any other lighted smoking equipment used for the practice commonly known as smoking, or the intentional inhalation or exhalation of smoke from any such lighted smoking equipment."

SECTION 2: Severability

If any provision of Chapter 10.7 of the Health and Safety Code or the application thereof to any person or circumstance is held invalid, any such invalidity shall not affect other provisions or applications of said Chapter which can be given effect without the invalid provision or application, and to this end, the provisions of said Chapter are severable.

SECTION 3: Effective Date

Chapter 10.7 of the Health and Safety Code becomes effective 90 days after approval by the electorate.

TEXT OF PROPOSITION 6—Continued from page 29

truth of the charges upon which a finding of probable cause was based and whether such charges, if found to be true, render the employee unfit for service. This hearing shall be held in private session in accordance with Govt. Code § 54957, unless the employee requests a public hearing. The governing board's decision as to whether the employee is unfit for service shall be made within thirty (30) working days after the conclusion of this hearing. A decision that the employee is unfit for service shall be determined by not less than a simple majority vote of the entire board. The written decision shall include findings of fact and conclusions of law.

(f) Factors to be considered by the board in evaluating the charges of public homosexual activity or public homosexual conduct in question and in determining unfitness for service shall include, but not be limited to: (1) the likelihood that the activity or conduct may adversely affect students or other employees; (2) the proximity or remoteness in time or location of the conduct to the employee's responsibilities; (3) the extenuating or aggravating circumstances which, in the judgment

of the board, must be examined in weighing the evidence; and (4) whether the conduct included acts, words or deeds, of a continuing or comprehensive nature which would tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct.

(g) If, by a preponderance of the evidence, the employee is found to have engaged in public homosexual activity or public homosexual conduct which renders the employee unfit for service, the employee shall be dismissed from employment. The decision of the governing board shall be subject to judicial review.

SECTION 4. Severability Clause

If any provision of this enactment or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this enactment which can be given effect without the invalid provision of application, and to this end the provisions of this enactment are severable.

TEXT OF PROPOSITION 7—Continued from page 33

found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Sec. 5. Section 190.2 of the Penal Code is repealed.

190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which

one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physi-