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# 4C

## Information/Action

### *Professional Practices Committee*

#### **Division of Professional Practices' and Committee of Credentials' Workload and Statutory Framework – Efficiency, Due Process, and Public Safety Implications**

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**Executive Summary:** This item addresses the existing challenges to efficiency, due process, and public safety, created by the rising workload of the Division of Professional Practices and Committee of Credentials, as well as the statutory framework currently governing the educator disciplinary process.

**Recommended Action:** Staff recommends that the Commission authorize Commission staff to engage with stakeholders and seek legislative solutions.

**Presenters:** Linda Schneider, Senior Assistant Attorney General, Licensing Section, Office of the Attorney General, and Vanessa Whitnell, General Counsel, Division of Professional Practices

#### **Strategic Plan Goal**

##### ***I. Educator Quality***

- d) Effectively, efficiently, and fairly monitor the fitness of all applicants and credential holders to work with California students.

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## **Division of Professional Practices' and Committee of Credentials' Workload and Statutory Framework – Efficiency, Due Process, and Public Safety Implications**

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### **Introduction**

The Commission makes appointments to the Committee of Credentials (“Committee”) pursuant to Education Code section 44240. The Committee is comprised of seven members appointed by the Commission and consists of one elementary teacher, one secondary teacher, one school board member, one school administrator employee, and three public representatives.

The Committee meets three days each month at the Commission offices in Sacramento. Members review allegations of educator misconduct to determine whether there is probable cause to recommend discipline.

This item addresses the existing challenges to efficiency, due process, and public safety, created by the rising workload of the Commission’s Division of Professional Practices (“DPP”) and the Committee, as well as the statutory framework currently governing the educator disciplinary process. The Commission should direct and authorize Commission staff to engage with stakeholders and seek legislative solutions.

### **Background**

Prior to the 2011 Bureau of State Audits Report as to DPP’s work, the Committee reviewed 45-50 cases per month at Initial Review. Effective May 2013, through the next four fiscal years, the Committee reviewed approximately 90 cases per month at Initial Review and was able to maintain equilibrium and ensure efficient resolution of educator misconduct cases. Due to the increased number of cases being opened in DPP, an average of 95 cases was presented to the Committee each month beginning in Fiscal Year 2017-18, with a high of 100 cases in June 2018.

The increased number of cases presented to the Committee each month was necessary to manage the growth of the overall educator discipline case load in DPP without experiencing a backlog. However, staff is now submitting an average of 105 cases per month to the Committee for Initial Review, as the case load in DPP has continued to rise. The number of cases presented to the Committee for Initial Review in October 2018 was actually 106. Furthermore, the number of appearances requested by educators has already required staff to identify cases to move to future Committee meetings. This continued triage is not sustainable, as the Committee process is becoming severely overburdened by the volume of cases.

In Fiscal Year 2017-18, DPP’s monthly case volume averaged 2,812 open cases, reflecting a “new normal,” as compared to the prior normal range of 2,400–2,600 open cases in previous

years. The large increase in volume corresponds with the upsurge in applications received. This number continues to increase. In September 2018, the number of open cases in DPP was 2,876. In October, that number increased to 2,954. DPP's monthly caseload may soon exceed 3,000 cases. This number is substantially higher than the monthly caseload managed by DPP directly following the Audit, which averaged around 2,300. In September 2018, [DPP's Annual Workload Report](#) was presented to the Commission, providing a detailed analysis as to the increase in case numbers. During the presentation, Commission members expressed concern as to both DPP's and the Committee's abilities to withstand further increase in the case numbers; the issues of burnout and avoidance of any future backlogs were primary concerns.

Definitively, the Committee simply cannot evaluate much more than 105 cases per month at Initial Review. As the caseload increases in DPP, staff can no longer raise the case numbers presented to the Committee. Doing so will present risk to the due process of credential holders and deprive the Committee of adequate time to hear a case. Similarly, it is problematic for DPP to delay cases for presentation to the Committee in order to avoid overburdening the Committee. Delaying cases from Committee review decreases efficiency, creates a backlog, and may present a significant risk to the safety of school children.

As DPP management has been monitoring the increasing case load, the Commission's Executive Director and General Counsel have engaged in conversations with the administration, Department of Finance, and the Office of the Attorney General in order to identify solutions. During this process, as counsel to the Commission, Senior Assistant Attorney General Linda Schneider has identified challenges to efficiency, due process, and public safety, endemic in the current statutory framework governing the educator disciplinary process and has suggested amendments for improvement.

Ms. Schneider has identified the following concerns as to the current statutory scheme:

1. The statutory requirement that only the Committee shall make the determination that probable cause exists for adverse action has overburdened the Committee with the sheer number of cases it must review. For other agencies, probable cause is a threshold determination that is generally made by enforcement staff. The workload of the Committee could be reduced and its expertise better directed for both efficiency and effectiveness if this initial probable cause determination was made by DPP staff.
2. The statutory scheme contains a legal error requiring the Commission to initiate an adjudicatory hearing by filing an accusation where the Committee has found probable cause for adverse action, which is an insufficient legal basis to institute disciplinary action. California courts have held that due process requires that administrative charges that may result in a license being revoked, suspended, limited, or conditioned must be supported by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-857.) This legal anomaly in the statutory scheme is the reason for the long-standing problem of lack of investigation

to produce sufficient admissible evidence upon which prosecution of adverse action cases must be founded.

3. The statutory requirement that each allegation of an act or omission by an applicant or credential holder for which they may be subject to adverse action shall be presented to the Committee of Credentials has overburdened the Committee with the sheer number of cases it must review which, in turn, delays the adverse action process.
4. The Committee's jurisdiction to investigate and commence Initial Review is severely limited to just six categories of documents<sup>1</sup>. These limitations impair the Commission's public protection mission and delay the review process.
5. Although not statutory, the Committee is further burdened by regulation, requiring it to recommend any proposed settlement of an adverse action case before it is submitted to the Commission to accept or decline. The decision to resolve a case by way of settlement rests exclusively with the Commission. The requirement for the Committee to recommend settlement falls outside its current function of determining probable cause and adds unnecessary delay for a proposed settlement to reach the Commission for decision.

Ms. Schneider recommends that the Commission seek to amend the current statutory and regulatory scheme to address these concerns, including broadening the Commission's jurisdiction under Education Code section 44242.5 (see attached) to investigate cases beyond the six restricted categories in the interest of public protection. Should the Commission agree with Ms. Schneider's concerns and proposals to broaden jurisdiction, it is likely that case numbers before the Committee will significantly increase by an unknown number, possibly by the hundreds.

Given the already existing challenges created by the rising workload of the Division of Professional Practices and Committee of Credentials, should the Commission agree with Ms. Schneider's concerns and proposals, it is likely that DPP personnel would need to make probable cause determinations in conjunction with Disciplinary Guidelines adopted by the Commission, similar to other professional licensing agencies. The Committee process is not sustainable long-term and the Commission will need to consider another more reasonable role for the Committee, such as conducting a smaller phase of the investigatory process. These changes will require legislation and will have the following long-term benefits:

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<sup>1</sup> The six categories of initial jurisdiction are generally limited to 1) official records of arrest, 2) affidavits signed under penalty of perjury by affiants with personal knowledge, 3) reports from employing school districts of final employment actions while allegations of misconduct are pending or due to allegations of misconduct, 4) a notice from an employer of a complaint of sexual misconduct coupled with a declaration under penalty of perjury evidencing personal knowledge of the sexual misconduct, 5) notices of contract abandonment, use of pupil data for business purposes, reports of false fiscal expenditures, subversion or attempted subversion of licensing exams, and 6) disclosure or failure to disclose a conviction, licensing action, or pending criminal or licensing investigation on an application to the Commission.

- Ensures the Commission’s disciplinary process complies with due process requirements of law and that sufficient investigation is conducted to collect evidence to meet the burden of proof to impose discipline.
- Utilizes DPP staff for probable cause determinations, similar to other licensing agencies, so probable cause assessment is not restricted by the time limits of a three-day meeting.
- Avoids Committee burnout and member turnover.
- Supports the Commission in defining its own regulatory guidelines for discipline for DPP staff to follow, ensuring consistency and due process.
- Is more efficient than the Committee review process, saving six months to one year in adjudication of a final adverse action or dismissal.
- Ensures broader jurisdiction, and thereby broader investigation, increasing public protection.

**Staff Recommendation**

Staff requests that the Commission authorize Commission staff to engage with stakeholders and seek legislative solutions.

**Attachment A**  
**Education Code Section 44242.5**

(a) Each allegation of an act or omission by an applicant for, or holder of, a credential for which he or she may be subject to an adverse action shall be presented to the Committee of Credentials.

(b) The committee has jurisdiction to commence an initial review upon receipt of any of the following:

(1) (A) Official records of the Department of Justice, of a law enforcement agency, of a state or federal court, and of any other agency of this state or another state.

(B) For purposes of subparagraph (A), "agency of this state" has the same meaning as that of "state agency" as set forth in Section 11000 of the Government Code.

(2) An affidavit or declaration signed by a person or persons with personal knowledge of the acts alleged to constitute misconduct.

(3) (A) A statement from an employer notifying the commission that, as a result of an allegation of misconduct, or while an allegation of misconduct is pending, a credentialholder has been dismissed, nonreelected, suspended for more than 10 days, or placed pursuant to a final adverse employment action on unpaid administrative leave for more than 10 days, or has resigned or otherwise left employment.

(B) The employer shall provide the notice described in subparagraph (A) to the commission not later than 30 days after the dismissal, nonreelection, suspension, placement on unpaid administrative leave, resignation, or departure from employment of the employee.

(C) For purposes of subparagraphs (A) and (B), a change in status due solely to unsatisfactory performance pursuant to paragraph (4) of subdivision (a) of Section 44932 or a reduction in force pursuant to Sections 44955 to 44958, inclusive, is not a result of an allegation of misconduct.

(4) A notice from an employer that a complaint was filed with the school district alleging sexual misconduct by a credentialholder. Results of an investigation by the committee based on this paragraph shall not be considered for action by the committee unless there is evidence presented to the committee in the form of a written or oral declaration under penalty of perjury that confirms the personal knowledge of the declarant regarding the acts alleged to constitute misconduct.

(5) A notice from a school district, employer, public agency, or testing administrator of a violation of Section 44420, 44421.1, 44421.5, or 44439.

(6) (A) An affirmative response on an application submitted to the commission as to any conviction, adverse action on, or denial of, a license, or pending investigation into a criminal allegation or pending investigation of a noncriminal allegation of misconduct by a governmental licensing entity.

(B) Failure to disclose any matter set forth in subparagraph (A).

(c) An initial review commences on the date that the written notice is mailed to the applicant or credentialholder that his or her fitness to hold a credential is under review. Upon commencement of a formal review pursuant to Section 44244, the committee shall investigate

all alleged misconduct and the circumstances in mitigation and aggravation. The investigation shall include, but not be limited to, all of the following:

(1) Investigation of the fitness and competence of the applicant or credentialholder to perform the duties authorized by the credential for which he or she has applied or that he or she presently holds.

(2) Preparation of a summary of the applicable law, a summary of the facts, contested and uncontested, and a summary of any circumstances in aggravation or mitigation of the allegation.

(3) Determination of probable cause for an adverse action on the credential. If the allegation is for unprofessional or immoral conduct, the committee, in any formal review conducted pursuant to Section 44244 to determine probable cause, shall permit the employer of the credentialholder to be present while testimony is taken. If the allegation of unprofessional or immoral conduct involves sexual abuse, the employer shall be examined in the meeting for any relevant evidence relating to the sexual abuse.

(A) If the committee determines that probable cause for an adverse action does not exist, the committee shall terminate the investigation.

(B) If the committee determines that probable cause for an adverse action on the credential exists, upon receipt of a request from an applicant or a credentialholder pursuant to Section 44244.1, the commission shall initiate an adjudicatory hearing, as prescribed by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, by filing an accusation or statement of issues.

(d) The committee has jurisdiction to commence a formal review pursuant to Section 44244 upon receipt of any of the following:

(1) (A) Official records of a state or federal court that reflect a conviction or plea, including a plea of nolo contendere, to a criminal offense or official records of a state court that adjudge a juvenile to be a dependent of the court pursuant to Section 300 of the Welfare and Institutions Code due to allegations of sexual misconduct or physical abuse by a credentialholder or applicant.

(B) Nothing in subparagraph (A) shall be construed to relieve the commission from the confidentiality provisions, notice, and due process requirements set forth in Section 827 of the Welfare and Institutions Code.

(2) An affidavit or declaration signed by a person or persons with personal knowledge of the acts alleged to constitute misconduct.

(3) A statement described in paragraph (3) of subdivision (b).

(4) Official records of a governmental licensing entity that reflect an administrative proceeding or investigation, otherwise authorized by law or regulation, which has become final.

(5) A notice described in paragraph (5) of subdivision (b).

(6) A response or failure to disclose, as described in paragraph (6) of subdivision (b).

(e) (1) Upon completion of its investigation, the committee shall report its actions and recommendations to the commission, including its findings as to probable cause, and if probable cause exists, its recommendations as to the appropriate adverse action.

(2) The findings shall be available, upon its request, to the employing or last known employing school district, or, if adverse action is recommended by the committee and the credentialholder has not filed a timely appeal of the recommendation of the committee pursuant to Section

44244.1, upon a request made within five years of the date of the committee's recommendations to a school district providing verification that the credentialholder has applied for employment in the school district. The findings, for all purposes, shall remain confidential and limited to school district personnel in a direct supervisory capacity in relation to the person investigated. Any person who otherwise releases findings received from the committee or the commission, absent a verified release signed by the person who is the subject of the investigation, shall be guilty of a misdemeanor.

(3) The findings shall not contain any information that reveals the identity of persons other than the person who is the subject of the investigation.

(f) (1) Except as provided in paragraph (2) and, notwithstanding subdivision (b), for purposes of determining whether jurisdiction exists under subdivision (b), the commission, in accordance with Section 44341, may make inquiries and requests for production of information and records only from the Department of Justice, a law enforcement agency, a state or federal court, and a licensing agency of this state or a licensing agency of another state.

(2) For purposes of determining whether jurisdiction exists, paragraph (1) does not apply to release of personnel records.

*(Amended by Stats. 2013, Ch. 232, Sec. 2. Effective January 1, 2014.)*