



1-1-1998

Public Entities, Officers and Employees

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific, McGeorge School of Law, *Public Entities, Officers and Employees*, 29 MCGEORGE L. REV. 723 (1998).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol29/iss3/24>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Chapter 934: Demand for Teachers Creates Alternative Ways to Earn a Teacher Credential

Michelle J. Mandel

Code Sections Affected

Education Code § 44300 (amended).

Education Code Article 5.6 (new).

AB 351 (Scott); 1997 STAT. Ch. 934

Kathy Jensen has not been in a classroom in twenty five years, and at that time she was a student. She is a homemaker and recently started a job as a proofreader. Now, Kathy is preparing to take the California Basic Educational Skills Test (CBEST) to earn an emergency teaching credential.¹ Kathy joins many other people entering the teaching profession without any formal training other than a college degree.²

Class reduction measures, increased enrollment, and the need for bilingual teachers have created a high demand for teachers in California.³ There is a concern that the increased demand for teachers will affect the quality and preparedness of teachers hired in California.⁴

I. INTRODUCTION

The introduction of recent educational measures in California, such as the movement for reduction in classroom size, has created a demand for teachers.⁵ This

1. See Kimberly Kindy, *Would-be Teachers Lining up for Tests*, ORANGE COUNTY REG., Jan. 29, 1997, at A1 (explaining that the CBEST provides individuals with an opportunity to try teaching); see also Nanette Asimov, *Special Permits Sought for Under Qualified Teachers Push to Hire New Staff for Small Classes*, S. F. CHRON., Sept. 2, 1996, at A17 (stating that to qualify for an emergency teaching credential individuals must have a bachelor's degree and must pass a multiple-choice exam called the California Basic Educational Skills Test).

2. See Kindy, *supra* note 1, at A1 (reporting that the number of CBEST test takers jumped from 12,334 in August of 1996 to 21,093 in October of 1996).

3. See ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 351, at 2 (Apr. 23, 1997) (stating that the class size reduction has created a demand for new teachers); see also Asimov, *supra* note 1, at A17 (recognizing the increased demand for new teachers is related to the reduction in class size in elementary grades); Jan Ferris, *As Class Sizes Shrink, Schools Run Out of Subs*, SACRAMENTO BEE, Oct. 16, 1996, at A1 (stating that three months into the implementation of the class size reduction reform, school districts are facing a need for new teachers).

4. See ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 351, at 3 (Apr. 23, 1997) (explaining that the aim of this bill is to improve under-prepared teachers by directing them into a more structured training program).

5. See *id.* (asserting that there is a need for this bill because of the increased demand for elementary and secondary school teachers); see also Katie Hickox, *Intern Programs Represent the Fast Track in Teaching Training*, ORANGE COUNTY REG., July 28, 1996, at A12 (acknowledging that schools are facing teacher shortages).

increased demand has led to the employment of teachers who often lack formal training and classroom experience.⁶ The legislature has attempted to balance the need for more teachers with the need for quality teachers by enacting a number of laws. The laws offer alternative options to earn a teaching credential as well as providing support for teachers so that they are inclined to stay in the profession.⁷

Chapter 934 establishes the Pre-Internship Teaching Program to provide a structured program for individuals who want to become credentialed teachers through an alternative path.⁸ In addition, Chapter 934 aims to replace the existing emergency permit system with the pre-internship certificate program.⁹ Supporters of Chapter 934 believe that the implementation of a Pre-Internship Teaching Program will provide needed support for new teachers.¹⁰ On the other hand, opponents argue that this bill will only exacerbate the existing teacher shortage problems.¹¹

II. EXISTING LAW

Existing law provides mandatory requirements for issuing teacher credentials.¹² A "credential" is a document issued by the State Board of Education or the Commission for Teacher Credentialing (CTC), which authorizes a person to engage in a service specified in the credential.¹³

with the recent implementation of the class size reduction reform). Reports estimate that Orange County needs at least 21,000 new teachers. *Id.*

6. See Emily Bazar, *Teacher Readiness Doubted*, SACRAMENTO BEE, Sept. 13, 1996, at A1 (reporting that approximately one in eight of California's new teachers have not met the minimum requirements needed to teach effectively); see also James Richardson, *A Primer on Adding Teachers*, SACRAMENTO BEE, Apr. 30, 1997, at A4 (reporting that approximately 18,000 new teachers have entered the classrooms since last fall, and many of them have minimal training).

7. See CAL. EDUC. CODE § 44300 (amended by Chapter 934) (explaining the intent of the legislature to increase the quality and preparedness of teachers with emergency permits).

8. See *id.* § 44305 (enacted by Chapter 934) (stating the goals of the California Pre-Internship Teaching Program).

9. See *id.* § 44305(a) (stating that as resources are made available to the school districts the CTC may issue pre-intern certificates instead of an emergency multiple subjects permit).

10. See *id.* § 44305(d) (stating that Chapter 934 will give under qualified teachers the kind of support they need to become more effective teachers).

11. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 351 (Apr. 16, 1997) (arguing that Chapter 934 does not alleviate the current teacher shortage program). The California Association of Suburban School Districts and the Association of Marin County Schools believe that the Legislature should look at the larger issues facing the teaching profession such as credentials, recruitment, and teacher preparation. *Id.*

12. CAL. EDUC. CODE §§ 44250, 44256, 44272 (West 1993) (authorizing teacher credentialing, and setting forth four basic kinds of teacher credentials).

13. *Id.* § 44250 (West 1993) (stating that the CTC is authorized to issue teacher and services credentials).

The CTC, which was established in the 1970s¹⁴ is authorized to issue emergency permits to individuals who, at a minimum, possess a bachelor's degree and pass the CBEST.¹⁵ In addition, individuals holding emergency credentials are required to attend an orientation, and to teach with the assistance of a certified employee of the school district.¹⁶

Demand for teachers varies in certain geographic areas and in specific school subjects.¹⁷ In response, existing law requires alternative teaching certificate programs to address these problems. For example, under existing law a school district has the authority to establish a teacher education internship program.¹⁸ These alternative programs are targeted toward people with work experience and those who have a bachelor's degree in the field in which they plan to teach.¹⁹

III. CURRENT LAW

A. Chapter 934

Chapter 934 aims to provide structure for new teachers who lack formal training and classroom experience with the establishment of the Pre-Internship Teaching Program.²⁰ Chapter 934 establishes a structured program which provides an alter-

14. *Id.* § 44210 (West 1993) (establishing the Commission on Teacher Credentialing).

The CTC consists of fifteen voting members. Fourteen of these members are to be appointed by the Governor with the advice and consent of the Senate. The commission shall include the following members: (1) The Superintendent of Public Instruction; (2) six practicing teachers from public elementary and secondary schools; (3) one person who is employed on the basis of a service credential; (4) four representatives of the public; (5) one school administrator in a public elementary or secondary school; and (6) one faculty member from a college or university that grants baccalaureate degrees.

Id.

15. *Id.* § 44300 (West 1993) (stating that the CTC has the authority to issue emergency permits if: (1) The applicant possesses a baccalaureate degree; (2) has passed the state basic skills proficiency test; and (3) the CTC approves the justification for the emergency permit).

16. *Id.* § 44300(e) (West 1993) (stating that the holder of an emergency permit is required to participate in ongoing training, coursework, or seminars to prepare the individual to become a fully credentialed teacher).

17. *See* ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 351, at 2 (Apr. 27, 1997) (explaining that there is a great demand for teachers in California as a result in measures such as class size reduction).

18. *See* CAL. EDUC. CODE § 44325(c) (West 1993) (authorizing the CTC to issue district intern certificates to individuals who meet the minimum qualifications including: (1) The possession of a baccalaureate degree; (2) the passage of the basic skills proficiency test; (3) the passage of the appropriate subject matter exam in the area in which the district intern is going to teach; and (4) the oral language component leading to a bilingual-crosscultural certificate of competence for individuals who plan to teach bilingual education classes).

19. *Id.*

20. *See* CONCURRENCE IN SENATE AMENDMENTS, ANALYSIS OF AB 351, at 1 (Sept. 9, 1997) (explaining that Chapter 934 creates the Pre-Internship Teaching Program to establish a structured program for individuals who would like to become credentialed teachers).

native for persons to become fully credentialed teachers.²¹ In addition, Chapter 934 is aimed at replacing the use of emergency permits with pre-intern certificates.²²

In the 1995-96 school year, over 6,400 elementary teachers in California held emergency permits.²³ Most of these teachers have minimal training and receive little support from the schools that employ them.²⁴ As a result, approximately 35% to 40% of teachers with emergency permits drop out of teaching after their first year.²⁵ Therefore, the legislature would like the CTC to look into the feasibility of better preparing and retaining pre-intern teachers by providing them with intensive preparation programs.²⁶ In addition, the legislature requires that the CTC issue regular reports regarding the success of the Pre-Internship Teaching Program.²⁷

Chapter 934 allows the CTC to continue issuing emergency permits as long as the applicant possesses a baccalaureate degree, passes the state basic skills proficiency test, the CTC approves the justification for the emergency permit, and documentation exists that the school district made a thorough search, but has been unable to recruit certified teachers.²⁸ The goal of Chapter 934 is to replace the emergency permit system with a pre-intern program which involves intensive preparation.²⁹ The pre-intern certificate is valid for one year, but may be renewed for an additional year if the holder takes the appropriate subject matter exam.³⁰ In order to obtain a pre-intern certificate the applicant must meet a number of minimum

21. *Id.*

22. *See* CAL. EDUC. CODE § 44300(b)(1) (amended by Chapter 934) (stating that the CTC shall issue pre-intern certificates instead of emergency teaching permits when sufficient resources are made available to the school districts to carry out the new provisions).

23. 1997 Cal. Legis. Serv. ch. 934, sec. 1(3) (West) (explaining that most of these teachers have little teaching experience or responsibility).

24. *Id.*

25. 1997 Cal. Legis. Serv. ch. 934, sec. 1(6) (West) (explaining that this is partly a result of a shortage of resources to help this group of teachers). In addition, many of the teachers who hold emergency permits are employed in urban schools where students need well trained and qualified teachers. *Id.*

26. *Id.*

27. *See* CAL. EDUC. CODE § 44306 (enacted by Chapter 934) (requiring the CTC to submit a report to the legislature and the legislative analyst no later than October 1, 2000). The report must include: (1) The number of participating school districts using pre-interns; (2) the impact of the program in reducing the number of emergency permits being issued; (3) the retention rates of pre-intern teachers; (4) the success rates of pre-internship teachers; (5) feedback from pre-interns regarding the effectiveness of preparation and support provided; (6) a description of in-kind contributions to the pre-intern teaching program provided by participating school districts; and (7) recommendations whether the pre-internship program should be continued, modified, or disbanded. *Id.*

28. *Id.* § 44300(a) (amended by Chapter 934).

29. *See id.* § 44305 (enacted by Chapter 934) (explaining that the implementation of this process involves the issuance of competitive grants to school districts).

30. *See id.* § 44305(b) (stating that a pre-intern teacher who successfully passes the subject matter exam in his first or second year of teaching is required to enroll in a district or university teacher credentialing program). In addition, a pre-intern certificate may be renewed for a third year if a school district, cooperating college or university, and the pre-intern support the renewal. *Id.*

requirements.³¹ The CTC is required to establish criteria for the approval of pre-intern teaching programs.³²

IV. COMMENT

How does California deal with the increasing demand for new teachers and the concern that this will lead to an influx of teachers who lack formal training? Nearly one in eight of California's new teachers have not met the minimum requirements to educate children effectively.³³ Thousands of teachers will be needed in the next few years because of class size reduction in the primary grades and growing student enrollment rates.³⁴ There is a growing concern that the class size reduction measure has put a burden on school districts to hurriedly hire new teachers.³⁵

School districts are adopting unique and alternative programs to deal with the need for new teachers.³⁶ For example, Elk Grove Unified School District's Education Institute works with San Francisco State to train individuals with bachelor degrees in an eleven month program that combines student teaching and course work.³⁷ University of California at Los Angeles started a two year master's program that requires students to spend the second year of teaching in an inner-city school.³⁸ The goal of this program is to give the students more hands on experience, much like a medical resident.³⁹ Another example is California State University at North-

31. See *id.* § 44305(c) (enacted by Chapter 934) (stating that minimum requirements for obtaining a pre-internship include: (1) A baccalaureate or higher degree; (2) passage of the state basic skills proficiency test; and (3) completion of a required number of classroom units in the subject matter that they are going to teach).

32. See *id.* § 44305(d) (enacted by Chapter 934) (stating that the criteria to be considered includes: (1) Demonstrated need for teachers; (2) quality of preparation and support provided to the pre-intern teachers; (3) collaboration between district administrators and experienced teachers regarding development of a pre-intern program plan; (4) cost effectiveness of plan; (5) collaboration between the school districts and cooperating colleges and universities to ensure availability of courses for the pre-intern teachers; (6) the role of personnel in the delivery of pre-intern support; (7) the program should reflect the California Standards for the Teaching Profession no later than the second year of employment for each pre-intern, and (8) approval of the district plan by the governing board of the school district).

Id.

33. Bazar, *supra* note 6, at A1; see *id.* (reporting that a study conducted by the National Commission on Teaching and America's Future found that more than 12% of the country's newly hired teachers do not have adequate undergraduate training or course work in their primary area of teaching).

34. See *id.* (stating that in 1996 the state needed to hire at least 19,500 new teachers to implement class size reduction reforms).

35. See Ferris, *supra* note 3, at A1 (explaining that the reduction in class size has resulted in an increased demand for new teachers).

36. See Bazar, *supra* note 3, at A1 (stating that school districts have begun implementing their own programs in order to meet the demand for new teachers without having to sacrifice quality).

37. *Id.*

38. See Elaine Woo, *Campus & Career Guide; Teaching Internships Catching On*, L.A. TIMES, Feb. 16, 1997, at 2 (reporting that UCLA students are employed as a full-time teacher, but only after a year of study). In addition, the students are supported by a UCLA faculty member and an experienced mentor teacher at their school.

Id.

39. *Id.*

ridge which offers night classes and teacher preparation workshops at schools where new teachers are working.⁴⁰ The increase in programs such as these indicates the desire of educators to provide more training to new teachers who may lack formal training. Expansion of student internship programs and the relaxation of teacher credentialing requirements is the result of an effort to recruit new teachers.⁴¹

In the past year, the number of emergency credentials issued has increased dramatically.⁴² On the one hand, there is a concern that the issuance of emergency credentials means the influx of teachers who are not prepared and are under qualified.⁴³ On the other hand, there are a number of educators who have had great success with teachers who possess an emergency credential.⁴⁴

V. CONCLUSION

In California, the teacher credentialing process has been in a state of upheaval.⁴⁵ Class reductions, increased enrollment, and the need for bilingual teachers have created a demand for new teachers. California has responded to this demand by hiring teachers with emergency permits and individuals who have obtained a teaching credential through non-traditional methods. The legislature is attempting to deal with the teacher shortage by passing legislation encouraging people to enter and stay in the profession while at the same time trying to improve the quality of the teachers in California.

40. See Eric Slater, *Schools Push to Train Wave of New Teachers*, L.A. TIMES, Oct. 28, 1996, at A1 (explaining that programs are beginning to be offered to deal with thousands of new and inexperienced teachers).

41. Richardson, *supra* note 6, at A4; see *id.* (reporting the Task Force Recommendations which include: an aggressive recruiting program, providing undergraduates with more classroom experience such as tutoring, recruiting among returning Peace Corp volunteers, and developing a common application for all the state's education graduate schools).

42. See Nick Anderson, *Emergency Licenses Likely to Hit Record*, L.A. TIMES, June 22, 1997, at A22 (reporting that state officials estimate that 11,000 permits will have been issued by June 30, 1997, approximately 75% more than last year's total of 6,200).

43. See Ferris, *supra* note 3, at A1 (stating that credentialing standards have been lowered in order to fill empty slots).

44. See John Gittelson & Ana Menendez, *Schools Defend Teacher Hiring*, ORANGE COUNTY REG., Sept. 14, 1996, at B1 (quoting Don Champlin, Santa Ana's assistant superintendent for human resources, "We have very fine teachers on emergency credentials. There's this assumption that we put a sign on the corner and signed up everyone that walked in").

45. See Ferris, *supra* note 3, at A1 (discussing the effect of the demand for teachers on the school districts).

School Safety: Brutal Slaying Prompts Creation of Employee Criminal Background Check Prior to Employment

Catherine L. Donohue

Code Sections Affected

Education Code § 42125.1 (new); §§ 44237, 45125 (amended).

AB 1610 (Ortiz); 1997 STAT. Ch. 588

Education Code §§ 44332.6, 44346.1, 45122.1 (new).

AB 1612 (Alby); 1997 STAT. Ch. 589

I. INTRODUCTION

On May 16, 1997, a substitute school janitor was charged with the rape and murder of a graduating high school senior, Michelle Montoya.¹ Alex Del Thomas was hired only weeks before the murder, and his criminal background check was pending.² Had the check been completed in a timely fashion, it would have revealed that Thomas had a history of committing violent crimes, and should not have been hired by the school district to work around students.³

Although it seems that this gruesome crime could have been prevented by a quicker response to the criminal background check from the Department of Justice, the law did not require the school district to conduct a background check on Thomas.⁴ California law did not require criminal background checks for non-

1. See *Plug This Dangerous Gap, Temporary School Employees Need Screening*, SAN DIEGO UNION-TRIB., June 1, 1997, at G2 [hereinafter *Plug*] (describing how Alex Del Thomas was charged with the brutal rape and murder of Michelle Montoya, who was found with a severe head wound and a slit throat in the woodshop classroom of Rio Linda High School); see also Ramon Coronado & Emily Bazar, *Rape Charge in Teen's Slaying? Could Bring the Death Penalty*, SACRAMENTO BEE, June 7, 1997, at B1 (noting that the motive for Alex Del Thomas could have been sexual assault and that this second charge could lead the prosecutors to seek the death penalty).

2. See John Howard, *District Slow in Background Check: Authorities Say Rio Linda School Officials did not Submit a Request Until Weeks After the Janitor was Hired*, ORANGE COUNTY REG., May 20, 1997, at A4 (establishing that Grant Joint Union School District hired Thomas in April of 1997).

3. *Plug*, *supra* note 1; see *Assembly OK's Bill on School Workers' Background Checks*, L.A. TIMES, May 30, 1997, at A25 (explaining that a criminal background check by the Department of Justice would have revealed that Alex Del Thomas was a member of the notorious 107th Street Hoover Crips, a Los Angeles gang, and that he had served time in prison for numerous convictions including: a 1982 robbery conviction; a 1986 manslaughter conviction, which was actually a plea down from a murder charge when he killed a customer during the armed robbery; and a 1994 conviction for beating his wife and violating his parole).

4. See *Plug*, *supra* note 1, at G2 (discussing that California state law did not require a background check on Thomas because he was employed as a substitute janitor, a category not requiring background checks).

certified substitute or temporary employees.⁵ Unfortunately, it took a horrible murder to expose the weak links in the laws that are supposed to keep California's school children safe.⁶ Therefore, the Legislature reacted with uncharacteristic speed in enacting Chapters 588 and 589 in order to ensure the safety of California's children before the start of the new 1997/1998 school year.⁷

II. LEGAL BACKGROUND: LAWS TO PROTECT CHILDREN

In December 1982, President Reagan's Task Force on Victims of Crime issued a report which recognized that most of the individuals who abused school children had extensive criminal records.⁸ Therefore, the federal government enacted a law requiring each state to report child abuse crimes to a national background check system.⁹ This system was designed to assist employers in making sound decisions about future employees.¹⁰

California agreed that children may be in grave danger while at school, and therefore sought to further the actions of the federal government by enacting statutes into the California Education Code to restrict the hiring of certain in-

5. See CAL. EDUC. CODE § 45125 (West 1993) (stating that substitute and temporary employees, those employed for less than a year, were exempt from the fingerprint checks required for other non-certificated employees).

6. See ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1610, at 2 (May 27, 1997) (stating that the murder of Michelle Montoya exposed the loopholes in the California Education Code regarding safety to students); see also Jan Ferris et al., *State Calling For Reforms After Slaying: Hiring by Schools to Tighten Up*, SACRAMENTO BEE, May 20, 1997, at A1 (reflecting that this case "is fast becoming the Polly Klaas case of public school safety, with outrage already prompting efforts to fix laws that allow criminals to work near children").

7. See Mary Lynne Vellinga, *Assembly Passes Bills Spurred by Slaying at School*, SACRAMENTO BEE, May 30, 1997, at B3 (stating that Assemblymember Deborah Ortiz, who introduced one bill because she had known Montoya's mother since childhood and Assemblymember Barbara Alby, who introduced the other bill because Rio Linda High School is located in her district, admitted the legislation zipped through the Assembly to the Senate with the uncharacteristic speed of nine days). But see John Matthews, *School Safety Bills Slowed*, SACRAMENTO BEE, June 23, 1997, at B1 [hereinafter Matthews, *School Safety*] (stating the bills were slowed to a crawl in the Senate because Senator John Vasconcellos was in Hong Kong until early July and he asked that the bills not be heard while he was absent).

8. *Final Report*, President's Task Force on Victims of Crime, Dec. 1982, Executive and Legislative Recommendation 9; see also *Final Report*, Attorney General's Task Force on Family Violence, Sept. 1984, State Legislative Recommendation 5.

9. See 42 U.S.C.A. § 5119 (West 1997) (stating that each State is required to report child abuse crime information, or index child abuse information, in the national criminal history background check system); see also Howard Davidson, *Protection of Children Through Criminal History Record Screening: Well-Meaning Promises and Legal Pitfalls*, 89 DICK. L. REV. 577, 577 (1985) (explaining "Legislation should be . . . enacted to make available . . . the sexual assault, child molestation, and pornography arrest records of prospective and present employees whose work will bring them in regular contact with children").

10. Davidson, *supra* note 9, at 579.

dividuals.¹¹ These statutes prohibit a school district from employing any person who has been convicted of a sex offense,¹² or of a controlled substance offense.¹³

In addition, the California State Board of Education and the Commission on Teacher Credentialing may revoke the credentials of individuals convicted of certain sex offenses, drug offenses, or certain violent felonies.¹⁴ Although this revocation enhances school safety, the revocation only occurs after the criminal conviction of the individual, therefore leaving the period between the actual crime and the later conviction unprotected. Also, this statute only applies to employees with credentials and provides few restrictions on non-certified employees.

Although the restrictions on hiring practices benefit society, the ex-offenders have a different view.¹⁵ The moral character of an individual plays an important role in both the hiring and licensing of individuals hoping to engage in certain professions, and ex-offenders have struggled to find employment in professions requiring background checks that may reveal a significant criminal history.¹⁶ Therefore, ex-offenders have tried to fight the laws that restrict the hiring of certain applicants by labeling them as discriminatory.

A. Constitutional Challenges of Hiring Practices

Throughout the years hiring practices that bar individuals with certain criminal records from employment have been challenged under the United States Constitution. However, these cases are generally unsuccessful because the United States Supreme Court has found that employment does not constitute a fundamental right.¹⁷ Since employment is not a fundamental right, the State must only prove its objective has a rational relation between the means chosen and the ends pursued.¹⁸ This "minimum scrutiny" theory is an easy category to satisfy because as long as the law is based on a legitimate state objective, it will satisfy a constitutional challenge.¹⁹ Therefore, a hiring practice to keep ex-offenders out of specific employ-

11. See CAL. EDUC. CODE § 45123(a) (West 1993) (stating no person shall be employed by a school district who has been convicted of any sex offense); see *id.* § 45123(b) (West 1993) (stating that no person shall be employed by a school district who has been convicted of a controlled substance offense).

12. See *id.* § 44010 (West 1993 & Supp. 1997) (defining sex offenses).

13. See *id.* § 44011 (West 1993 & Supp. 1997) (defining controlled substance offenses).

14. See *id.* § 44424 (West 1993) (listing the enumerated felonies, such as voluntary manslaughter, that qualify as reason to revoke a teaching credential); see *id.* § 44425 (West 1993) (providing that the conviction of a sex or narcotic offense is grounds for revoking a teaching credential).

15. Davidson, *supra* note 9, at 579.

16. *Id.*

17. *Id.*; see *DeVeau v. Braisted*, 363 U.S. 144, 157-59 (1960) (holding that a Waterfront Commission Act barring convicted felons and ex-offenders from the waterfront union office did not violate the Due Process Clause of the Fourteenth Amendment because their presence on the waterfront was a contributing factor to the corrupt waterfront situation); *id.* (explaining that this type of federal law had been utilized since 1833 because convicted felons may not enlist in the United States Army or the Air Force).

18. *Duke Power Co. v. Carolina Environment Study Group, Inc.*, 438 U.S. 59, 82-94 (1978).

19. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring).

ment fields is a valid state interest because the objective is to protect the school children.²⁰

B. Constitutional Challenges of Right to Privacy

In addition, ex-offenders have tried to argue their right to privacy is violated when employers search their criminal records.²¹ This argument is more difficult to overcome than the right to employment because although the United States Constitution does not expressly provide for a right to privacy, courts have held privacy to be a fundamental right and within the penumbra of rights guaranteed under the Constitution.²² Therefore, because privacy is considered a fundamental right, a strict scrutiny test must be applied in order to satisfy a constitutional challenge.²³ This test is more difficult to satisfy than the rational basis test discussed earlier because the State's objective must be compelling, and the means must be necessary to achieve the ends.²⁴ In other words, there must not be a less burdensome mean to achieve the end.

Although most statutes fail the strict scrutiny test, the right to search criminal records concerning public employment continues to prevail.²⁵ This is due to the balance between the individual's right to privacy against the importance of the State's interests.²⁶ The balance usually weighs in favor of the State's interests because the Court has long recognized the inherent right of the States to enact laws and regulations designed for the protection of the general welfare of children.²⁷

20. Herbert B. Kaplan, *Is This What They Mean by Sex Education? Keeping Sex Offenders Out of the Schools*, 8 U. FLA. J.L. & PUB. POL'Y 51, 71 (1996).

21. See *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (finding no merit to a defendant's argument that a search of his criminal record violated his privacy rights); see also *Rowlett v. Fairfax*, 446 F. Supp. 186, 187-88 (W.D. Mo. 1978) (same); *Hammons v. Scott*, 423 F. Supp. 618, 623-24 (N.D. Cal. 1976) (same).

22. U.S. CONST. amend. I-XII; see Kaplan, *supra* note 20, at 69 (explaining that in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) although "privacy" is not expressly stated in the constitution, the "zones of privacy" are found in the First Amendment right of association, the Third Amendment prohibition against quartering soldiers, the Fourth Amendment "right of people to be secure in their houses, papers, and effects, against unreasonable search and seizures," the Fifth Amendment right against self-incrimination, and the Ninth Amendment provision for rights retained by the people); see also *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (stating that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits on government power).

23. See, e.g., *Roe v. Wade*, 410 U.S. 113, 151-56 (1973) (finding that a woman's right to privacy was fundamental, thus the Court applied strict scrutiny).

24. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923) (applying a strict scrutiny test to a constitutional challenge); see also *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (same); *Pierce v. Society of Sister*, 68 U.S. 510 (1925) (same).

25. Kaplan, *supra* note 20, at 71.

26. *Id.* at 70; see *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 465 (1977) (holding that the privacy interest must be balanced against the public need for information).

27. *Davidson*, *supra* note 9, at 578; see *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 168 (1944) (stating that State's authority over children's activities is broad because of the interest in making sure of the growth of young people into mature citizens); see also *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) as saying "[i]t is beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling").

Therefore, because the State's interest in protecting children is compelling, and the hiring practices are necessary to ensure school safety, the statutes have withstood constitutional challenges.²⁸

C. *Constitutional Challenges to Ex-Post Facto Laws, Bills of Attainder, and Cruel and Unusual Punishment*

In addition, ex-offenders have based constitutional challenges concerning hiring practices on ex post facto laws,²⁹ bills of attainder,³⁰ and cruel and unusual punishment.³¹ These laws concern the unlawful infliction of increased punishment. The rationale behind the ex post facto law is the concept of fair notice.³² Bills of attainder are enacted to ensure that people are not subject to punishment without judicial process.³³ The rationale behind constitutional provisions of cruel and unusual punishment ensures that the punishment fits the crime.³⁴

However, all of these challenges have failed because hiring practices are not viewed as a regulation rather than punishment.³⁵ The Legislature is not punishing the ex-offender again, but instead is protecting the safety of the school children.³⁶ In addition, there is no further stigmatizing of the ex-offender due to the hiring practices, because the stigma attached to the ex-offender when he committed the offense.³⁷

For instance in *Hawker v. New York*,³⁸ a ban on the practice of medicine by convicted ex-felons was justified because it was categorized as a regulatory measure regulating certain individuals into the occupation of a medical physician.³⁹ Therefore, the cases under these causes of action concerning hiring practices fail because the laws are not enacted to punish the ex-felons, but rather to protect children.⁴⁰

28. Kaplan, *supra* note 20, at 71.

29. See BLACK'S LAW DICTIONARY 580 (6th ed. 1990) (defining "ex post facto law" as a law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed).

30. See *id.* at 165 (defining "bill of attainder" under "attainder: bill" as such special acts of the legislature to inflict punishment upon persons supposed to be guilty of high offenses, without any conviction in the ordinary course of judicial proceedings).

31. See U.S. CONST. amend. VIII (stating that it is prohibited to inflict cruel and unusual punishment and therefore the punishment must be proportional to the crime).

32. Kaplan, *supra* note 20, at 64.

33. *Id.* at 71.

34. *Id.* at 66.

35. *Id.* at 65.

36. *Id.*

37. *Id.*

38. 170 U.S. 189 (1988).

39. See generally *id.* (justifying a ban on the practice of medicine by ex-convicts).

40. Kaplan, *supra* note 20, at 72; see *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (stating that the Waterfront Commission Act to prohibit hiring of ex-felons was neither a bill of attainder, nor an ex post facto law because the legislative purpose of enacting the law was to devise a scheme of regulation on the waterfront).

D. California Constitutional Challenges

Ex-offenders have also tried to assert their right to privacy concerning the hiring practice laws under the California Constitution.⁴¹ The California Constitution was amended in 1972 to state expressly the fundamental right to privacy.⁴² Although the explicit language may imply a stronger right than that found under the United States Constitution, the California courts still use the balancing test invoked in the federal Constitution cases. However, regardless of the categorization of privacy as a fundamental or a non-fundamental right, the laws regarding hiring practices withstand constitutional challenges. Once again, these cases have failed because the State's interests in protecting children and the general public satisfy the "compelling" interest prong of the strict scrutiny test and outweigh the ex-offender's right to privacy.⁴³ The protection of children and ensuring safe schools definitely qualify as a compelling state interest.

III. LEGISLATIVE HISTORY: SCHOOL SAFETY OR SO THEY THOUGHT

Prior law required employees, not subject to certification qualifications, to undergo criminal background checks within 10 days of employment.⁴⁴ However, substitute and temporary employees⁴⁵ were exempt from any criminal background checks.⁴⁶ Therefore in the Montoya murder, Thomas, who was a substitute janitor, was not required to undergo a criminal background check.⁴⁷ In addition, school districts that had a daily attendance of over 400,000 or school districts wholly within a city and county were also exempt from criminal background checks.⁴⁸

41. See generally *Loder v. Municipal Court*, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976) (affirming the denial of a writ of mandate to compel erasure or return of the record of an arrest that did not result in a conviction).

42. See CAL. CONST., art. I, § 2 (stating "[a]ll people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy"); see also *White v. Davis*, 13 Cal. 3d 757, 774, 553 P.2d 222, 233-34, 120 Cal. Rptr. 94, 105-06 (1975) (explaining that the Amendment in 1972 was sparked by the "accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society," and explaining that the ability to control circulation of personal information is fundamental to our privacy).

43. See *Loder*, 17 Cal. 3d at 864, 552 P.2d at 628, 132 Cal. Rptr. at 468 (stating that the interest in the dissemination of arrest records may be characterized generally as the promotion of more efficient law enforcement in order to protect the public from recidivist offenders).

44. CAL. EDUC. CODE § 45125 (amended by Chapter 588).

45. See *id.* (defining a "temporary employee" as one who is hired for less than one year).

46. *Id.*

47. *Plug*, *supra* note 1.

48. *Id.*; see ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS ON AB 1610, at 1 (May 27, 1997) (explaining that Los Angeles School District is a district that has an average daily attendance over 400,000 and that San Francisco Unified School District is wholly within a city and county).

In the 1991 Legislative session, Assembly Members Dan Tucker and Tom Umberg recognized one of the loopholes in the California Education Code.⁴⁹ They realized that the system of sending the fingerprints to the Department of Justice was too slow, and they authored Assembly Bill 282 to provide school districts the opportunity to conduct an automated records check to prospective non-certificated employees.⁵⁰ This bill was enacted and did not contain the same exception clause as California Education Code section 45125 regarding temporary and substitute employees.⁵¹ Even though this statute closed the exception loophole, it also created a new loophole by making this automated check only a recommendation, and not a mandate.⁵²

In the 1996 Legislative session, Assembly Member Williard Murray recognized yet another loophole in the California Education Code, and he authored Assembly Bill 215.⁵³ This bill proposed a similar recommendation as the law enacted by Assembly Bill 282, by authorizing an automated records check on prospective certificated employees, those who were excluded from the previous statute.⁵⁴ However, Assembly Bill 215 specified the California Law Enforcement Telecommunications System (CLETS) as the device to conduct the automated records check.⁵⁵ That specification led to the defeat of the bill in the Senate Education Committee because of the concern for potential misidentification.⁵⁶ In addition, Attorney general Dan Lungren expressed his concern about the CLETS system because of concern that misidentification based on name-only identification would violate an individual's right to privacy.⁵⁷

49. 1991 Cal. Legis. Serv., ch. 152, sec. 1 (West) (enacting CAL. EDUC. CODE § 45125.5) (relating to school employees).

50. *See id.* (defining "prospective non-certificated employee" as an applicant whom the requesting school district intends to hire at the time that automated records check is requested).

51. CAL. EDUC. CODE § 45125 (West 1993).

52. *Id.* § 45125.5 (West 1993).

53. AB 215 (Murray), 1996-97 Legislative Regular Session.

54. *Id.*

55. *Id.*

56. *See* SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS ON AB 215, at 3 (Jan. 3, 1996) (explaining that the name-only retrieving system may cause misidentification because the state system currently had 5 million records indexed by over 13 million names); *see also* Glen Martin, *State Has Made It Tougher To Do Background Checks: School Says Murder Suspect Lied To Get Job*, S.F. CHRON., May 21, 1997, at A16 (explaining CLETS might not have worked to retrieve Alex Del Thomas' criminal record because he lied about his information concerning his date of birth therefore revealing a different person with the same name).

57. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS ON AB 215, at 3 (Jan. 3, 1996); *see* Dave Leshner, *District Told to Alter Background Checks Safely*, L.A. TIMES, May 24, 1997, at A21 (explaining that Attorney General Dan Lungren banned the use of CLETS in Los Angeles Unified School District because of a 1979 appellate court case which did not allow employers to see arrests and other unconfirmed reports on criminal records because this was a violation to the right of privacy under the Constitution and also explaining that others believe Lungren's interpretation is wrong because the Los Angeles police department should not be considered an employer, but rather an independent agency, which would allow the use of CLETS); *see also* Central Valley Chapter of 7th Step Foundation, Inc. v. Younger, 95 Cal. App. 3d 212, 236, 157 Cal. Rptr. 117, 131 (1979) (holding that the actual employers cannot see arrest records because they are not conclusive and may have negative weight in the hiring process, but that other organizations are allowed to sort through this information and only relay the

However, despite existing California Education Codes concerning employee background checks, Michelle Montoya's life was unjustly taken. There still remained loopholes in the system.

IV. FINALLY SCHOOL SAFETY UNDER CHAPTER 588 & CHAPTER 589

Chapter 588 and Chapter 589 are two statutes which complement each other to protect children in California's school districts.⁵⁸ They work together to close the major loopholes in the California Education Code relating to the hiring of school employees.

A. Chapter 588

Chapter 588 destroys some of the loopholes that allow criminals convicted of a violent or serious felony by requiring all potential employees, including substitute and temporary employees, in all districts, including Los Angeles and San Francisco Unified School Districts, to undergo criminal background checks.⁵⁹ In addition, an employee who has a contract with the school district, having more than a limited contact with pupils, is required to undergo the check.⁶⁰

Furthermore, employees will not be hired until the background check is completed and received by the school district.⁶¹ Once the background check is complete, the Justice Department must inform the employer of any individual with a pending criminal proceeding of a felony or a conviction of a felony.⁶² Therefore, had Thomas' criminal background check been returned before he was hired, Michelle Montoya would still be alive.

actual criminal convictions); *see also* Amy Pyle & Doug Smith, *50 Districts Have Criminal Records Check*, L.A. TIMES, June 5, 1997, at B1 (clarifying that prior to Attorney General Dan Lungren's ban of CLETS to check non-teaching applicants, teaching applicants were never subjected to CLETS because of union opposition on confidentially grounds).

58. *See* ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1612, at 2 (May 27, 1997) (explaining this bill is connected to AB 1610 and only operative if AB 1610 is also enacted).

59. CAL. EDUC. CODE § 45125(g), (h) (amended by Chapter 588); *see id.* § 41302.5 (West 1993) (defining a school district as including the county boards of education, county superintendents of schools, and direct elementary and secondary level instructional services provided by the state, including the Diagnostic Schools for Neurologically Handicapped Children as established pursuant to Article I of the California Constitution).

60. *See id.* § 45125.1(c) (added by Chapter 588) (explaining that the school district shall consider the totality of circumstances such as "length of time contractors will be on school grounds, whether pupils will be in the proximity with the site where the contracts will be working, and whether the contractors will be working by themselves or with others" in order to determine whether a contract employee has limited contact).

61. *See id.* § 45125(b) (West 1993) (explaining that the results from the Department of Justice must be within 30 days until the state can implement a new electronic fingerprinting system which will have a return time of three days).

62. *Id.* § 45125.1(d) (enacted by Chapter 588).

B. Chapter 589

Chapter 589 complements Chapter 588 by implementing an electronic fingerprinting system which will return the background checks within three days.⁶³ This quick return is necessary to keep the employment process moving and to protect upstanding employees who also must wait for fingerprinting results. In order to pay for this increased turn around time, millions of dollars were given to the Department of Justice to manage the system.

The immense cost of this system will be covered by Senate Bill 720 authored by Senator Bill Lockyer.⁶⁴ This law attaches a one dollar surcharge to vehicle registration to pay for the new fingerprinting system.⁶⁵ This law will remain in effect until January 1, 2003, when the cost of the fingerprinting system will be paid in full.⁶⁶

In addition, Chapter 589 states that prior to issuing a temporary teaching certificate, the board of education must obtain an applicant's criminal records.⁶⁷ If the applicant was convicted of a violent felony⁶⁸ or a serious felony,⁶⁹ the Department of Justice shall not issue the temporary certificate.⁷⁰

However, because many of the records filed with Department of Justice are from many years ago, and the ex-offender has been rehabilitated, a pardon may be obtained. If an applicant has obtained a certificate of rehabilitation and a pardon, then he may still have the opportunity to obtain the temporary certificate.⁷¹ In addition, this exception applies to both credentials and employment.⁷²

63. *Id.* § 45122.1 sec. 3 (West 1993).

64. 1997 Cal. Legis. Serv., ch. 587, sec. 1 (West) (enacting CAL. VEH. CODE § 9250.19).

65. CAL. VEH. CODE § 9250.19 (enacted by Chapter 587); *see* Matthews, *supra* note 7, at B1 (explaining that SB 720 was introduced prior to Michelle Montoya's death).

66. CAL. VEH. CODE § 9250.19 (enacted by Chapter 587).

67. *Id.*

68. CAL. EDUC. CODE § 44332.6 (enacted by Chapter 589).

69. *See* CAL. PENAL CODE § 667.5 (West 1993 & Supp. 1997) (listing a few examples of a violent felony such as murder or voluntary manslaughter, mayhem, rape, sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury, fear of immediate and unlawful bodily injury on the victim or another person, etc.).

70. CAL. EDUC. CODE § 45122.1(a)-(c) (enacted by Chapter 589).

71. *Id.* § 44332.6(d) (enacted by Chapter 589).

72. *Id.* § 44346.1(d) & 44830.1(e) (enacted by Chapter 589).

V. CONCLUSION

Chapter 588 and 589 were enacted as urgency statutes under the California Constitution in response to the murder of Michelle Montoya. These laws were enacted immediately to preserve the safety of other children at school.⁷³ Students are entitled to safe school environments where their only concern should be obtaining quality education. These statutes not only ensure safety in schools, but also restore peace of mind to parents and other Californians.⁷⁴ It appears that through the enactment of Chapters 588 and 589, the Legislature may have finally closed the major loopholes in the California Education Code thereby furthering student safety. Hopefully, the tragedy of Michelle Montoya's death will allow other graduating seniors to attain their high school diplomas.⁷⁵

73. See ASSEMBLY FLOOR ANALYSIS OF AB 1610, at 5 (May 20, 1997) (stating that the urgency statute is necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect); see also CAL. CONST. art. IV, § 1 (stating that no statute may go into effect until the 61st day after adjournment of the regular session at which the bill was passed, or until the 91st day after adjournment of the special session at which the bill was passed, except statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes); CAL. EDUC. CODE § 45125 (amended by Chapter 588) (explaining AB 1610 is notwithstanding § 17580 of the Government Code); CAL. GOV'T CODE § 17580 (West 1993) (stating that no bill, except a bill containing an urgency clause, introduced or amended on or after January 1, 1989, that mandates a new program or higher level of service requiring reimbursement of local agencies or school districts shall become operative until July 1 of the following the date on which the bill takes effect).

74. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS ON AB 1610, at 2 (May 27, 1997).

75. See Randy Pench, *Pride and Remembrance*, SACRAMENTO BEE, June 6, 1997, at A1 (explaining that Pam Schleeter, mother of Michelle Montoya, raised her daughter's diploma over her head in front of the graduating class Thursday, June 5, 1997).