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**TO:** K-12 Public School Trustees & Administrators  
**FR:** Kevin T. Snider, Chief Counsel  
**RE:** Effective Date of AB 1266  
**DT:** January 14, 2014

## INTRODUCTION

Numerous individuals have contacted this office with inquires as to whether Assembly Bill 1266, referred to in the popular media as the Co-ed Bathroom law, has taken effect. The heart of the issue concerns the question of the legal consequences of the submission of signatures for a referendum on a statute. In other words, does a bill take effect during the pendency of the referendum process? This memorandum addresses that question.

## ISSUE

In view of the current referendum process, has AB 1266 gone into effect?

## SHORT ANSWER

No. Presentation of the requisite signatures for a referendum stays/suspends a bill.

## DISCUSSION

### Facts:

The State's Legislature passed AB 1266. AB 1266 amends section 221.5 of the California Education Code by adding subsection f dealing with gender identity. Subsection f states in full, as follows:

A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

Governor Brown signed the bill on August 12, 2013. That same day the Secretary of State chaptered the law with a scheduled effective date of January 1, 2014. Just four days after the Governor signed the bill, a citizen, Gina Gleason, filed papers with the State Attorney General's office in order to place the bill under a referendum. The person making such a filing is known as a *proponent*. From the date of the chaptering of a bill, Mrs. Gleason had 90 days (i.e. November 10)

to submit signatures from 504,760 registered California voters. The proponent<sup>1</sup> submitted over 619,000 signatures to elections officials in order to place the matter on the ballot. Importantly, the collection and filing of signatures with elections officials for all of California's 58 counties occurred by the 90th day in accordance with subsection b of Article II, §9 of the California Constitution and Elections Code §9014.<sup>2</sup>

### **Law:**

It may seem counterintuitive that the most potent political authority in California does not lie with the Governor, the State's Supreme Court, or lawmakers in Sacramento. Under the California Constitution, all political power ultimately resides in the people.<sup>3</sup>

To this end, more than a century ago the people of this state changed their Constitution so that citizens can directly approve or veto laws passed by the Legislature. This exercise of the people's will occurs in the voting booth when deciding the relative merits of referenda. Noteworthy, the power to render the fate of a law via referendum does not embody a right that the government gave Californians at some point in the past. Rather, the people's authority to subject proposed laws to referenda constitutes a sovereignty that they have reserved to themselves.<sup>4</sup> Thus, the courts describe the referendum as "one of the most precious rights of our democratic process."<sup>5</sup>

When in 1911 the voters of California amended the state's Constitution to include the referendum, the ballot argument in support explained the rationale for the referendum as follows:

*The referendum* will reserve to the people the power to pass judgment upon the acts of the legislature, and to prevent objectionable measures taking effect. In short, will enable the people to enact laws, or amend the constitution, and veto vicious or unsatisfactory laws enacted by the legislature. The first step toward good government is the making of good laws. This amendment will give the people power to make good laws or compel the legislature to do so.<sup>6</sup>

The word *veto* in the ballot argument is important. A veto applies only to laws that have not gone into effect. "[T]he legislative power of referendum reserved to the people in our Constitution does not countenance that a legislative act subject to referendum can be effective before the power of referendum can be exercised."<sup>7</sup>

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<sup>1</sup> This office represents Mrs. Gleason.

<sup>2</sup> Within eight working days of the submission of the signatures, elections officials from the 58 counties submit a raw count of the signatures. If the total equals at least 504,776, then elections officials have 30 working days to perform a sampling of the signatures. A county's registrar of voters samples the greater of 500 signatures or 3% of the total from the county. If the sampling tally from the entire state projects a figure equal to or greater than 555,237 valid signatures (i.e., 110% of the number needed) then the item automatically goes on the ballot. Should the projection of valid signatures equal or is less than 479,522 (i.e., less than 95% of the number needed) then the item does not go on the ballot. In the event that the sampling falls between 95% and 110% the counties conduct a full count of the signatures.

<sup>3</sup> CA Const. Art. II, §1.

<sup>4</sup> *Perry v. Brown*, 52 Cal. 4th 1116, 1140 (2011).

<sup>5</sup> *Mervynne v. Acker*, 189 Cal.App.2d 558, 563 (1961).

<sup>6</sup> Constitutional Amendment 22; Oct. 11, 1911, General Election. "Reasons Why Senate Constitutional Amendment No. 22 Should be Adopted."

<sup>7</sup> *Midway Orchards v. County of Butte*, 220 Cal.App.3d 765, 781-82 (1990) citing *County of San Mateo v. Bartole*, 184 Cal.App.2d 422, 429 (1960).

Hence, the California Constitution provides for the staying of a legislative statute by the filing of a referendum, and the law does not come into effect unless and until approved by a majority of voters. “An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.”<sup>8</sup>

Consider this example. In a letter last year Secretary of State Debra Bowen wrote to an official with the U.S. Department of the Interior.<sup>9</sup> The Secretary explained the consequence of the referendum process in which she writes as follows: “The referendum proponents have 90 days from the date of the enactment [July 3, 2013] of the ratifying statute to qualify the referendum for the ballot. If the referendum qualifies by the deadline ... [October 1, 2013] ... the statute ... will be stayed/suspended until the voters have voted to either reject or adopt it.” As explained elsewhere in this memo, the 90th day marks the final day for the submission of signatures. Note that the process of tabulating and submitting the raw count takes eight business days beyond the 90 day deadline. After that, the 3% sampling requires 30 business days and the full count yet another 30 business days. Be that as it may, assuming the proper submission of the signatures, the Secretary’s letter explains clearly that the “stay/suspension” of a law occurs on the 90th day from the chaptering of the bill, i.e., chaptered on July 3rd with the 90 day deadline landing on Oct. 1st.

Concerning the specific dates of AB 1266, the timeline reads as follows:

- Signed by the Governor and chaptered August 12th
- Referendum papers filed August 16th
- 90 day deadline for submission of signatures November 10th

In sum, by operation of law AB 1266 has been stayed/suspended since November 10, 2013.

Several decades ago the California Supreme Court had occasion to interpret the referendum provision of the state’s Constitution. “[U]nder the mandate of article II of the state Constitution, the filing of a valid referendum challenging a statute normally stays the implementation of that statute until after the vote of the electorate. The statute takes effect only if approved by the voters.”<sup>10</sup> The concurring opinion further explained as follows:

The referendum process, however, is necessarily a disruptive, undeferential procedure by which the people halt in their tracks the operation of duly enacted statutes. Nonetheless, the Constitution guarantees that the people’s voice *shall be both heard and obeyed*. It clearly mandates the stay to preserve the effect of the people’s will. Any attempt to circumvent such a stay...in deference to the Legislature or the Governor, necessarily frustrates and defies the sovereign people.<sup>11</sup>

## CONCLUSION

In light of the above analysis, the Co-ed Bathroom bill remains suspended until the referendum process runs its course.

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<sup>8</sup> CA Const. Section 10(a) of Article II.

<sup>9</sup> The letter, dated August 9, 2013, involved an Indian gaming bill (AB 277) chaptered on July 3rd. Like the Co-ed Bathroom Bill, the Indian gaming law was set to take effect on January 1, 2014.

<sup>10</sup> *Assembly of State of Cal. v. Deukmejian*, 30 Cal.3d 638, 656-57 (1982).

<sup>11</sup> *Id.* at 685 (Concurrence of Newman, Broussard and Tamura)(emphasis added).

In the more than one hundred years since the voters added the referendum to the California Constitution, numerous government officials have refused to fully consent to the people's inherent authority to approve or veto laws. Inevitably, these instances of official defiance have wound up before the courts. On this issue, the judiciary does not suffer fools. Judges inevitably construe the referendum power such that they give the benefit of any doubt to the sovereignty of the people. Indeed, since the early twentieth century, the California Supreme Court instructed that the referendum power "should be liberally construed and should not be interfered with by the courts except upon a clear showing that the law is being violated."<sup>12</sup> In like manner, more recently Chief Justice Tani Cantil-Sakauye wrote, "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."<sup>13</sup>

This leads to the conclusion that any legal action brought by either a private party or school official to enforce AB 1266 before completion of the referendum process would meet with failure.

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<sup>12</sup> *Laam v. McLaren*, 28 Cal.App.632, 638 (1915).

<sup>13</sup> *Perry v. Brown*, 52 Cal. 4th 1116, 1140 (2011), quoting *Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582 (Cal. 1976) (italics omitted).