

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:	)	
	)	
BOARD OF EDUCATION	)	DECISION OF DISAPPROVAL
	)	OF REGULATORY ACTION
REGULATORY ACTION:	)	
	)	(Gov. Code, sec. 11349.3)
Title 5, California Code of	)	
Regulations	)	OAL File No. 03-0321-06 S
	)	
ADOPT SECTIONS: 11963, 11963.1,	)	
11963.2, 11963.3, 11963.4, 11963.5,	)	
11963.6	)	
_____	)	

**DECISION SUMMARY**

The regulatory action deals with classroom and nonclassroom-based instruction in charter schools. On May 5, 2003, the Office of Administrative Law (“OAL”) notified the Board of Education (“Board”) that the regulatory action was disapproved for incorrect procedure.

**INCORRECT PROCEDURE**

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.)

1. Government Code section 11347.3 subdivision (b)(5), requires that the rulemaking file contain “The estimate, together with the supporting data and calculations, required by paragraph (6) of subdivision (a) of Section 11346.5.”

Government Code section 11346.5, subdivision (a)(6), requires the notice of proposed rulemaking to include:

“An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.”

The Department of Finance’s State Administrative Manual (“SAM”) section 6601 requires the use of the Fiscal Impact Statement (“STD 399”) for the estimates. The Std. 399 contained in the rulemaking file is incomplete because Part C “Fiscal Effect on Federal Funding of State Programs” is not filled out.

The file also contains an Economic and Fiscal Impact analysis dated March 12, 2003 that states “This revision to our original analysis is being completed at the request of the Department of Finance. It was discovered that our original analysis was not based on the final version of the amended regulations; as such our original analysis was in error.”

Clarification is needed from the Board. Because the Std. 399 is not dated it is not clear if the Std. 399 reflects the final version of the regulation or was completed prior to the revision of the original analysis.

2. Government Code section 11346.9, subdivision (a)(3), requires that the Final Statement of Reasons (“FSR”) contain:

“A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action . . . .”

Mr. Peter Stewart’s comments were accurately summarized as follows:

**“Comment #9:** Peter Stewart, Director of School Development for K12 Inc., requested that web-based programs be provided with the option of meeting the 50 percent rule or meeting a set percentage spent on instruction. K12 schools spend monies in ways that are considerably different from other nonclassroom-based charters, especially by investing heavily in technology and staff development. At the public hearing he encouraged the State Board of Education to convene an eLearning task force.” (Emphasis added.)

The response said to refer to a prior response for comments submitted by Mr. Charlie Leo for the reasons why the Board chose a different approach rather than the one proposed by Mr. Stewart. However the response to Mr. Leo’s comments did not contain a response to Mr. Stewart’s issues that are underlined above.

3. Government Code section 11347.3, subdivision (b)(7), mandates that the rulemaking file include:

“(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption,

amendment, or repeal of a regulation, including any cost impact estimates as required by Section 11346.3.”

The rulemaking file did not identify or contain any documents relied upon.

(a) Both the FSR and Revised FSR make references to recommendations made by the Advisory Commission on Charter Schools (“Commission”) to the Board.

The Revised FSR states that “After five minutes of hearing testimony from the public and discussion the . . . [Commission] recommended to the . . . [Board] changes to the emergency regulations . . .” The emergency regulations were effective March 15, 2002 and lapsed on September 12, 2002 (Prior OAL file 02-0305-08 ER). The Revised FSR further states that “The proposed regulations acted upon by the . . . [Board] after the public hearing on May 30, 2002 included all of the . . . [Commission’s] recommended changes, which required a 15-day comment period. The final regulations were adopted on June 27, 2002.”

The Updated Informative Digest on page 99 of the rulemaking file states “The . . . [Board] has incorporated suggested changes made by [Commission] into the proposed regulations.” Responses to public comments in the FSR make several references to Commission hearings and that the comments “were rejected in favor of the approach adopted in the proposed regulations.”

Clarification is needed from the Board. The references to the Commission quoted above raise the issue of whether or not the Board relied upon any documents from the Commission in the adoption, amendment or repeal of the proposed regulations. If there are documents from the Commission that were relied upon, then those supporting documents require a 15-day public availability period in compliance with Government Code section 11347.1.

If the Commission’s recommendations were oral and memorialized in writing then a 15-day public availability period is required for these documents.

B. The response to Mr. Dennis Boyer’s comment in the FSR on page 101 stated that “The . . . [Commission] heard these concerns during public testimony in their meetings and determined that exclusion of these revenue sources would render the certified employee percentage meaningless since that percentage was originally determined based on a comparison to school district data including those grants, and since most schools would then meet the percentage targets in the proposed regulations. . . .” (Emphasis added.)

The FSR also contains the following response to a public comment from Mr. Michael Coppess challenging the factual basis for specified percentage benchmarks used for making funding determinations: “The percentages in the proposed regulations are based upon actual expenditure from the small school districts.” (Emphasis added.) The revised FSR on page 106 (a) augmented the response as follows:

“The percentages in the proposed regulations are not drawn directly from existing data. However, actual expenditure data from school districts reported to the California Department of Education through the Standardized Account Code

Structure (SACS) were used as a starting point for the development of the percentages because that data provided the . . . [Commission] and the . . . [Board] with a sense of how small school districts spent their revenues. The SACS data are required to be provided annually and are available to the public upon request to the California Department of Education. From there, the percentages were adjusted to reflect expenditures that in the judgment of the . . . [Commission] and . . . [Board] would demonstrate that a charter school's non-classroom-based instruction is substantially dedicated to the instructional benefit of pupils.”

The May 30, 2002 public hearing tape contains an explanation by a person identified only as “Mark” who explained the Commission’s rationale on how grants factor into the funding process. He mentioned data from districts that included grants and also data used as the basis for statistics without any further explanation.

Clarification is needed from the Board. The source of the data, i.e., Board staff, the Commission or other entity is not the determinative factor. If there was any data and other factual information, technical, theoretical, and empirical studies or reports, on which the Board relied upon, whether it is actual expenditure data or for example an extrapolation of the base data, then that data etc. must have a 15-day public availability period as required by Government Code section 11347.1.

## **CONCLUSION**

For the reasons set forth above, OAL has disapproved the proposed adoption of sections 11963, 11963.1, 11963.2, 11963.3, 11963.4, 11963.5, 11963.6 of Title 5 of the California Code of Regulations.

May 12, 2003

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For:

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