

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
BOARD OF EDUCATION)	DECISION OF DISAPPROVAL
)	IN PART OF CERTIFICATE
)	OF COMPLIANCE
)	
REGULATORY ACTION:)	Government Code section 11349.6(d)
)	
Title 5, California Code of Regulations)	OAL File No. 01-0427-04 C
)	
Adopt sections)	
1031, 1032, 1033, 1034, 1035,)	
1036, 1037, 1038, and 1039, with)	
amendments to sections 1031-1038)	
_____)	

SUMMARY OF REGULATORY ACTION

This Certificate of Compliance completes the previous emergency actions (OAL file numbers 00-1218-04E and 01-0122-02E) which implemented three academic statutory awards programs which rank and compare schools, their academic achievement, growth, and improvement, set targets for future improvement, and provide monetary and non-monetary awards to demonstrably improving schools and staff, and clarified the eligibility criteria and applicable funding formulae. The emergency regulations were first effective on December 29, 2000, and modified effective February 1, 2001. On June 11, 2001, OAL approved the filing except for subsection 1032(i), a post-hearing addition, which OAL disapproved for failing to comply with the “clarity” standard of the Administrative Procedure Act (APA).

DISCUSSION

The Board of Education (“Board”) must adopt regulations pursuant to the Administrative Procedure Act (“APA”) unless expressly exempted. Any regulatory act adopted by a state agency through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless a statute expressly exempts or excludes the act from

APA coverage. (Gov. Code section 11346.) No exemption or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action can become effective, the Office of Administrative Law (“OAL”) must review it for compliance with procedural requirements of the APA and certain substantive standards. (Gov. Code section 11349.1(a).)

Subsection (a) of Government Code section 11349.1 specifies the six substantive standards with which agencies must comply when adopting regulations pursuant to the APA. Subsection (a)(3) requires OAL to review all regulations for compliance with the “clarity” standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.” Section 16, title 1, California Code of Regulations, further defines the clarity standard.

The Board adopted Section 1032(i) of title 5 of the California Code of Regulations (CCR) as a post-hearing modification to the noticed regulations. On April 27, 2001, the Board submitted the Certificate of Compliance filing with post-hearing amendments to the emergency regulations to OAL for review. Proposed subsection (i) of section 1032 provides:

“The local educational agency must notify the department [Department of Education] and the test publisher within thirty (30) days of the publication of the [STAR testing and] demographic data on the department’s web-site that there are errors in the STAR testing or demographic data. All data corrections must be submitted to the test publisher by a deadline specified by the department in consultation with the test publisher.”

Education Code section 60641(e) requires the department to make the test results available on the Internet by August 15 each year. However, the proposed subsection is unclear in several ways. First, the first sentence does not specify *how* the school (local educational agency) must notify the department and publisher -- or if any and all means of notification are acceptable (U.S. mail, e-mail, fax, phone call, other). Secondly, must notice be *sent* within thirty days or *received by the department* within thirty days of publication? It might also be useful to further identify the web site which contains the data in question, for example, whether it is the data published as the STAR results (one series of online reports), the information shown separately as the API base reports, or both (or something else).

It is also unclear precisely which data on the web site is subject to notice and correction.. As proposed, the subsection referred to the triggering event for the thirty days as “publication of the *demographic data* on the department’s web-site [emphasis added],” but errors could be in the “STAR testing *or demographic data* [emphasis added]” Apparently the Board intended to refer to “publication of the STAR testing and

demographic data,” (underlined language was suggested to clarify the submitted language). A review of the agency’s web sites shows that some reports are primarily demographic and do not include the kind of “STAR testing data” which would reveal testing errors such as scoring an incorrect answer as correct (as was recently reported in the news) or similar testing errors. Other Education web sites show cumulative test scores by school and the school’s ranking, and so on . Does the phrase “STAR testing data” refer to these cumulative scores?

Most critically of all, the reader cannot tell how (or whether) the department will notify the local educational agency after “specifying” the deadline “in consultation with the test publisher,” or upon what standards the deadline will be based, or even if there is a minimum amount of notice to be given. The rulemaking record notes that the deadline will be based on the test publisher’s needs and workload, and estimates time periods between two and six weeks. But under the proposed regulation’s language, the time period could be as long or short as desired, with no minimum. The regulation should specify not only how the department or the publisher (which is it?) will notify the school, but also what the minimum time period (if any) is. For example, it could state: “After consulting with the publisher, the department shall notify the school in writing of the deadline within which the publisher must receive the corrections (in writing, by mail, e-mail, fax, phone—whatever is acceptable, if the Board wishes to place any limitations on the method or format). In no case shall the department give the school less than two weeks (or 20 working days, or whatever minimum time period the Board wishes to set) within which to make the corrections.”

CONCLUSION

For the reasons set forth above, OAL has disapproved the proposed adoption of section 1032, subsection (i), of title 5 of the CCR. Since this new subsection was not part of the most recently adopted emergency action, there is no repeal and reversion to the pre-emergency language. The Board may revise and correct the language to resolve the clarity problems of subsection (i) and, after a 15 day period of public availability

pursuant to Government Code section 11346.8(c) and section 44, title 1, CCR, may resubmit the revised language to OAL within 120 days of the receipt of this decision pursuant to Government Code section 11349.4(a).

If you have any questions or would like to discuss rewording to clarify the subsection in question, please contact me at (916) 323-6805.

DATE: June 18, 2001

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