

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
AGENCY: STATE BOARD OF EDUCATION)	DECISION REGARDING DISAPPROVAL OF A CHANGE WITHOUT REGULATORY EFFECT (Cal. Code Regs., tit. 1, sec. 100)
)	
RULEMAKING ACTION:)	
Repeal sections 303, 304, and 352 of title 5 of the California Code of Regulations)	OAL File No. 05-0308-01N
)	

PROPOSED CHANGE WITHOUT REGULATORY EFFECT

The State Board of Education (Board) proposes to repeal as changes without regulatory effect the following three regulations, which were adopted in 1969. Rule 303 provides: “A pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school.” Rule 304 provides: “Every pupil shall leave the schoolroom at recess unless it would occasion an exposure of health.” Rule 352 provides: “A pupil shall not be required to remain in school during the intermission at noon, or during any recess.”

SUMMARY OF DECISION

On April 19, 2005, the Office of Administrative Law (OAL) disapproved the above-referenced proposed change without regulatory effect. The reasons for the disapproval are summarized here and explained in detail below. The Board has not demonstrated that the proposed changes would “not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations provision,” as is required by California Code of Regulations, title 1, section 100.

DISCUSSION

A state agency may make changes without regulatory effect to the California Code of Regulations using the procedure set out in section 100 of title 1 of the California Code of regulations.¹ That procedure requires the agency to demonstrate to OAL that the change “does

¹ California Code of Regulations, tit. 1, sec. 100, provides, as relevant: “(a) Subject to the approval of OAL as provided in subsections (c) and (d), an agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change

not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.” In this proposed change without regulatory effect the Board proposes to “repeal”² sections 303, 304, and 352 from title 2 of the California Code of Regulations. The Board’s written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision is the following:

“It is our opinion that Sections 303, 304, and 352 are in conflict with Education Code Section 44807.5 which provides that:

“The governing board of a school district may adopt reasonable rules and regulations to authorize a teacher to restrict for disciplinary purposes the time a pupil under his or her supervision is allowed for recess.

“Because of the conflict, the regulation sections are invalid as a matter of law, and should be repealed.”

This statement does not make the required demonstration for the deletion any of these rules.

There is no inherent conflict demonstrated between rule 303 and the cited statute. Rule 303, quoted above, requires a pupil to remain on the school premises, except in case of emergency, or with the approval of the principal of the school. The statute, in contrast, authorizes the adoption of reasonable rules to allow a teacher to discipline a student by restricting recess time. Requiring a pupil to stay in the classroom during recess does not conflict with a requirement that the student remain on the school premises. Further, it is not reasonable to infer that a teacher could be authorized for disciplinary purposes to keep a person from leaving the school premises during recess when leaving the premises at that time is required by an emergency or some other equally compelling reason approved by a principal.

does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision. The addition, revision or deletion is a “change without regulatory effect.” Changes without regulatory effect include, but are not limited to:

“(1) ...;

“(2) deleting a regulatory provision for which all statutory or constitutional authority has been repealed;

“....

“(6) making a regulatory provision consistent with a changed California statute if both of the following conditions are met:

“(A) the regulatory provision is inconsistent with and superseded by the changed statute, and

“(B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.”

² Section 100, quoted in footnote 1, allows for the “deletion” rather than the repeal of a provision. This reflects the idea that a regulation can be removed from the code, i.e., deleted, when the deletion has no regulatory effect.

The analysis for rules 304 and 352 is somewhat different. Rule 304 provides: "Every pupil shall leave the schoolroom at recess unless it would occasion an exposure of health." Rule 352 provides: "A pupil shall not be required to remain in school during the intermission at noon, or during any recess." OAL's regulation, subsection (a)(6) of section 100,³ gives an example of a change without regulatory effect involving an inconsistency between a statute and a regulation. It provides that an agency can make a regulatory provision consistent with a changed California statute if both of the following conditions are met:

"(A) the regulatory provision is inconsistent with and superseded by the changed statute, and

"(B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen."

If rules 304 and 352 are authorized by statute,⁴ and we presume that they are,⁵ then any potential conflict that may exist between them and the authority to adopt a discipline rule pursuant to Education Code Section 44807.5 could be harmonized by amending rules 304 and 352 to add an exception for a restriction of the time allowed for recess under a rule adopted pursuant to that statute. Since the cure for the potential inconsistency identified by the Board is the amendment rather than the deletion of the rules, and it appears that the Board has the discretion to amend the rules, the Board has not made the requisite showing that a deletion of the regulations would not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of the rules.

For these reasons OAL disapproved the above-referenced proposed change without regulatory effect.

Date: April 25, 2005

MICHAEL McNAMER
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for: WILLIAM L. GAUSEWITZ
DIRECTOR

Original: Jack O'Connell, Superintendent of Public Instruction
cc: Debra Strain

³ See footnote 1.

⁴ The Board has made no attempt to show that these regulations are not authorized by statute.

⁵ The history note for these section indicates that these regulations were filed with the Secretary of State 9-23-69. This raises a rebuttable presumption that the Board of Education has rulemaking authority authorizing the adoption of the regulations. Gov. Code sec. 11343.6, subd. (c). The Board's explanation does not overcome this presumption. We note that no authority and reference notes for these sections are printed in the California Code of Regulations.