

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: STATE BOARD OF)	DECISION OF DISAPPROVAL
EDUCATION)	OF EMERGENCY
)	REGULATORY ACTION
)	
)	
)	(Gov. Code, sec. 11349.6)
ACTION: Adopt SECTIONS 1000, 1000.1)	
1000.2, 1000.3, 1000.4, 1000.5, 1000.6, 1000.7)	
of Title 5 of the California Code of Regulations)	OAL File No. 07-0119-02 E
_____)	

DECISION SUMMARY

On January 17, 2007, the State Board of Education (Board) submitted to the Office of Administrative Law (OAL) a proposed emergency action to set forth the application process for grants under the Quality Education Investment Act (QEIA) and the manner in which the applications would be reviewed, ranked and selected. On January 29, 2007 OAL notified the Board that OAL disapproved the emergency regulatory action because the finding of emergency did not contain “a description of the specific facts demonstrating the existence of an emergency and the need for immediate action” pursuant to the Administrative Procedure Act (APA). (Government Code sections 11342.545 and 11346.1¹)

DISCUSSION

STATUTORY REQUIREMENTS GOVERNING OAL REVIEW

The regulation adopted by the Board concerning grants under the QEIA must be adopted pursuant to the APA unless a statute expressly exempts or excludes it from APA requirements (sections 11340.5 and 11346). No express statutory exemption applies to this emergency regulation. Thus, before it may become effective, it must be reviewed and approved by OAL for compliance with the APA. Compliance requires satisfaction both of the substantive requirements of section 11349.1, and the emergency standards of sections 11342.545, 11346.1, and 11349.6.

The first comprehensive changes in the adoption of emergency regulations since the 1980s

¹ Unless stated otherwise, all California Code references are to the Government Code.

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became effective January 1, 2007 as part of AB 1302. Section 11342.545 now defines an “emergency” as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” The adoption of an emergency regulation by the Department must satisfy new requirements established by section 11346.1, which provides in part:

“(b)(1)...[I]f a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

(2) Any finding of an emergency shall include a written statement that contains . . . a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. . . .

A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.”

Section 11349.6 governs OAL’s review of emergency regulations, providing:

“(b)The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations, is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1.”

In the emergency filing submitted to OAL, the Board’s description of specific facts did not demonstrate that the situation addressed by the regulations was an emergency. The Finding of Emergency contained information on the benefit of adopting the regulations and established that

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regulations will have to be adopted to ensure a proper application process for QEIA funds, but provided no data or documentation demonstrating the need for immediate action.

The APA permits the adoption of emergency regulations only if they meet an additional level of justification, since the use of emergency regulations circumvents one of the key purposes of the APA – public participation in the rulemaking process. Since emergency regulations require the regulated public to obey rules that it had little opportunity to review and comment upon, the APA limits emergency regulations only to certain circumstances. In the absence of substantial evidence in the Finding of Emergency that the situation calls for immediate action to avoid serious harm, OAL will disapprove the proposed emergency regulation.

THE FINDING OF EMERGENCY

The Board submitted a Finding of Emergency and, at OAL’s request, a Supplemental Finding of Emergency. The Finding of Emergency based the emergency on the necessity to comply with statutory changes. It demonstrated that many schools have overcrowded classrooms, lower teacher quality than higher performing schools in their districts, and poor counselor to student ratios. It indicated that without the proposed regulations there would be a delay in securing necessary resources and assistance to implement the QEIA and the schools would risk failing to meet benchmarks prior to the end of the grant cycle.

OAL requested additional information concerning what specific harm that would be avoided if the regulations were adopted immediately and what would happen to the 2007 funding if it was not allocated by a particular date. The Supplemental Finding of Emergency described conditions that schools would continue to face. It stated that adequate numbers of facilities are limited and that QEIA funding would take steps toward assuring that more students have qualified teachers. It stated that environments not conducive to learning will continue to perpetuate the outputs of a low performing school. The Board also indicated that the regulations would have a one-time impact since the selection of schools for QEIA funding would be made before the regulations would become permanent.

OAL REVIEW OF THE ISSUE OF EMERGENCY

OAL is expressly prohibited from “substitut[ing] its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations” (section 11340.1). OAL’s disapproval of these regulations does not reflect a judgment upon the benefits, the value, or the advisability of the proposed rules.

With respect to determining whether or not regulations may be appropriately adopted as

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an emergency, OAL makes a separate and independent determination. The rulemaking agency is required, pursuant to sections 11342.545 and 11346.1, to present specific facts demonstrating the existence of an emergency and the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. In section 11349.6 OAL is directed to disapprove emergency regulations if it determines that the situation addressed by the regulations is not an emergency.

A review of relevant case law yields useful guidance.

RELEVANT CASE LAW

Prior to the 1979 amendments of the APA² the determination that an emergency did or did not exist was mostly a matter of agency discretion. In *Schenley Affiliated Brands V. Kirby* (1971) 21 Cal.App.3d 177, 98 Cal.Rptr. 609, the court said that “[w]hat constitutes an emergency is primarily a matter for the agency's discretion.” In practice, this amounts to a presumption that a finding of emergency is valid. However, even then the agency’s determination was not conclusive. In *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, for the first time, the court clarified that an emergency was required to “reflect a crisis situation, emergent or actual.” (Id. at 942.) In *Poschman*, the board of trustees of the California state colleges adopted an emergency regulation which allowed the Chancellor to amend employment grievance procedures. (Id. at 937.) In the statement of reasons setting out the emergency, the trustees contended that the regulation was necessary to avoid confusion in personnel practices. (Ibid.) On review, the court found that this reasoning did not reflect a crisis situation. The court held that an emergency had to reflect a “crisis situation, emergent or actual,” not merely a declaration of sound policy (Id. at 942). This is the first elucidation of the court’s understanding of what qualifies for an emergency under the APA.

Several years after *Schenley* and *Poschman*, the Legislature enacted AB 1111, which amended the APA by, among many other changes, creating OAL and giving it authority to make an independent determination as to whether an agency’s emergency regulations comply with the statutory standard.

Neither OAL nor the courts are required to defer to the judgment of the agency in the determination of whether an emergency exists. Each is required under the APA to evaluate this question separately. In the two leading cases that followed *Schenley* and interpreted this provision of the APA, the Court of Appeals upheld the finding of emergency in one case (*Doe v.*

² Chapter 537, Statutes of 1979 (AB 1111, McCarthy)

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Wilson (1998) 31 Cal.App.3d 932, 107 Cal.Rptr. 596) and overturned the finding in the other (*Poschman v. Dumke, supra*).

The most recent appellate decision on this specific issue is *Doe v. Wilson (supra)*. *Doe* describes an emergency as “an unforeseen situation calling for immediate action.” (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306.) In *Doe v. Wilson* the court borrowed the reasoning of the court in *Sonoma County Organization of Public/Private Employees, Local 707, SEIU, AFL/CIO v. County Of Sonoma* (1991) 1 Cal.App.4th 267, 276-277, 1 Cal.Rptr.2d 850.

Sonoma County provides the most comprehensive discussion of what constitutes an emergency to be found in case law. In addition to the language identifying it as “an unforeseen situation calling for immediate action”, it contains an extensive discussion of the factors that characterize an emergency (*Sonoma County, supra*, 277-278). Although *Sonoma County* examined a local emergency ordinance and did not interpret the APA, its discussion of the meaning of the “word 'emergency' as used in legislative enactments” is illuminating and its citation in *Doe v. Wilson* demonstrates that the same principles apply to emergency regulations adopted pursuant to the APA.

According to *Sonoma County*:

It is a considerably harder task to specify identifying characteristics of an emergency, given that “[t]he term depends greatly upon the special circumstances of each case.” (*Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 356 [291 P. 839, 71 A.L.R. 161].) Not only must urgency be present, the magnitude of the exigency must factor. We agree with the trial court that an emergency may well be evidenced by an imminent and substantial threat to public health or safety. (... *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586, 592 [214 Cal.Rptr. 424, 699 P.2d 835].) Certainly this is an important-perhaps the most important-criterion if the emergency involves a public sector labor dispute, although we are disinclined to view it as a sine qua non. Without question, an emergency must have “a substantial likelihood that serious harm will be experienced” (*Dow Chemical Co. v. Blum* (E.D. Mich. 1979) 469 F.Supp. 892, 902) unless immediate action is taken. The anticipation that harm will occur if such action is not taken must have a basis firmer than simple speculation. (See *People v. Weiser* (Colo.App. 1989) 789 P.2d 454, 456; *Senn Park Nursing Center v. Miller* (1983) 118 Ill.App. 733, [74 Ill.Dec. 132, 455 N.E.2d 162, 168].) Emergency is not synonymous with expediency, convenience, or best interests (*Hunt v. Norton* (1948) 68 Ariz. 1 [198 P.2d 124, 130, 5 A.L.R.2d 668]; *State v. Hinkle* (1931) 161 Wash. 652 [297 P. 1071, 1072]), and it imports “more ... than merely a general public need.” (*Hutton*

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Park Gardens v. Town Council (1975) 68 N.J. 543 [350 A.2d 1, 13].) Emergency comprehends a situation of "grave character and serious moment." (*San Christina etc. Co. v. San Francisco, supra*, 167 Cal. 762 at p. 773.)

The considerations in evaluating a purported emergency identified by the *Poschman, Sonoma County*, and *Doe* courts may be summarized as:

1. The magnitude of the potential harm.
2. The existence of a crisis situation, emergent or actual.
3. The immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken.
4. Whether the anticipation of harm has a basis firmer than simple speculation.
5. Whether the basis for believing that an emergency exists is simply expediency, convenience, best interests, or a general public need.
6. Whether the situation is of grave character and serious moment.
7. Whether the situation is unforeseen.

The existence of all or many of the factors identified in the case law provides strong evidence that the use of emergency regulations is justified. The existence of few or none of these factors is strong evidence that emergency regulations are not justified. Although *Doe* described an emergency as "an unforeseen situation calling for immediate action," a situation may have been foreseen and nevertheless meet the definition of an emergency.

Ultimately, the rulemaking agency, in evaluating its proposed regulations, and OAL, in its independent review of the file, must use case law as an evidentiary tool in applying the statutory standard.

ANALYSIS OF FINDING OF EMERGENCY

OAL is cognizant of the enormity of the overcrowding issues in schools and the negative impact upon children, parents, school personnel and the public in the long term. It is doubtless in everyone's best interest that the overcrowding be addressed as soon as possible. However, OAL must determine whether or not the proposed emergency regulations meet the requirements of the APA. OAL bases this determination primarily upon review the facts provided by the Board. Based upon OAL's review of the information provided by the Board in this filing, OAL concludes that the situation presented by the Board does not qualify as an emergency.

The Finding of Emergency and Supplemental Finding of Emergency submitted by the Board establish that many schools are overcrowded, and, in some cases, unsanitary, that there is a shortage of qualified teachers, and that there are high pupil-to-counselor ratios. These are continuing conditions. If these regulations do not go into effect immediately, the harm that will

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befall schools will be no different from the existing harm. The potential harm established by the Board is that the status quo will continue during the few months required by a regular rulemaking process. This harm does not, by itself, justify adoption of emergency regulations and the circumvention of public participation requirement of the APA.

CONCLUSION

For the reasons discussed above, OAL disapproved the emergency regulatory action because the Board did not demonstrate that the proposed regulations were immediately necessary to avoid serious harm to the public peace, health, safety or general welfare. If you have any questions, please do not hesitate to contact me at (916) 323-6817.

DATE:

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