

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: BOARD OF EDUCATION	)	DECISION OF DISAPPROVAL
	)	OF REGULATORY ACTION
ACTION: Amend sections 3001, 3051,	)	
3060, 3061, 3062, 3063, 3064, 3065, 3066,	)	(Government Code section 11349.3)
3067, 3068, 3069 and 3070 of Title 5 of the	)	
California Code of Regulations	)	OAL File No. 07-0323-02 S
_____	)	

BACKGROUND

The Board of Education (Board) proposed the amendment of standards for state certification of nonpublic schools with the goal of making them conform to provisions of the federal Individuals with Disabilities Education Act, various other changes to laws, and the requirements imposed on public schools as a result of the Williams settlement. On March 23, 2007, the regulations were submitted to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA) and on May 4, 2007, OAL disapproved them. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the Board's proposed regulations for lack of clarity, necessity, and consistency, omission of required documents from the rulemaking file, failure to meet all the requirements for incorporation of standards into regulations by reference, and failure to summarize and respond to all public comments.

DISCUSSION

1) APPLICATION FORM

The Education Code provides that public schools may enroll students with exceptional needs in nonpublic nonsectarian schools and agencies under section 56365. As they are defined in sections 56034 and 56035, nonpublic nonsectarian schools and agencies must be certified by the Department of Education. Section 56366.1 describes the certification procedure, and in subdivision (a) provides, in part:

“A nonpublic, nonsectarian school or agency that seeks certification shall file an application with the Superintendent on forms provided by the department and include the following information on the application:”

This is followed by a list of items numbered (1) through (5). The Board completed the adoption of the current regulation [CCR, title 5, section 3060] implementing the

application requirements in 1999. The regulation, entitled Application for Certification, further provides in subdivision (c):

“Each nonpublic school or nonpublic agency application shall include information pursuant to Education Code section 56366.1(a) and:”

[A list of 17 items follows.]

Thus, we see that the use of an application form provided by the Department for collection of the information set forth in both the statute and the regulation is clearly required by existing law. The proposed amendment would change the regulation as follows:

“Each nonpublic school or nonpublic agency application shall include all information required by the Department’s application pursuant to Education Code section 56366.1(a) and (b):”

[Followed by the list described immediately above, with amendments.]

The Department’s new application has not been included in the record. The amendment is a subtle change, but it is a cause for concern because it opens the door to additional requirements and standards that may be added to the application form without following the proper rulemaking procedure. It is impossible for OAL to review *all information required by the application* and determine the Board’s compliance with the APA without having the application itself. Even though the requirement to use an application is in law, this does not authorize the imposition of any requirement not supported by law simply by means of its inclusion in the application. OAL’s interpretation of this language is supported by the forms exception to the APA set forth in Government Code section 11340.9, subdivision (c). It provides that the [forms exception] “is not a limitation on any requirement that a regulation be adopted pursuant to [Chapter 3.5] when one is needed to implement the law under which the form is issued.”

## 2) NECESSITY

In describing the need to amend the regulations, the initial statement of reasons (ISR) attributes some of the changes to the requirements of federal regulations. Some of the federal regulations cited there do not address the matters ascribed to them.

(A) For example, section 3064 specifies the minimum standards for instructors in special education. The ISR includes a narrative that explains these standards are necessary to meet the requirements of 34 CFR 300.15 and 34 CFR 300.153. Section 300.15 is a simple one sentence definition of the term IEP, and section 153 prohibits using federal funds to supplant state funds. Neither of these sections requires the adoption of a regulation with minimum standards for instructors.

(B) Section 3065 specifies the minimum qualifications for persons who will provide related services. Once again, the ISR attributes the need for these standards to 34 CFR 300.15 and 34 CFR 300.153. No such requirements can be found there. The ISR for this section also indicates that the list of related services is found in 20 USC 1401 (22), but it is actually found in 20 USC 1401 (26). It also states that such a list can be found in 5 CCR 3051, but it is actually found in 5 CCR 3001 (aa).

(C) Finally, for section 3060, subdivision (c)(20), the ISR attributes the need for daily and weekly class schedule information to Education Code section 4611-46113. This is simply a typographical error, where 46111-46113 would be appropriate.

While we trust that there are federal requirements that these proposed changes do address, our inability to use some of these citations to confirm the basis for these changes hampers our review. The same mistakes may also have limited the ability of interested persons to understand and comment on the proposal. These citation errors must be corrected in the final statement of reasons.

### 3) CLARITY

#### Section 3001

Amended section 3001, subdivision (a), requires each nonpublic nonsectarian school to provide the same instructional materials used by the local school district in which the nonpublic school is located, unless otherwise stated in the student's individualized education program. In paragraph (a)(1), it provides "[e]ach student *will* have a copy of textbooks . . ." (Italics added.) Because the regulation uses the passive voice, describing what will happen, rather than who must do it, it does not clearly indicate who must supply the textbooks. In context, it's apparent that the Board's intention was that the nonpublic school must provide the textbooks, but the sentence should be rearranged to describe who must supply them, rather than what each student will have.

Subdivision (a) is also unclear because it is not possible to determine whether the exception to the obligation to provide curriculum and instructional materials set forth at the beginning of (a) limits the impact of paragraphs (1) and (2) that follow it. The exception in (a) for cases where a student's IEP provides otherwise, may in some cases limit the obligation to provide the same curriculum and instructional materials used in local schools. On the other hand, the language of (a)(1), stating that each student will have textbooks and the prohibition of using photocopies of books in (a)(2), both seem absolute. This was a matter of considerable controversy because representatives of nonpublic schools were concerned with the cost of purchasing these books, and many questioned the usefulness of these requirements. It is especially important that the answer to these questions be made clear in the language of the regulation.

Section 3060

Another provision related to instructional materials found in section 3060 is also unclear. The current rule, one aspect of which is discussed in (1) above, provides:

“(c) Each nonpublic school or nonpublic agency application shall include information pursuant to Education Code section 56366.1(a) and:”

[Items (1) through (17) omitted.]

The proposed amendment provides:

“(c) Each nonpublic school or nonpublic agency application shall include all information required by the Department’s application pursuant to Education Code section 56366.1(a) and (b):”

[Items (1) through (26) omitted.]

The change adding (b) before the colon brings in material from the Education Code, but it leaves the list of 26 items that follows without a proper introduction. Inserting “and” after (b) will solve this small problem, but there are two others. New paragraph (c)(9) requires the inclusion of :

“standards-aligned core-curriculum and instructional materials used by the local school district in which the nonpublic school is located, unless otherwise stated in the IEP.”

Most of this language, including the exception, was added in a second round of changes made available for comment from January 16, 2007 to January 31, 2007. The exception mirrors the language used in section 3001, subdivision (a) discussed above, and it is unclear because it describes an exception that is particular to an individual student in connection with a school’s application for certification. We presume that in most instances, a school would enroll a number of students, each of them with an IEP, and that the school’s application for certification would ordinarily not be dependent upon a single IEP. The regulation is also unclear because its effect is different from the Board’s description of it. The ISR, on page 4, discusses paragraph (9) and explains “Applicants are required to *identify* the curriculum and instructional materials it [sic] is using to meet the requirements of IDEA 2004 and AB 1858, Education Code sections 56366.10(b)(1) and 60117-60119.” (Italics added.) Although perhaps unintended, the proposed rule actually requires the applicant to *include* with its application the curriculum and instructional materials, which it would seem, based upon section 3001, would include a set of all the books.

Section 3062

As amended, the first sentence of subdivision (h) of section 3062 provides:

“Nonpublic schools and agencies shall notify the Superintendent and ~~contracting local education agencies~~ LEAs in writing within ~~forty five (45)~~ days of any change in credential or licensed personnel ~~changes~~, and registered staff, including but not limited to persons who provide direct services to students.”

The California Association for Parent-Child Advocacy (CAPCA) objected to this provision in the original 45 day (p.104) and in the second 15 day (p. 208) comment periods, stating that the term “registered staff” is vague. In particular the CAPCA noted that the “including but not limited to language” does not clearly define the registration requirement. The Board’s response (p. 216) rejected the comment, reasoning that the reporting requirement is clearly stated. The duty to report is plain, but the regulation does not clearly identify which staff members are subject to the registration requirement, nor does it indicate what registration entails. Section 3051, which relates to the qualifications of persons who will provide related services (formerly “designated instruction”) at a nonpublic nonsectarian school, requires them to be *certified* pursuant to sections 3060 – 3065. These sections implement the requirement for certification of the school, and in section 3060, subdivision (c), paragraphs (14), (15) and (16) require the school to provide information concerning its staff, or qualified staff. Perhaps the intention is that the staffers so identified are thus “certified staff,” and if this is the case, they should be referred to by that term. If there is indeed another sort of approval contemplated in the registration concept, then this must be clearly stated and supported by a proper rulemaking record.

#### 4) REJECTION OF PUBLIC COMMENTS

In addition to the response to the comments discussed in (3) above objecting to the language concerning staff registration, some of the Board’s responses to comments do not adequately state a reason for rejection of a commenter’s recommendation.

(A) Four comments offering suggestions related to the timeliness of notification or communications between the Department of Education and the nonpublic nonsectarian schools that the commenters believed would improve the certification program were rejected substantially as follows:

“This request is not in law, therefore it cannot be added by regulation.”

The reason provided is legally incorrect. While it’s true that regulations must interpret, implement, or make specific laws administered by the agency, or govern procedure, all of the suggestions could be implemented through rulemaking.

(B) Quite a few commenters including the Board of Psychology, the California Psychological Association, practicing psychologists, and others objected to the Board’s proposed regulation on the subject of “psychological services” set forth in section 3065, subdivision (o). Their concern is that the regulation appears to sanction the unauthorized practice of psychology. Subdivision (1) is the proposed

definition, which is not detailed and generally describes services connected with consultation and counseling. Then, in subdivision (2), the regulation lists the persons who may provide psychological services. The Board's list of acceptable providers includes certain classes of therapists, social workers and interns who are not licensees of the Board of Psychology. Business and Professions Code section 2903 prohibits the unauthorized practice of psychology. It provides:

"No person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license granted under this chapter, except as otherwise provided in this chapter. The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis; and of constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivations.

"The application of these principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups.

"Psychotherapy within the meaning of this chapter means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

"As used in this chapter, "fee" means any charge, monetary or otherwise, whether paid directly or paid on a prepaid or capitation basis by a third party, or a charge assessed by a facility, for services rendered."

Virtually all the commenters interested in this cited Business and Professions Code section 2902, subdivision (c), which provides:

"A person represents himself or herself to be a psychologist when the person holds himself or herself out to the public by any title or description of services incorporating the words 'psychology,' 'psychological,' 'psychologist,' 'psychology consultation,' 'psychology consultant,' 'psychometry,' 'psychometrics' or 'psychometrist,' 'psychotherapy,' 'psychotherapist,' 'psychoanalysis,' or 'psychoanalyst,' or when the person holds himself or herself out to be trained, experienced, or an expert in the field of psychology."

These commenters recommended, in the alternative, either a change that would limit the provision of psychological services to licensees of the Board of Psychology, or the

removal of the definition, and in its place, reliance upon the definition of counseling services. The Board's response is simply that

“[t]he explanation for changing ‘Psychological services’ to ‘Counseling services’ is not specific and therefore we can not respond.”

The commenters recommended either limiting provision of psychological services to licensees of the Board of Psychology, or steering clear of the qualifications issue by speaking only of counseling, which is apparently general and less regulated. These comments and recommendations are worthy of a response and the Board must provide a better one. If the response includes making no change to the regulation, then the Board should explain how the regulation is consistent with the identified limitations on the practice of psychology. Under Government Code section 11349.1, subdivision (a)(4), OAL must review proposed regulations under the consistency standard, which is defined in section 11349, subdivision (d). It simply requires a proposed regulation to be consistent with other applicable laws. Without the benefit of the Board's views on this matter, appropriate resolution of the consistency issue will be more difficult. Based upon the information available at this time, it does appear that the commenters have raised a significant legal issue that must be addressed by the Board in its response.

#### 5) AUTHORITY & REFERENCE CITATIONS

The Board's regulations include citations of authority and reference, as required by the APA. The following errors were noted:

##### Authority

Section 3063 is entitled Program Reviews. The proposed amendment, which is minor, includes the addition of Education Code sections 56366.9 and 56366.10 as authority for the regulation. Section 56366.9 prohibits placement of a child with exceptional needs in an institution that requires the residents to attend its educational program. Section 56366.10 requires nonpublic nonsectarian schools that are certified to also certify their own compliance with enumerated standards. Neither of these sections provides for the adoption of regulations by the Board, and consequently they are not proper citations of authority.

##### Reference

(A) Section 3061 cites Education Code section 56366.7 as reference. This statute was repealed on January 1, 2002 and should be deleted.

(B) Section 3065 cites 34 CFR 300.34 as reference. There is no section with that number. Perhaps the Board intended to cite section 300.340.

(C) Although not a “reference” citation as defined in the APA, section 3067, subdivision (a)’s cross-reference to subdivision 3067(d)(1) should refer instead to subdivision 3067(b).

(D) Sections 3069 and 3070 both cite 34 CFR 300.104 and 300.323-324. as reference. The citations are not in the proper format, and more importantly, these federal regulations do not exist.

## 6) DOCUMENTATION OF BOARD ACTION

The Administrative Procedure Act requires the rulemaking record to contain documentation of a board’s action adopting a regulation. Government Code section 11347.3, subdivision (a)(8), requires a transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation. In this particular rulemaking action, the Board’s public hearing, which was adequately documented by a tape recording, preceded the adoption of the regulation. The actual adoption of the regulations occurred after additional public comment at a public meeting that was not designated as a public hearing under the APA. Two documents in the rulemaking record contain statements, or present evidence of the Board’s decision to adopt these amendments that are inconsistent with each other. The updated informative digest recounts the history of comment periods, hearings and meetings concerning these amendments. The final sentence provides:

“The State Board of Education adopted the proposed amendments to the regulations at their January, 2007 Board meeting.”

A memorandum appearing at pages 118 and 119 of the record contains the statement that the regulations were adopted on March 7, 2007. Upon resubmission, the Board must resolve or explain this apparent conflict in the reported dates of action. Additionally, the memorandum concerning the public meeting should be improved so that it adequately identifies the version of the regulations adopted. In this rulemaking there was an original proposal and two rounds of changes were offered up for 15 days of public comment, yet the memorandum only refers to “the regulations.”

For the foregoing reasons, OAL disapproved the proposed amendments to the standards for certification of nonpublic schools. We also noted the following errors in grammar that must be corrected.

(A) On page 5, lines 1 and 2, the subject “systems” and the form of the verb “meets” do not agree.

(B) On page 7 section 3051 sets forth a description and some standards and limitations applicable to “related services,” a term of art. Subdivision (a)(2) provides:

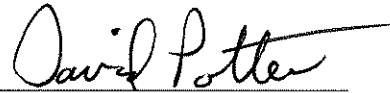


~~“Designated instruction and Related services, when needed as determined by the individualized education program IEP, shall including include the frequency and duration of services.”~~

Apparently this means that related services shall only be available when an IEP indicates that they are needed, and that the IEP shall indicate how often, and for how long the related services are needed. Unfortunately, the sentence presently says related services include frequency and duration. Frequency and duration are associated terms, and they must be in the IEP, but they are not services.

(C) On page 17, the phrase “license as a Psychologist, or regulated by the Board of Psychology.” appears on lines 31 and 32 following words of introduction that indicate a person must possess an authorization to practice. Some words necessary to complete the thought are missing from the phrase. For example, this might be improved by adding the words “or other professional” before the word “regulated.” This same problem is also present on page 18, lines 27 and 28.

Date: May 11, 2007



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