

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

AGENCY: STATE BOARD OF	)	DECISION OF DISAPPROVAL
EDUCATION	)	OF REGULATORY ACTION
	)	
Title 5, California Code of Regulations	)	
	)	(Gov. Code, sec. 11349.3)
ACTION: Amend sections 3051.16, 3065	)	
	)	OAL File No. 2007-1015-04 SR
	)	

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**DECISION SUMMARY**

On March 21, 2007, the State Board of Education (Board) submitted to the Office of Administrative Law (OAL) proposed amendments to Title 5, sections 3051.16 and 3065 of the California Code of Regulations. The proposed amendments seek to change the requirements for qualification of interpreters for pupils who are deaf or hard of hearing. The rulemaking was withdrawn from OAL review and resubmitted on October 15, 2007.

Interpreters must meet state approved or recognized certification, licensing, registration or other standards as established by the Board. The amendments were submitted to clarify the definition of “qualified personnel” to provide educational interpreter services in public and private schools and agencies. Current regulations require any educational interpreter for the deaf and hard of hearing pupils employed as of January 1, 2007, to be RID (Registry of Interpreters for the Deaf) certified or equivalent, or if providing cued speech interpreting services, by any certifying body recognized by the National Cued Speech Association (NCSA). In that school districts have found it impossible to hire the requisite number of RID certified interpreters to meet their current needs, the Board approved amendments of the existing regulations to allow the use of interpreters who are not currently RID certified, but have demonstrated a certain level of competence in national testing. The amendments establish a graduated standard for competence over the next three years, i.e. achieve a 3.0 in 2007, 3.5 in 2008 and 4.0 in 2009.

On November 28, 2007 OAL notified the Board that OAL disapproved the resubmitted regulatory action because the Board: (1) failed to follow required Administrative Procedure Act (APA) procedure; and, (2) failed to summarize and/or adequately respond to each substantive comment made regarding the proposed action. (Government Code sections 11349.3<sup>1</sup>)

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<sup>1</sup> Unless stated otherwise, all California Code references are to the Government Code.

## DISCUSSION

Any regulatory amendment adopted by the Board 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 proposed regulatory action. Thus, before it may become effective, it must be reviewed and approved by OAL for compliance with the APA. Compliance means, among other requirements, satisfaction of both the substantive provisions of section 11349.1, and the procedural requirements contained in section 11347.3(b)(8).

### A. FAILURE TO MEET APA PROCEDURAL REQUIREMENTS

#### **1. Government Code section 11347.3.**

Section 11347.3 requires that:

(a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding.

...

(b) The rulemaking file shall include:

...

**(8) A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.**

...

California Code of Regulations, Title 1, section 90 further articulates what constitutes compliance with section 11347.3 (a)(8). It states:

"Transcript," "Recording," or "Minutes."

**(a) Information submitted in compliance with the requirements of Government Code section 11347.3(b)[sic](8) shall fully and accurately reflect all proceedings applicable to the rulemaking action under review and shall be adequate:**

- (1) to ensure effective review of the record by OAL, in light of the provisions of the APA providing for meaningful public participation; and
- (2) to permit effective judicial review of the record.

**(b) Material submitted as a "transcript" or "recording" in fulfillment of this requirement shall consist of a word-by-word, speaker-by-speaker record of all that is said on the record in any and all public hearings or public meetings held as part of the adoption, amendment or repeal of the regulation in question.**

... (Emphasis added.)

Although a cassette tape of the public hearing was included as part of the rulemaking file, it abruptly cuts off and does not appear to be a complete representation of the public hearing. As such, it does not meet the requirements of section 11347.3(b)(8) or section 90. The Board was advised of this at the time of the original March submission as well as upon resubmission in October. A representative of the Board advised OAL that the Board would be unable to produce a transcript, minutes or recording of the public hearing to fulfill the APA requirement. Furthermore, OAL was informed that it would not be possible for the Board to confirm or deny that the proceedings on the tape were in fact the entire proceedings that took place and that all commenters were responded to in the Final Statement of Reasons.

OAL and Board staff discussed whether there might be other means by which the Board could substantiate the hearing proceedings in the absence of being able to obtain a complete recording. OAL was informed that the Board would not be able to fulfill the requirements of section 11347.3 prior to expiration of the statutory time period for OAL review of the file.

## **2. Government Code section 11343.4.**

The Board requested an effective date of June 1, 2007. However, as discussed with the Board staff, OAL cannot approve a regulatory amendment that provides a retroactive date for compliance absent a clear statutory provision that provides for such. Regulations are effective thirty (30) days after filing with the Secretary of State as indicated in section 11343.4.

**11343.4. A regulation or an order of repeal required to be filed with the Secretary of State shall become effective on the 30th day after the date of filing unless:**

(a) Otherwise specifically provided by the statute pursuant to which the regulation or order of repeal was adopted, in which event it becomes effective on the day prescribed by the statute.

(b) A later date is prescribed by the state agency in a written instrument filed with, or as part of, the regulation or order of repeal.

(c) The agency makes a written request to the office demonstrating good cause for an earlier effective date, in which case the office may prescribe an earlier date.

## **B. FAILURE TO ADEQUATELY RESPOND TO COMMENT**

According to Government Code section 11346.9, every agency shall:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(3) **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.** The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. . . (Emphasis added.)

Once a complete recording, transcript or minutes of the public hearing is obtained, each relevant objection or recommendation must be summarized and responded to in accordance with section 11346.9.

Additionally, OAL found instances in which the responses that were submitted by the Board to written comments on the rulemaking were insufficient. OAL has identified these instances with Board staff. An example of an insufficient response follows:

➤ Association of California School Administrators (letter dated January 2, 2007) states: "We are also unclear whether the higher cut points of 3.5 and 4.0 are to be achieved by all those hired regardless of start date or those hired after July 2009? This section is confusing in terms of staggered requirements. The Informative Digest does not explain the staggered requirement process nor does it say how the cut points effect hiring at the local level."  
**Response:** "The IDEA requires that States set qualification standards for educational interpreters. California would be out of compliance with federal law if it postponed setting a standard until 2008. In addition, postponing the requirement would be a grave disservice to our state's children who are deaf or hard of hearing. The agencies that administer the Educational Interpreter Performance Assessment and the Educational Sign Skills Evaluation do not set passing scores, but leave it to individual states to determine passing scores. At the local level, school districts will be expected to hire interpreters who have met the regulatory qualification standard."

The response by the Board does not answer the question posed and does not meet the response requirement of section 11346.9.

**CONCLUSION**

For the reasons discussed above, OAL disapproved the regulatory action on November 28, 2007. According to section 11349.4, the Board has 120 days from receipt of this opinion to resubmit the rulemaking.

If you have any questions, please do not hesitate to contact me at (916) 323-6800.

DATE: December 5, 2007

  
Elizabeth Heidig  
Staff Counsel

For: SUSAN LAPSLEY  
Director

Original: Roger Magyar, General Counsel  
cc: Connie Diaz