State of California
Office of Administrative Law

In re:
Board of Education

Regulatory Action: Title 5
California Code of Regulations

Adopt sections: 11968.5.1, 11968.5.2, 11968.5.3, 11968.5.4, 11968.5.5
Amend sections: 11965, 11969 (renumbered 11968.1), 11969.1, 11969.2 (renumbered 11969.11), 11969.3 (renumbered 11969.12), 11969.4 (renumbered 11969.13), 11969.5 (renumbered 11969.14), 11969.6 (renumbered 11969.15), 11969.7 (renumbered 11969.16), 11969.8 (renumbered 11969.17), 11969.9 (renumbered 11969.18), 11969.10 (renumbered 11969.19), and 11969.11 (renumbered 11969.20)

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2011-0210-03 S

SUMMARY OF REGULATORY ACTION

In this regulatory action, the State Board of Education (SBE) proposed to adopt and amend regulations pertaining to "Charter Revocation and Revocation Appeals." The SBE implements provisions of Education Code section 47607 which pertain to the procedures and requirements for the revocation of a charter school's charter and the appeal rights applicable to charter school revocation actions. Included in this regulatory action are regulations pertaining to (1) the procedures generally applicable when a chartering authority considers the revocation of a charter school's charter, (2) the procedures applicable when a chartering authority revokes a charter school's charter upon a determination that a violation under Education Code section 47607(c)

constitutes a severe and imminent threat to the health or safety of pupils, (3) the procedures for an appeal to a county board of education when a district chartering authority revokes a charter school's charter, and (4) the procedures for an appeal to the SBE of charter school revocation-related decisions. In addition to these regulations, this regulatory action also proposed to include a regulation implementing Education Code section 47604.5, setting forth procedures applicable when the State Superintendent of Public Instruction considers making a recommendation to the SBE for charter revocation or for other action involving a charter school where there have been one or more alleged violations under Education Code sections 47604.5(a) or 47604.5(b).

DECISION

On March 25, 2011, the Office of Administrative Law (OAL) notified the SBE of the disapproval of this regulatory action. The reasons for the disapproval were the following: (1) failure to comply with the "Clarity" standard of Government Code section 11349.1, (2) failure to adequately summarize and respond to all of the public comments received regarding the proposed action, (3) documents in the rulemaking file which are defective, and (4) failure to comply with all required Administrative Procedure Act procedures.

DISCUSSION

Regulations adopted by the SBE must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11365). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

A. CLARITY

OAL must review regulations for compliance with the "Clarity" standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "Clarity" as meaning "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The "Clarity" standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), OAL's regulation on "Clarity," which provides the following:

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
(3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
(5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be "directly affected" if they:

(1) are legally required to comply with the regulation; or
(2) are legally required to enforce the regulation; or
(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this charter revocation and revocation appeals rulemaking, a number of provisions of the proposed regulations fail to comply with the "Clarity" standard. Examples of the "Clarity" problems are set forth below. Additional "Clarity" concerns (such as minor wording and grammar problems) have been discussed with SBE staff and will also need to be corrected in any resubmission of this rulemaking.

1. Regulation sections 11968.5.3, 11968.5.4, and 11968.5.5 – As detailed below, the proposed regulations raise significant "Clarity" concerns with regard to appeals of charter revocation actions under section 11968.5.3 and how the appeal procedures set forth in sections 11968.5.4 (appeal to a county board of education) and 11968.5.5 (appeal to the SBE) would be applied in section 11968.5.3 appeals.

Section 11968.5.3, "Charter Revocation When There is a Severe and Imminent Threat to the Health or Safety of Pupils," provides for an exemption from the generally applicable procedures for charter revocation by a chartering authority (which are in section 11968.5.2) when the chartering authority has determined that any violation under Education Code 47607(c) constitutes a severe and imminent threat to the health or safety of pupils. Under section 11968.5.3, a chartering authority may immediately revoke a charter school's charter by means of a "Notice of Revocation by Determination of a Severe and Imminent Threat to Pupil Health or Safety." Section 11968.5.3(b) then sets forth appeal rights as follows: "Following the approval and delivery of the Notice of Revocation by Determination of a Severe and Imminent Threat to Pupil Health or Safety by the [local educational agency], the charter school may appeal to the

county board of education or the SBE, as applicable, pursuant to Education Code sections 47607(f) and (g) and sections 11968.5.4, 11968.5.5, and 11968.5.6."

The proposed reference in section 11968.5.3(b) to appeal rights in section 11968.5.6 does not makes sense (and would be confusing), as there is no section 11968.5.6 in either existing SBE regulations or proposed in this rulemaking.

The proposed references in section 11968.5.3(b) to sections 11968.5.4, "Appeal of District Charter Revocation to a County Board of Education," and 11968.5.5, "Appeal of a Charter Revocation to the State Board of Education and Submission of the Administrative Record," also raise "Clarity" concerns. The standards and requirements which would be applicable to a section 11968.5.3 appeal are not clear upon examining the specific provisions in those two appeal regulations. Sections 11968.5.4 and 11968.5.5 may have been written with the assumption of an appeal of a revocation action under Section 11968.5.2, "Charter Revocation," (essentially the generally applicable procedures for charter revocation), and without much consideration of an appeal of a revocation action under section 11968.5.3.

For example, section 11968.5.4(a)(1) provides that the charter school filing an appeal shall include with its Notice of Appeal "a copy of the Notice of Violation, Notice of Intent to Revoke and the Final Decision issued pursuant to this article except that the charter school shall not be responsible for providing these documents if the chartering authority did not provide [them] to the charter school as required in section 11968.5.2." Sections 11968.5.4(a)(3) and (a)(4) require the charter school filing an appeal to include "all evidence relied upon by the chartering authority in determining whether substantial evidence existed that the charter school failed to remedy one or more violations identified in the Notice(s) of Violation" and "all evidence and correspondence submitted by the charter school's governing body as described in the school's charter in response to the chartering authority's Notice of Violation and Notice of Intent to Revoke." Similarly, section 11968.5.5(b)(1) refers to an entity appealing to the SBE providing the Notice of Violation, Notice of Intent to Revoke and Final Decision. Sections 11968.5.5(b)(3) and (b)(4) require the appealing entity to submit "[e]vidence relied upon by the chartering authority in determining whether substantial evidence existed that the charter school failed to refute to the chartering authority's satisfaction or remedy one or more violations identified in the Notice(s) of Violation" and "[e]vidence and correspondence submitted to the charter school's governing body as described in the school's charter in response to the chartering authority's Notice of Violation and Notice of Intent to Revoke." The Notice of Violation, Notice of Intent to Revoke, and the Final Decision are documents which are referenced as part of the revocation process in section 11968.5.2 but which are not referenced as part of the revocation process in section 11968.5.3. The document issued under the terms of section 11968.5.3, which is the "Notice of Revocation by Determination of a Severe and Imminent Threat to Pupil Health or Safety," is not mentioned in either section 11968.5.4 or 11968.5.5 as being part of the required administrative record to be provided by the appealing party.

Other provisions of section 11968.5.4 raise "Clarity" concerns with respect to how they relate or apply to an appeal of a revocation action under section 11968.5.3. For example, section 11968.5.4(b)(1) provides as a standard for county board of education review the following: "In determining whether the district chartering authority's factual findings are supported by

substantial evidence, the county board of education shall consider whether the district chartering authority provided the charter school's governing body as described in the school's charter a Notice of Violation, a reasonable opportunity to remedy the identified violation(s), a Notice of Intent to Revoke, a public hearing, and Final Decision, pursuant to Articles 2 and 2.5 and Education Code sections 47607(c) through (e)." However, this review standard is confusing in relation to an appeal of a revocation action under section 11968.5.3 since section 11968.5.3 does not provide for a Notice of Violation, a Notice of Intent to Revoke, a Final Decision, or a reasonable opportunity to remedy the identified violation(s).

As discussed in greater detail below under "Summary and Response to Public Comments," a public commenter in this rulemaking (Colin A. Miller, on behalf of the California Charter Schools Association) raised some of these "Clarity" concerns. Mr. Miller's comments included the following: "We suggest adding language [to sections 11968.5.4 and 11968.5.5] to clarify what happens in the situation in which the charter school was revoked for a 'severe and imminent threat to the health or safety of its pupils.' The process for revoking a school under that provision has different standards and steps that apply, so the record will look different for schools that are appealing under this circumstance...."

In summary, if section 11968.5.3(b) is to provide for appeal rights pursuant to sections 11968.5.4 and 11968.5.5, sections 11968.5.4 and 11968.5.5 require greater clarity with respect to the appeal requirements and standards for an appeal of a revocation action under section 11968.5.3.

2. Regulation sections 11965 and 11960 – Section 11965 is an existing "Definitions" regulation within the body of charter school regulations, containing definitions of terms used in the "Subchapter 19. Charter Schools" regulations. In its existing form, the section 11965 definitions appear to have applicability throughout Subchapter 19, as there is no limiting language at the beginning of or within this section, and section 11965 is in Article 2 "General Provisions" within Subchapter 19.

As part of this rulemaking, the SBE is adding to section 11965 many new definitions of terms that are used in the proposed charter revocation and revocation appeals regulations. In amending regulation section 11965, the SBE has added new limiting language at the beginning of this regulation which reads: "For the purposes of this Article and Article 2.5, the following definitions shall apply." This new language has the effect of limiting the scope of coverage of the definitions to only those regulations within Articles 2 and 2.5 of Subchapter 19.

The addition of this limiting language at the beginning of section 11965 raises a "Clarity" problem. One of the existing definitions within section 11965 is the definition of the term "satisfactory progress." Besides the use of this "satisfactory progress" definition within Article 2, the definition is also used within existing Article 1 of Subchapter 19 in regulation section 11960. Section 11960(c)(1)(A) contains multiple references to the defined term "satisfactory progress." Consequently, the addition in section 11965 of the limiting language "For the purposes of this Article [2] and Article 2.5, the following definitions shall apply" has the effect of making a pertinent definition no longer applicable to Article 1, section 11960. The definition of "satisfactory progress" needs to continue to apply to Article 1, section 11960 in order to maintain the clarity of that regulation.

Furthermore, section 11960(c)(1)(A) includes a specific cross-reference to the definition of "satisfactory progress" in section 11965. Section 11960(c)(1)(A) refers to pupils making satisfactory progress "consistent with the definition of satisfactory progress set forth in subdivision (b) of Section 11965." As part of the proposed amendments to section 11965, the "satisfactory progress" definition is being re-lettered to be subdivision (h) of section 11965. Consequently, the cross-reference in section 11960(c)(1)(A) needs to be updated to reflect the new lettering of the definition of "satisfactory progress."

3. Regulation sections 11968.5.1(c), 11968.5.2 (first sentence), and 11968.5.2(a) – Throughout the proposed regulations in their final form, the SBE has generally used the phrase "charter school's governing body as described in the school's charter" to refer to the governing body of a charter school (changes were specifically made during the first 15-day notice period to utilize this phrase in the body of regulations). However, in section 11968.5.1(c), the regulation text continues to instead refer to "the charter school board or the governing entity described in the school's charter." Similarly, section 11968.5.2 (first sentence) instead refers to "the charter school's governing board." The use of this alternative language in sections 11968.5.1(c) and 11968.5.2 (first sentence) is confusing because it is internally inconsistent with the terminology used elsewhere in the charter revocation and revocation appeals regulations.

A similar type of problem relates to the use of the term "charter authorizer" in section 11968.5.2(a). Throughout these regulations, the SBE has used the term "chartering authority" to refer to the entity that grants a school's charter, and, in fact, that term is specifically defined in proposed regulation section 11965(a). However, section 11968.5.2(a), instead of using the defined term "chartering authority," uses the term "charter authorizer." The "Clarity" of section 11968.5.2(a) would be improved by utilizing the defined term.

4. Regulation section 11968.5.4(b)(2) – As discussed above, section 11968.5.4 provides for charter school appeals to a county board of education when a charter has been revoked by a district chartering authority. Section 11968.5.4(b)(2) states: "If the charter school submits a response to the Notice of Violation pursuant to section 11968.5.2(b), the county board of education shall, in determining whether the district chartering authority's factual findings are supported by substantial evidence, consider whether the charter school complied with the procedures set forth in that section." (Emphasis added.) The referenced "section 11968.5.2(b)" does not make sense because that section 11968.5.2(b) does not include any provisions regarding a charter school submitting a response to a Notice of Violation. Section 11968.5.2(c) does contain provisions regarding a charter school submitting a response to a Notice of Violation, and it is likely that the SBE intended to refer to that subsection.

5. Regulation section 11968.5.5(a) – As discussed above, section 11968.5.5 provides for appeals to the SBE. Section 11968.5.5(a) states: "If the district chartering authority or the charter school's governing body as described in the school's charter elects to appeal to the SBE, the appellant shall approve and deliver a written Notice of Appeal to the SBE within 30 calendar days of receiving a written decision by the county board of education, upon the expiration of 90 calendar days pursuant to section 11968.5.4(b), or a county chartering authority's Final Decision." (Emphasis added).

The language underlined above is subject to multiple interpretations and is not easy to understand. For appeals "upon the expiration of 90 calendar days pursuant to section 11968.5.4(b)," does SBE mean that the Notice of Appeal must be delivered to the SBE at the time of the expiration of 90 calendar days, or does SBE intend to allow for a 30 calendar day period for the Notice of Appeal after the expiration of 90 calendar days and therefore essentially mean "within 30 calendar days after the expiration of the 90 calendar day period referenced in section 11968.5.4(b)"? For appeals of "a county chartering authority's Final Decision," does SBE mean that the Notice of Appeal must be delivered to the SBE "within 30 calendar days of receiving a county chartering authority's Final Decision" or does SBE have an alternative meaning? It is important that Section 11968.5.5(a) be clear since a failure to meet the required time periods for an appeal to the SBE could have a significant impact on a "directly affected" appealing party.

6. Regulation sections 11968.5.5(b) and (b)(1) – In relation to an appeal to the SBE, the opening language of section 11968.5.5(b) and section 11968.5.5(b)(1) provide the following: "(b) The appellant shall, at the same time it delivers a Notice of Appeal to the SBE, deliver to the SBE the following information: (1) The appellant's Notice of Appeal to the SBE, which shall include copies of the Notice of Violation, Notice of Intent to Revoke, the Final Decision, the Notice of Appeal, and the county board of education's written decision, as applicable." (Emphasis added.) The several references to "Notice of Appeal" are confusing in this context. SBE appears in this language to be requiring the "Notice of Appeal to the SBE" twice (the written Notice of Appeal to the SBE is already required under section 11968.5.5(a) immediately above these provisions). In addition, the final reference to "the Notice of Appeal" is somewhat confusing given the multiple references to this term. SBE probably intended this final reference to mean "the Notice of Appeal to the county board of education," but that needs to be clarified.

7. Regulation section 11968.5.5(b)(6) – In relation to an appeal to the SBE, one of the document submission requirements for an appellant is set forth in section 11968.5.5(b)(6) as follows: "These documents should be individually and sequentially numbered, one number per page." The use of the word "should" in the context of a regulation may in some instances raise "Clarity" concerns with regard to whether a regulatory provision is mandatory requirement or a non-mandatory recommendation. In the case of section 11968.5.5(b)(6), the use of "should" leaves some uncertainty as to whether an appellant would be non-compliant with appeal submission requirements (and therefore subject to having the appeal rejected) if the appellant submitted documents which were not individually and sequentially numbered, one number per page. The use of the word "should" needs to be avoided in this context. Assuming that the intent here is that the requirements of section 11968.5.5(b)(6) be mandatory, the word "shall" would be appropriate instead of the word "should." We note that similar requirements pertaining to documents being "individually and sequentially numbered, one number per page" appear to be mandatory in sections 11968.5.5(c)(4), 11968.5.5(d)(4), and 11968.5.5(e)(3) which follow.

8. Regulation sections 11968.5.5(e) and (e)(4) – In relation to an appeal to the SBE, the opening language of section 11968.5.5(e) and section 11968.5.5(e)(4) provide the following: "(e) Within 15 calendar days of the delivery of the respondent's written argument to the SBE, the appellant may submit to the SBE a written reply to the respondent's written argument in the form of a brief

or letter. If submitted, this written argument shall: . . . (4) be delivered to the appellant within five calendar days of delivery to the SBE." (Emphasis added.) These provisions are confusing, in that the appellant submitting a written reply to the SBE is required to deliver a copy of the reply to the appellant. It is unlikely that the appellant is required to deliver a copy to itself. Perhaps section 11968.5.5(e)(4) is intended to read: "(4) be delivered to the respondent within five calendar days of delivery to the SBE."

Conclusion: The "Clarity" problems discussed above and all other "clarity" problems which have been discussed with SBE staff must be resolved before the regulations can be approved by OAL.

B. SUMMARY AND RESPONSE TO PUBLIC COMMENTS

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons include:

> 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 . . . .

In this charter revocation and revocation appeals rulemaking, the SBE received a total of six public comment letters during the 45-day public comment period and two 15-day public comment periods. Some of those comment letters included a large number of individual public comments. The SBE adequately summarized and responded to many of the public comments which were received. However, a detailed review of the final statement of reasons and of the public comments indicates that (1) a number of public comments did not receive a summary and response, and (2) some public comments were summarized and responded to, but the summary and response contained errors, was incomplete, or was otherwise not fully responsive to the comments received. Examples of the problems with summary and response to public comments are set forth below.

1. Comments of Colin A. Miller -- Colin A. Miller, on behalf of the California Charter Schools Association, submitted extensive comments regarding the proposed charter revocation and revocation appeals regulations in a letter dated July 6, 2010. These comments were submitted in connection with the 45-day public comment period. Summary and response problems include the following:

Mr. Miller commented that with respect to regulatory language explaining "a severe and imminent threat to pupil health or safety" in section 11965(e)(4), "[i]nclusion of 'severe' is necessary to more closely align with the statutory language." See pages 33 and 40 of the

rulemaking record. The final statement of reasons does not include a summary and response to this comment.

Mr. Miller commented with respect to regulation section 11968.5.1, which pertains to State Superintendent of Public Instruction recommended revocations or other actions under Education Code sections 47604.5(a) and 47604.5(b): "We suggest addition of the 'chartering authority' to assure all affected parties are notified." See page 34 of the rulemaking record. Related to this comment, in the annotated regulation text attached as part of the comments, the commenter shows the addition of "chartering authority" four places within section 11968.5.1, thereby effectively granting the chartering authority notice and response rights in the event of a potential State Superintendent of Public Instruction recommendation to the SBE for revocation or other action under Education Code section 47604.5(a) or section 47604.5(b). See pages 43 and 44 of the rulemaking record. The SBE responds to each of these comments on pages 3 and 4 of the final statement of reasons with the response: "... [T]his exceeds the requirements for revocation set forth in Education Code section 47607." These responses, relying upon Education Code section 47607, are not meaningful. The State Superintendent of Public Instruction recommendations involved in regulation section 11968.5.1 are governed by Education Code section 47604.5, not Education Code section 47607. Education Code section 47607 would not be determinative as to which parties are entitled to notice and participation in relation to a potential action under Education Code section 47604.5. The SBE needs to provide more accurate and meaningful responses to these comments.

Mr. Miller commented as follows with respect to regulatory language relating to the response of a charter school governing body to a Notice of Violation in section 11969.1(b)(1) [a section which was subsequently renumbered section 11968.5.2(c)(1)]: "We suggest deleting the word 'detailed' as this is a subjective and unnecessary qualifier with no basis in the law. We are concerned that under this language, a chartering authority could simply reject a response as not being 'detailed' enough. In addition, the chartering authority isn't subject to the same 'detailed' requirement in its Notice of Violation, so the charter could be put in a position of trying to provide a 'detailed' response to a very vague Notice. Charter schools should be able to gauge the appropriate level of detail necessary to be compelling to its authorizer. Therefore 'detailed' should be deleted from this phrase." See pages 35 and 45 of the rulemaking record. The final statement of reasons does not include a summary and response to this comment.

Mr. Miller commented regarding the regulations involving appeals to a county board of education and appeals to the SBE, regulation sections 11969.3 and 11969.4 [sections which were subsequently renumbered sections 11968.5.4 and 11968.5.5, respectively]: "We suggest adding language to clarify what happens in the situation in which the charter school was revoked for a 'severe and imminent threat to the health or safety of its pupils.' The process for revoking a school under that provision has different standards and steps that apply, so the record will look different for schools that are appealing under this circumstance. This amendment offers some clarity to ensure that the entity considering the appeal receives the necessary information related to that finding." See page 37 of the rulemaking record. Related to this comment, in the annotated regulation text attached as part of the comments, the commenter shows an addition to section 11969.3 (county board of education appeals) of a provision reading: "If the school was revoked pursuant to 11969.2, provides all information the chartering authority relied on in

making the determination of a 'Severe and Imminent Threat to the Health and Safety of the Pupils.'" See page 48 of the rulemaking record. Furthermore, in the annotated regulation text the commenter shows an addition to section 11969.4 (SBE appeals) of a provision reading: "All information the chartering authority relied on in making the determination of a 'Severe and Imminent Threat to the Health and Safety of the Pupils,' if the school was revoked pursuant to 11969.2." See page 50 of the rulemaking record. The SBE responds to these comments on pages 7 and 8 of the final statement of reasons with the following: ". . . the proposed regulations already provide a clear appeal process for charter schools that are revoked pursuant to section 11969.2. It is clear in section 11969.2 that the appeal process shall follow the provisions in proposed sections 11969.3, 11969.4 and 11969.5." This response is not adequate. The commenter is asserting that section 11969.3 [later section 11968.5.4] and section 11969.4 [later section 11968.5.5] need added language to clarify the requirements which would be applicable to an appeal of a "severe and imminent threat to the health or safety of pupils' revocation at the county board of education and SBE appeal levels. The commenter is pointing out that since a "severe and imminent threat" revocation "has different standards and steps that apply...the record will look different for schools that are appealing under this circumstance." The final statement of reasons does not include a meaningful response to these comments.

Mr. Miller recommended, in the annotated regulation text which he submitted as part of his comments, the following addition to the regulation pertaining to appeals to a county board of education, regulation section 11969.3 [a section which was subsequently renumbered section 11968.5.4]: "The county board shall hold a public hearing to consider the appeal within 60 days of the receipt of a Notice of Appeal. No later than 10 days before the public hearing, the county board shall provide the charter school with all documents and materials that will be used to consider the appeal. At the public hearing, the county board shall present the evidence and representatives of the charter school and of the general public shall have an equal opportunity to address the board regarding the allegations and the evidence presented." See page 48 of the rulemaking record. The SBE provides a response to this comment on page 7 of the final statement of reasons as follows: "The suggested new section exceeds the statutory language in Education Code section 47607(f)(3) that provides a county board of education the option to not act on an appeal of a charter revocation." This response is not complete. The commenter is essentially making multiple recommendations in his proposed regulation language. There does appear to be a response to the commenter's proposed recommended language which would require the county board of education to hold a public hearing to consider the appeal within 60 days of the receipt of a Notice of Appeal. However, there are not adequate responses to the commenter's other recommendations regarding (1) the county board providing the charter school, no later than 10 days before a public hearing, with all documents and materials that will be used to consider the appeal (in the event a hearing is held), and (2) representatives of the charter school and of the general public having an equal opportunity at a public hearing to address the county board regarding the allegations and evidence presented (in the event a hearing is held).

Mr. Miller commented as follows with respect to regulatory language regarding the effect of a county board of education not issuing a written decision within 90 calendar days in section 11969.3(b) [a section which was subsequently renumbered section 11968.5.4(b)]: "We suggest deleting the word 'complete' as this is a subjective and unnecessary qualifier with no basis in the

law. We are concerned that under this language, a Notice of Appeal could be rejected simply for not being 'complete' and not receive the necessary due process considerations. Charter schools should be able to gauge the appropriate level of detail necessary to be compelling to the entity receiving the appeal." See pages 37 and 48 of the rulemaking record. The final statement of reasons does not include a summary and response to this comment.

Mr. Miller commented as follows with respect to the proposed procedures for appeals to the SBE under regulation section 11969.4 [a section which was subsequently renumbered section 11968.5.5]: "It is unclear why this additional back and forth is included in the state board appeal, but not at the county level. ... [W]e suggest the board seriously consider the value of this additional process against the timeliness of a decision. Because the state board already has the benefit of the county review, it seems it may be able to reach its decision in a timelier manner and the additional timelines and back and forth could be eliminated from the regulations altogether. While we support the opportunity for all parties to provide information to the board, we believe that a much simpler and streamlined approach could achieve that goal and lead to a fair decision sooner. See pages 38 of the rulemaking record. The final statement of reasons does not include a summary and response to this comment.

2. Comments of Gregory V. Moser – Gregory V. Moser submitted comments regarding the proposed charter revocation and revocation appeals regulations in a letter dated July 6, 2010. These comments were submitted in connection with the 45-day public comment period.

One of Mr. Moser's comments was the following: "Charter Schools are often limited to 3 minutes to respond to revocation charges along with members of the public, while the district staff gets an unlimited time to present its 'case' for revocation. The regulations should ensure that the charter school gets equal time to presents its case and an opportunity for rebuttal before the close of the hearing. I have personally experienced (more than once) districts making an extensive presentation, then limiting the respondents to 3 minutes with no opportunity for rebuttal." The response to this comment on pages 1 and 2 of the final statement of reasons is as follows: "The [California Department of Education] has no jurisdiction over how local boards conduct their meetings. California Education Code ... Section 47608 specifies that all meetings of the governing boards of the school district and the county board of education shall comply with the Ralph M. Brown Act (Brown Act). Section 54954.3(b) of the Brown Act authorizes these bodies to adopt regulations to assist in processing comments from the public and specifies that the bodies may establish procedures for public comments as well as specifying reasonable time limitations on particular topics or individual speakers." The concern with this response is that it does not accurately reflect changes which were ultimately made to the regulations. In fact, during the first 15-day comment period the SBE revised regulation section 11968.5.2, "Charter Revocation," to include in section 11968.5.2(f) the following language: "At any hearing concerning the revocation of a charter school, the charter school shall be allowed equal time to present and rebut prior to the close of the hearing."

3. Comments of Paul C. Minney – Paul C. Minney, on behalf of Middleton, Young & Minney LLP, submitted comments regarding the proposed charter revocation and revocation appeals regulations in a letter dated July 6, 2010. These comments were submitted in connection with the 45-day comment period.

One of Mr. Minney's comments recommended the deletion of the words "to the chartering authority's satisfaction" from section 11969.1(c)(1) [a section which was subsequently renumbered 11968.5.2(d)(1)]. See the annotated regulation text submitted by Mr. Minney at page 60 of the rulemaking record. The final statement of reasons does not include a summary and response to this comment.

Conclusion: These examples and all other public objections and recommendations directed at the SBE's proposed action must be substantively summarized and responded to before the regulations can be approved by OAL. Other specific problems relating to summarizing and responding to public comments have been discussed with SBE staff.

C. INCORRECT PROCEDURES AND DEFECTIVE DOCUMENTS

In addition to the problems discussed above, this charter revocation and revocation appeals rulemaking presents several problems relating to compliance with APA procedural requirements, including defective documents required as part of the APA process. Each of these problem areas is discussed below.

1. Final statement of reasons – Government Code section 11346.9, subdivision (a)(1), provides that the final statement of reasons for a regulatory action shall include "[a]n update of the information contained in the initial statement of reasons...."

In this charter revocation and revocation appeals rulemaking, the SBE has in its final statement of reasons partially updated the information contained in the initial statement of reasons by means of explaining the modifications made during the two 15-day notice periods (pages 11-14 and 16-17 of the final statement of reasons). However, a more comprehensive updating of the information set forth in the initial statement of reasons is needed. During the course of this rulemaking, four of the primary regulations being added were renumbered after the time the initial statement of reasons was written. Specifically, in the first 15-day notice, originally proposed sections 11969.1, 11969.2, 11969.3, and 11969.4 were renumbered 11968.5.2, 11968.5.3, 11968.5.4, and 11968.5.5, respectively. The information contained in the initial statement of reasons needs to be fully updated in the final statement of reasons to reflect the new regulation section numbering, as well as the other changes. This updating will provide a more accurate and complete explanation of the regulations as they were finally adopted and submitted for filing with the Secretary of State.

2. Form 400 – Section 6 of title 1 of the CCR requires that rulemaking agencies complete the Form 400 for the submission of regulations to OAL for publication and/or for transmittal to the Secretary of State for filing. Section 6(b) specifies the required contents of the completed Form 400, including a requirement in section 6(b)(2) that the form specify: "the title(s) of the California Code of Regulations affected and a list of all regulation sections being adopted, amended or repealed." In this charter revocation and revocation appeals rulemaking, the SBE did properly include a Form 400 with the original and copies of the final regulation text. In most respects, the Form 400 is complete and accurate; however, the list of regulation sections being

adopted, amended and repealed as set forth in Section B.2 of the form is inaccurate and incomplete.

3. Underline and strikeout in the final regulation text – Section 8 of title 1 of the CCR sets forth the requirements for the "final text" of regulations submitted to OAL for filing with the Secretary of State. Section 8(b) provides: "The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations…." In this charter revocation and revocation appeals rulemaking, generally the SBE accurately and properly showed changes in the final regulation text in underline and strikeout. The exception is on page 12 of the final regulation text where a regulation entitled "Purpose and Stipulation" is shown as being renumbered from "11969.10" (which is in strikeout) to "11969.1" (which is underlined). This "Purpose and Stipulation" regulation is already numbered "11969.1" in the CCR, so the changes in underline and strikeout are not appropriate.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6225.

Date: March 30, 2011

Bradley J. Norris

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