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Open Enrollment Act (Romero Bill) Emergency Regulations Adopted by the State Board of Education

The State Board of Education adopted emergency regulations implementing the Open Enrollment Act at its July 15, 2010 meeting.

The Open Enrollment Act (Romero SBX5 4) was enacted January 7, 2010 as part of the Legislative package enabling California to compete for Race to the Top funds (RTTT) under the American Recovery and Reinvestment Act (ARRA). As an emergency measure, the Act became effective April 14, 2010. The Act also required the State Board (SBE) to adopt emergency regulations to implement the Act.

List of 1,000 Schools. The adopted emergency regulations include the methodology for identifying 1,000 schools whose students are eligible for open enrollment to higher achieving schools beginning **this fall**. A preliminary list of schools was reviewed by the Board and a final list will be posted on the CDE website once the Office of Administrative Law approves the emergency regulations. The preliminary list is available on the CDE website at

<http://www.cde.ca.gov/be/ag/ag/yr10/documents/bluejul10item32.doc>.

Parent/Guardian Notice. Districts with schools on the list must notify parents/guardians of their open enrollment option on the first day of instruction, or if the final list is not then available, no later than September 15, making implementation for 2010-11 a scramble!

Emergency Regulations Effective Within a Month. The State Board adopted emergency regulations will be filed with the Office of Administrative Law but have not yet been posted on the OAL website. After review and final approval by OAL, the emergency regulations will become effective within 30 days of filing. Within that time the Office of Administrative Law will post notice of filing on its website and allow interested persons five

calendar days to submit comments on the proposed emergency regulations.

Permanent Regulations Still to Come. These emergency regulations will remain in effect until the SBE goes through the permanent rulemaking process. This process will provide a longer public review and comment period with an opportunity for your district to weigh in on the regulations. The Board has scheduled its first public hearing on the proposed permanent regulations at its September 14, 2010 meeting.

Included in the proposed emergency regulations were potentially problematic provisions for basic aid district rejection of open enrollment applications and timelines for district notice of acceptance or rejection of applications for the 2010-11 school year. Limitations on a basic aid district's determination of "adverse financial impact" as a standard for denying an application were also included. Although sections were removed from the emergency regulations they are still included in the proposed permanent regulations.

The SBE also adopted emergency regulations implementing another section of SBX5 4 which provides additional options for parents of students in persistently low-achieving schools that are not included in a list of lowest 5% of persistently low-achieving schools. This part of the law is known as Parent Empowerment because it empowers parents to require districts make changes in their current school through a petition process.

Purpose of the Open Enrollment Act

The stated purpose of the Open Enrollment Act is to improve pupil achievement in accordance with the federal regulations and guidelines for eligibility to compete for Race to the Top funds, and to enhance parental choice by providing additional choice regardless of their residence

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within the State.

The provisions of the Open Enrollment Act were not specifically required for California's eligibility for Round 2 of the federal RTTT, yet they will affect many schools and districts beginning this fall. The RTTT legislative package also included SBX5 1 which provided the "Intervening in the Persistently Lowest-Achieving Schools" amendments to the Education Code with the specific intent of implementing education reforms to dramatically improve the student achievement and ensure that California is positioned to be successful in the federal Race to the Top competition.

Definitions

The Open Enrollment Act provides an opportunity for parents/students attending one of 1,000 identified "low achieving schools" the option to enroll in a different school having a higher Academic Performance Index (API), whether inside or outside their district of residence. The Superintendent of Public Instruction (SPI) is required to create the list of 1,000 schools ranked by increasing API with the same ratio of elementary, middle, and high schools as existed in decile 1 in the 2008-09 school year. In constructing the list of 1,000 schools each year, the SPI must ensure each that no more than 10 percent of any school district's schools are on the list and that charter, court, community and community day schools are not included on the list.

The emergency regulations clarify the methodology to be used by the SPI in creating the list of 1000 low achieving schools for purposes of the Open Enrollment Act. The regulations determined the ratio of elementary, middle and high schools as existed in decile 1 in the 2008-09 school year to be 687 elementary, 165 middle and 148 high schools. The list excludes charter, court, community and community day schools but did include continuation high schools, opportunity schools and special education schools.

The preliminary list of 1000 schools includes schools with API scores ranging from 532 to 801. Many districts with no decile 1 schools

and schools with API's close to 800 may be surprised to find some of their schools are on the list of "low-achieving schools". According to SBE staff, this resulted from the legislative requirement to list 1000 schools but limit schools from any one district to 10%.

The definition of "low-achieving schools" for the purpose of providing the open enrollment option is confusingly different than the definitions of "low-achieving schools" and "persistently lowest-performing schools" included in the Intervening in the Persistently Lowest-Performing Schools provisions of SBX5 1.

The SBX5 1 provisions also require the SPI to establish a list of "low-achieving schools" and "persistently lowest-performing schools" for the purpose of requiring those schools identified as persistently lowest-performing schools to implement one of four intervention models, making state law consistent with the federal RTTT requirements. Those four intervention models include the turnaround model, restart model, school closure and the transformation model. For these purposes, the definition of "low-achieving schools" includes any Title 1 school in program improvement, corrective action, or restructuring and "persistently lowest-achieving schools" generally means the lowest 5 percent of all schools in program improvement as measured by the Academic Performance Index in reading/language arts and mathematics, the lowest 5 percent of secondary schools not receiving Title I as measured by the Academic Performance Index in reading/language arts and mathematics, and high schools having a graduation rate that is less than 60 percent in each of the previous three years.

The Open Enrollment Act excludes court, community, community day and charter schools from the list of 1000 schools from which students can transfer. The list of persistently lowest-achieving schools identified for intervention also excludes those schools but in addition excludes schools exclusively providing special education services and schools which have experienced academic growth of at least 50 points over the previous five years as measured by the Academic

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Performance Index. The persistently lowest-achieving list of schools includes charter schools.

The SPI identified and the State Board of Education approved the lists of low-achieving and persistently lowest-achieving schools on March 11, 2011. These lists are available on the California Department of Education website at <http://www.cde.ca.gov/ta/ac/pl/>.

To further confuse the matter, the Parent Empowerment act requires the SPI to identify the list of persistently lowest-achieving schools which are not the lowest 5% of those schools who would be eligible for the parent petition process to change their school using one of the four intervention models. These schools are likely listed as the Tier II and III schools on the CDE website which include over 3000 schools. Although these schools would be eligible to petition for change, the statute and emergency regulations provide that only 75 schools will be subject to the petition process.

Open Enrollment Notice and Application Timelines

The Act limits this transfer option to parents of students attending one of the 1000 schools listed, yet the districts and schools to which these students apply to transfer could be numerous and the process confusing with the many other school choice options already on the books. The Act's use of the term "open enrollment" further confuses the issue when there is already open enrollment required within districts, i.e. intra-district open enrollment, and there is already an inter-district enrollment procedure for transfers between districts. There is also the Program Improvement transfer option within districts which is required when a school is identified as a Title I Program Improvement school and no residency requirement for charter school enrollment option. All of these choice options come with their own priorities and procedural requirements and the Open Enrollment Act appears to layer on to these its own required notices, timelines, limitations, and enrollment priorities.

Districts with schools on SPI's 1000 list are

considered **districts of residence** and are required to provide **notice** to all parents/guardians of students enrolled in such a school of their option to transfer to another public school served by the school district of residence or to another school district. The notice must be on or before the first day of school or on the date the district is given notice of program improvement, corrective action, or restructuring status as is required for notice of Title I Program Improvement transfer options within the district. The emergency regulations further provide that if a district is not notified whether any of its schools are on the list by the first day of school, then notice must be given no later than September 15.

A parent/guardian's application to enroll their student in a school in another district must be submitted to that school district, **considered the school district of enrollment**, prior to January 1 of the school year preceding the school year for which the pupil is requesting to transfer, however, the district of enrollment may waive that deadline. The application may request enrollment of the pupil in a specific school or program within the school district of enrollment. The application deadline does not apply if the parent requesting a transfer for a student who resides with that parent is enlisted in the military and was relocated by the military within 90 days prior to submitting the application.

The **district of enrollment** must decide whether to accept or reject an application and notify both the applicant parent and the school district of residence in writing within 60 days of receiving an application. If the application is rejected, the school district of enrollment must state the reasons for the rejection in the notification. If accepted, the student may enroll in a school in the school district of enrollment in the following school year.

The original emergency regulations required that, for applications to transfer for the 2010-2011 school year, these notices be sent on or before September 30, 2010 and include in notices of acceptance the school site and address to which the student has been admitted. These regulations were not included in the adopted regulations and districts would

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have the full 60 days to provide notice.

Enrollment

The Act requires that if a student is accepted for transfer, the student may enroll in a school in the school district of enrollment in the following school year. For 2010-11, the original proposed regulations required an accepted student enroll no later than November 1, 2010 and if not, the district of enrollment is not required to enroll the student. For the 2011-12 school year and thereafter, the student must enroll on or before the first day of instruction.

These provisions were also not adopted by the Board ostensibly because they believed that because of the late implementation of the Act, parents would be unlikely to take advantage of the option and districts will likely deny applications based on adverse financial impact because staffing and budgets for next year have already been set.

Once the district accepts the application, a school district of enrollment must ensure that pupils are enrolled in a school with a higher Academic Performance Index than their prior school of enrollment in their district of residence.

For high school transfers, a school district of enrollment must accept previously awarded credits from another district toward graduation but can ensure the student pupil meets the graduation requirements of the school district of enrollment.

For both transfers within and from outside a district of enrollment, a student approved for a transfer under this Act are considered residents of the district (or the school's attendance area if within the district) and do not need to reapply for enrollment. The emergency regulations go further to state this applies regardless of whether the student's school of residence remains on the list of 1,000 Open Enrollment schools.

District Policies for Acceptance and Rejection of Applications

The Act provides that a school district of enrollment may adopt specific, written standards for acceptance and rejection of applications which may include consideration of capacity or adverse financial impact. Consideration of capacity can include the capacity of a program, class, grade level, or school building.

The Act allows districts of enrollment to limit open enrollment in the following circumstances in which: (1) an initial transfer applicant would displace a resident student or a student currently enrolled in the applicant's desired school, (2) an applicant does not meet the district's usual requirements for admission to a magnet school or a program designed to serve gifted and talented pupils and (3) where the governing board of the district determines that the transfer would negatively impact a court-ordered or voluntary desegregation plan of the district or the district's racial and ethnic balance. Any policy adopted to address desegregation plans or impacting the district's racial and ethnic balance must be consistent with federal and state law. District's considering a policy in this area should consult their attorney regarding recent court cases to ensure compliance.

District standards must not include consideration of a pupil's personal or academic characteristics, including previous academic achievement, physical condition, proficiency in the English language, family income or personal characteristics of disability, gender, nationality, race or ethnicity, religion, or sexual orientation.

Somewhat confusing is the Act's apparent blending of the intra-district open enrollment priorities and lottery process with the Act's inter-district open enrollment application process. The Act requires applicants be selected through a random, unbiased process except that applicants shall be assigned priority for approval first to siblings of children who already attend the desired school and second to students transferring from a program improvement school ranked in decile 1 on the Academic Performance Index and which is included on the list of 1000 Open Enrollment schools. If the number of pupils who request a

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particular school exceeds the number of spaces available at that school, a lottery must be conducted within the sibling and low-achieving school group priority order to select pupils at random until all of the available spaces are filled.

The emergency regulations do not clarify this process for districts, but it could be presumed that districts of enrollment would complete their intra-district open enrollment process which would include the priority for transfers from schools within the district which are on the 1000 school list before determining capacity to accept Open Enrollment applicants from other districts.

The original proposed emergency regulation included a provision affecting basic aid districts which was not adopted but which remains in the proposed permanent regulations. It requires that for purposes of acceptance or rejection of applications by basic aid districts, that apportionment of state aid for average daily attendance credited to, or to be credited to basic aid districts shall be presumed to eliminate any adverse financial impact on the district in the absence of clear and convincing evidence to the contrary. According to SBE staff, removal of this standard from the emergency regulation will allow districts of enrollment flexibility to accept or reject applications for the 2010-11 school year based on the statutory standards and their current policies regarding adverse financial impact.

Unlike traditional inter-district transfer which provides an appeal of a denied transfer request to the county board of education, there is no administrative appeal process for a rejection of an open enrollment application. The Act provides that "no exercise of discretion by a district of enrollment in its administration of this article shall be overturned absent a finding as designated by a court of competent jurisdiction that the district governing board acted in an arbitrary and capricious manner" (Education Code 43561). It appears that rejection of an application for enrollment could be challenged in court, making it all the more important to ensure your district's standards are consistent with law and supported by the facts of your district's capacity and financial

situation.

School districts are authorized, but not required, to adopt policies providing specific written standards for acceptance or rejection of applications under this Act. We strongly recommend that districts consider adopting such policies and include timelines and notices which minimize confusion among the various enrollment options. KMTG can provide sample policies and/or assist your district in developing or revising your policies to comply with the Act and regulations.

ADA Funding

For revenue limit districts, the average daily attendance for students from another district would be credited to the district of enrollment for purposes of determining state apportionments and the revenue limit.

For basic aid districts, the Act provides that 70 percent of the district revenue limit that would have been apportioned to the school district of residence will be credited to basic aid district of enrollment for any open enrollees under the Act. Apportionment of these funds would begin in the second consecutive year of enrollment, and thereafter continue annually until the pupil graduates from, or is no longer enrolled in, the basic aid school district of enrollment.

The proposed permanent regulation could eliminate the ability of a basic aid district to deny initial transfer applications based on adverse financial impact even if it would have had an adverse impact in the first year of enrollment.

Review and Evaluation of Open Enrollment Implementation

The Act encourages school districts to keep an accounting and records of all transfer applications and disposition of applications and to report this information to their governing board at a regularly scheduled board meeting of the governing board.

The State Superintendent of Public Instruction is required to conduct an independent evaluation of the program to consider its

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impact on academic achievement, fiscal and programmatic effects, numbers and demographics of student's districts of residence and enrollment and provide a final evaluation report to the Legislature, Governor, and state board on or before October 1, 2014.

What It Means to You

1. Implementation will be a scramble for the 2010-11 school year.
2. Districts should review the preliminary list of 1000 Open Enrollment schools to see if any of its own schools are on the list and prepare for notifying parents.
3. Districts should also review the list for any neighboring districts that have schools on the list to determine the likelihood of receiving applications.
4. Review the final list of schools when posted. Districts of residence should prepare notices to be issued on the first day of school or by September 15 if the final list is not published by the first day of school.

5. To avoid additional confusion for parents and districts, districts should try to coordinate the timing and explanation of options with their Title I Program Improvement notices if possible.

6. Districts of enrollment should consider adopting and/or revising existing open enrollment and transfer policies to establish written standards for acceptance or rejection of applications to be in place well prior to the January 1 application deadline for 2011-12 enrollment.

7. Both districts of residence and enrollment should review their current open enrollment and inter-district transfer procedures to coordinate and/or streamline procedures as much as possible.

8. Basic aid districts may be limited in establishing adverse financial impact standards if the limitation is adopted in the permanent regulations.

9. Be aware that a rejection of an open enrollment application could subject districts to a lawsuit in place of the county appeal process like other inter-district transfer denials.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult. You can also follow this topic on our Education Blog at <http://kmtg-educationlaw.blogspot.com>.

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