

SUBCOMMITTEE NO. 4

Agenda

Senator Richard D. Roth, Chair
Senator Janet Nguyen
Senator Richard Pan



Thursday, March 3, 2016
9:30 a.m. or upon adjournment of session
State Capitol - Room 2040

Consultant: Samantha Lui

PART B

PROPOSED FOR VOTE-ONLY

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ISSUES PROPOSED FOR VOTE-ONLY**8790 COMMISSION ON DISABILITY ACCESS**

Overview. The 1990 American with Disabilities Act (ADA) and California Building Standards Code require buildings, structures, and facilities be made accessible to and useable by persons with disabilities. The Division of the State Architect focuses on the development and maintenance of access regulations; and the Department of Rehabilitation works in partnership with consumers to provide services, independent living, and advocacy for individuals with disabilities.

Senate Bill 1608 (Corbett), Chapter 549, Statutes of 2008 established the Commission on Disability Access (Commission) to study existing disability access requirements and compliance, and to promote better compliance with existing laws and regulations. Today, the Commission services to help consumers, business owners/operators, and persons with disabilities understand the responsibilities under the ADA and California regulations to create accessible environments. The Commission coordinates with state agencies and local building departments to prevent and minimize compliance problems. In addition, the Commission determines the efficacy of public and private inspection programs, and acts as a centralized education hub for disability access compliance. Currently, the Commission is the only state agency that collects data on the impact of access non-compliance, and focuses on businesses and property owners' education needs, responsibilities, and legal liabilities related to access compliance.

Budget. The budget provides \$639,000 General Fund and 3.6 positions to the Commission.

Issue 1: Construction-related Accessibility Claims (AB 1521)

Budget. The budget includes a \$100,000 General Fund augmentation and one position to implement the provisions of Assembly Bill 1521 (Committee on Judiciary), Chapter 755, Statutes of 2015.

Background. SB 1186 (Steinberg), Chapter 383, Statutes of 2012, requires the California Commission on Disability Access (Commission) to collect and report on its website the top ten most frequently alleged construction-related physical access violations. From January to December 2015, the Commission received 2,946 records of court filings and/or demand letters, an average of 246 records per month. According to the January 2016 report to the Legislature, the Commission relies on interns, volunteers, or law clerks from stakeholder agencies to review demand letters and legal complaints alleging violations. Commission staff – comprised of one Executive Director, two analysts, and one office technician – must manually analyze the information, code the violations according to a list, and enter the data into an Excel matrix.

According to the Commission, between September 2012 and October 2014, 5,392 complaints (including demand letters) were filed (in both state and federal courts). More than half (54 percent) of the complaints were filed by just two law firms. Forty-six percent of all complaints

were filed by just 14 parties. Further, according to the Commission, “these types of lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, seeking expedited cash settlements rather than correction of the accessibility violation.” In response to the high-volume of lawsuits, AB 1521 imposes additional procedural requirements on high-frequency litigants. Among other provisions, AB 1521 requires an attorney, who serves a complaint, to notify the Commission within five days of judgment, settlement, or dismissal, the outcome of the case. Specifically, the attorney must include the following information:

- Whether the violations were remedied;
- Whether the plaintiff achieved a favorable result; and,
- Whether the defendant submitted an application for an early evaluation conference or site inspection.

Since October 2015, the Commission estimated around 500 case resolutions were directly related to AB 1521. The Commission requests the additional staffing to address the additional workload associated with implementing AB 1521 and to assist the existing workload of analyzing demand letters and complaints.

Staff Comment and Recommendation. Approve as requested. Given the Commission’s reliance on volunteers and student assistants to fulfill existing responsibilities, it appears that the need for additional staffing predates the provisions of AB 1521. To address the workload associated with increased notifications pursuant to AB 1521, the budget request appears justified. Next year, the subcommittee may wish to consider further oversight about the Commission’s hiring of the position and additional issues related to accessibility claims.

DISCUSSION ITEMS

7910 OFFICE OF ADMINISTRATIVE LAW

Overview. The Office of Administrative Law (OAL) reviews over 200 state agencies’ proposed administrative regulations for compliance with California’s Administrative Procedure Act (APA); for transmitting these regulations to the Secretary of State; and for publishing regulations in the California Code of Regulations. In addition, OAL evaluates petitions from the public that challenge a state agency rule, also known as a policy or procedure, as an underground regulation. OAL will issue a legal opinion as to whether the state agency is operating with a rule that has not been duly adopted pursuant to the APA. Through its Reference Attorney service, OAL provides direct legal advice to state agencies and the public regarding California rulemaking law.

In 2014 and 2015, over 1,023 files were submitted to OAL, affecting 8,426 regulations. Each file submitted concerns a regulatory action that affects anywhere from one regulation section to over a hundred sections. Below is a chart that displays the number of petitions OAL received.

Year	Total Number of Petitions received	Number of Determinations or Summary Dispositions issued	Number of Section 280 Certifications received from state agencies	Number of incomplete Petitions that were never completed	Number of Petitions declined to be considered by OAL	Number of Petitions withdrawn
2014	87	12	5	6	63	1
2015	71	9	2	1	58	1

Most of the petitions are filed by inmates in the California Department of Corrections and Rehabilitation (CDCR). In 2014, 61 petitions challenged rules by CDCR; in 2015, 40 petitions challenged CDCR rules. Of these, four determinations in 2014, were deemed to be underground.

Currently, OAL uses ProLaw, an off-the-shelf product that has been customized, as the database for all files and notices submitted to OAL. An OAL attorney uses ProLaw to track legal issues during his or her review of a proposed regulatory action. Then, OAL can use this information, to determine what legal issues and procedures should be focused on during training classes.

Budget. The budget includes \$3.4 million (\$1.9 million General Fund, \$111,000 reimbursements, and \$1.4 million Central Cost Recovery Fund) and 20 positions for the OAL.

Issue 1: Enhanced Regulatory Training

Budget. The budget proposes \$177,000 (\$101,000 General Fund, \$76,000 Central Service Cost Recovery Fund) for one attorney position, who will provide training on rulemaking actions for state agencies.

Background. State agencies adopt regulations that govern businesses and impact Californians. In order for state agencies to learn about the Administrative Procedure Act (APA) requirements, the Office of Administrative Law (OAL) holds a three-day training program for state employees. In this program, employees learn how to understand and comply with the rulemaking requirements. Specifically, agency personnel are trained on the following:

- Ensuring agency regulations are clearly written, necessary, and legally valid;
- Conducting an economic impact assessment of the proposed regulatory action;
- Providing a public notice; and,
- Creating a record for review by OAL, and if necessary, by the courts in any litigation.

From the inception of the training program in 1989 until May 2005, there has never been a single unit dedicated to conducting the classes. Initially, there were two primary senior attorneys, with two to three other attorneys participating. Over the years, one senior-level attorney conducted this three-day training – even continuing to lead the training after his retirement in 2005 until 2012. After two other attorneys, who also assisted in the training, retired, four full-time OAL attorneys now conduct the training in addition to their workload. This represents a diversion of 37.5 hours per month from the four attorney’s current workload to accommodate their abilities to provide this training, as well as additional follow-up from each class.

Approximately nine training classes are scheduled annually. Currently, there is a waitlist of more than 250 state employees for the voluntary training.

The training costs \$420 per student, effective January 1, 2016 – a \$70 increase from last year. OAL notes “the training price is being increased to reflect the increased cost of materials and equipment” to operate the class.

The current size of the training room accommodates no more than 22 students. The \$420 cost breakdown of each student follows:

Cost per student, assuming 22 students per class

Printed materials	89
Training classroom	73
Attorney time	107
Administrative time	55
Cost of equipment	3
Total cost per student	\$417

Justification. OAL recently installed a data system that allows it track the number and type of legal issues that are a persistent challenge for state agencies to comply with the APA. According to that data, 94 percent of matters submitted for review in the last six months needed corrections. According to the OAL, the one position is needed “to meet the demand placed by state agencies for this training, and [to] enhance training so that state agency rulemaking actions are no longer substandard and are conducted as efficiently as possible.”

Implementation Plan. OAL intends to have the one attorney achieve the following, among other goals:

- Increase the number of three-day training classes from nine classes to 20 classes in two fiscal years.
- Focus the training on most frequent and common challenges of APA requirements.
- Conduct two half-day classes regarding underground regulations.
- Conduct special presentations to state agencies on a specified area of law.
- Make presentations to staff of the Senate and Assembly, and deputies of the Office of Legislative Counsel.
- Create “how-to” webinars, to be posted, on the OAL website.

To address the (as of February 19, 2016) 150 state employee waitlist, the OAL intends to immediately increase the number of classes each year. According to the OAL, they intend to “target 14 classes in 2015-16 and 20 classes in 2017-18. Further, OAL anticipates it can eliminate the waiting list within two to three years, while maintaining the increased ‘20-class-per-year’ schedule.” The attorney will also help the OAL during the November and December workload.

Staff Comment and Recommendation. Approve as requested, as no concerns have been raised.

Questions

1. How frequently do state employees receive this training (e.g., every two years, or as a new hire only)?
2. Please provide some examples of the types of APA requirements that state agencies frequently find most challenging.

8620 FAIR POLITICAL PRACTICES COMMISSION

Overview. The Fair Political Practices Commission (FPPC) is an independent non-partisan agency who regulates and enforces actions performed by governmental officials and agencies and requires extensive disclosure reports to provide the public with access to government processes. The FPPC provides education about the Political Reform Act of 1974 and according to the agency, “provides for public officials’ disclosure of assets and income to avoid conflicts of interest.”

Public officials whose decisions could affect their economic interests are required by law to file economic interest disclosure statements, titled "Statement of Economic Interests" (SEI) also known as "Form 700". These statements become public records after they are filed. The SEI reporting process provides transparency and ensures accountability in two ways: 1) it provides necessary information to the public about a public official's personal financial interests to ensure that officials are making decisions that do not enhance their personal finances, and 2) it serves as a reminder to the public official of potential conflicts of interests so the official can abstain from making or participating in governmental decisions that are deemed conflicts of interest.

Budget. The budget includes \$11.9 million (\$11.2 million General Fund and \$741,000 in reimbursements) to support the FPPC. The agency has 80 established positions and 4.5 vacancies which includes two two-year limited-term positions.

Issue 1: Statement of Economic Interests Reporting – Gifts of Travel

Budget. The budget requests an increase of \$210,000 General Fund authority for 2016-17 and \$196,000 ongoing, as well as 1.5 positions to implement the provisions of Senate Bill 21 (Hill), Chapter 757, Statutes of 2015.

Background. The Fair Political Practices Act regulates campaign financing and spending, financial conflicts of interest, lobbyist registration and reporting, and governmental ethics. The Act prohibits public officials from receiving gifts in excess of \$440 from a single source in a calendar year, with exceptions. One exception to this gift limit is for payments made to public officials for travel reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy and paid for by a 501(c)(3) nonprofit organization. Public officials are required to report travel payments from nonprofits on their Form 700. If a donor uses a nonprofit as an intermediary to pay for public officials’ travel, the donor to the nonprofit is considered to be the source of the gift. In these cases, the public official is required to report both the donor to the nonprofit and the nonprofit on his or her Form 700. As such, the travel is subject to the \$440 gift limit.

SB 21 (Hill), Chapter 757, Statutes of 2015, creates new requirements for nonprofit organizations that pay for travel for state and local elected officials. Specifically, it requires a nonprofit organization that regularly organizes and hosts travel for elected officials, as specified, and that pays for these types of travel for an elected state officer or local elected officials to disclose the names of donors who, in the preceding year, donated to the nonprofit organization

and accompanied an elected officer or officeholder for any portion of the travel. The legislation also requires FPPC to analyze and determine which nonprofit organizations trigger this additional reporting requirement.

A nonprofit organization that makes travel payments of either (1) \$5,000 or more for one elected state or local officeholder, or (2) \$10,000 or more a year for elected state or local elected officeholders, and whose expenses for such travel payments total one-third or more of the organization's total expenses in a year as reflected on the organization's Internal Revenue Service Form 990, would trigger reporting. And, once it's determined that a nonprofit organization triggers this disclosure, it must disclose to the Commission the names of donors who donated \$1,000 or more in the past year and also went on the trips.

As a new requirement, the FPPC will need to promulgate regulations to interpret these requirements. It will also need to develop an entirely new form to enable this disclosure. The legislation raises legal questions as to the FPPC's jurisdiction to enforce these provisions against nonprofit organizations. In addition, the Enforcement Division is concerned that the "one-third of total expenses" requirement would be difficult to prove in light of the reporting and language variations used by nonprofit organizations on the Form 990, as well as the difficulty in establishing that the expenses reported were related to elected officers. The FPPC will need to do additional training and outreach to nonprofit organizations and public officials. For all these reasons, there is additional workload as a result of the legislation. The statute also requires a person who receives a gift of a travel payment from any source to report the travel destination on his or her Form 700. This will require the FPPC to modify the Form 700 and instructions, as well as update trainings and provide additional advice. This proposal would add one and one-half permanent positions: 1 Associate Governmental Program Analyst and 0.5 Senior Commission Counsel.

Justification. According to the department, the positions would create a new travel form to ensure that travel payments made by nonprofit organizations are reported in a consistent and standardized manner; revise the Form 700 and travel payment form instructions; prepare outreach materials; provide oral and written legal advice regarding the new law; and provide training for staff and filers at local and state agencies. In addition, the FPPC notes the positions would provide long-term functions that would benefit the department, namely:

- Perform the complex enforcement investigations involving nonprofit organizations under the new requirements of SB 21; and
- Research and train individuals regarding the IRS code on 501(c) organizations.

Staff Comment and Recommendation. Although some of the job duties and functions appear to be temporary, the department notes its necessity to have staff to specialize in nonprofit jurisdictions and matters. Staff recommends approving the proposal as requested, with the opportunity to revisit the issue next fiscal year for oversight.

Questions

1. Please provide some context for how nonprofits are an emerging jurisdiction for the department.
2. Please describe how SB 21 raises “legal questions as to FPPC’s jurisdiction to enforce provisions against nonprofits.”