Assembly Bill No. 386

Passed the Assembly September 11, 2009

_____

Chief Clerk of the Assembly

Passed the Senate September 10, 2009

_____

Secretary of the Senate

This bill was received by the Governor this _____ day of _____, 2009, at _____ o'clock ____M.

_____

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 67302 of, and to add Section 67302.5 to, the Education Code, relating to postsecondary education.

LEGISLATIVE COUNSEL'S DIGEST

AB 386, Ruskin. Public postsecondary education: instructional materials: disabled students.

Existing law requires publishers and manufacturers of printed instructional material for use at public postsecondary educational institutions to provide the material, upon request, in an electronic format that is compatible with commonly used braille translation and speech synthesis software, when those materials are to be used by a student whose disability prevents him or her from using standard instructional materials and other requirements are met.

Existing law also requires publishers and manufacturers to provide computer files or other electronic versions of nonprinted instructional materials, defined to include materials that require the availability of electronic equipment in order to be utilized, when technology is available to convert those nonprinted materials to a format that is compatible with braille translation or speech synthesis software.

This bill would require publishers, as defined, to provide a captioned format of instructional materials, as defined, or an electronic format of those materials and a license to create a captioned format of the materials, upon request by a public postsecondary educational institution, and would authorize the public postsecondary educational institution to create a captioned format, subject to prescribed conditions, if the publisher provides a license to create the captioned format or fails to respond to a request for a captioned format.

The bill would prescribe various requirements with respect to use and distribution of captioned formats of instructional materials by public postsecondary educational institutions that choose to participate in the request process.

The bill would also make conforming changes.

The people of the State of California do enact as follows:

SECTION 1. Section 67302 of the Education Code is amended to read:

67302. (a) An individual, firm, partnership, or corporation that publishes or manufactures printed instructional materials for students attending the University of California, the California State University, or a California Community College, shall provide to the university, college, or particular campus of the university or college, for use by students attending the University of California, the California State University, or a California Community College, any printed instructional material in an electronic format mutually agreed upon by the publisher or manufacturer and the college or campus. Computer files or electronic versions of printed instructional materials shall maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary. The computer files or electronic versions of the printed instructional material shall be provided to the university, college, or particular campus of the university or college at no additional cost and in a timely manner, upon receipt of a written request that does all of the following:

(1) Certifies that the university, college, or particular campus of the university or college has purchased the printed instructional material for use by a student with a disability or that a student with a disability attending or registered to attend that university, college, or particular campus of the university or college has purchased the printed instructional material.

(2) Certifies that the student has a disability that prevents him or her from using standard instructional materials.

(3) Certifies that the printed instructional material is for use by the student in connection with a course in which he or she is registered or enrolled at the university, college, or particular campus of the university or college.

(4) Is signed by the coordinator of services for students with disabilities at the university, college, or particular campus of the university or college or by the campus or college official responsible for monitoring compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the university, college, or particular campus of the university or college.

(b) An individual, firm, partnership, or corporation specified in subdivision (a) may also require that, in addition to the conditions enumerated above, the request shall include a statement signed by the student agreeing to both of the following:

(1) He or she will use the electronic copy of the printed instructional material in specialized format solely for his or her own educational purposes.

(2) He or she will not copy or duplicate the printed instructional material for use by others.

(c) If a college or university permits a student to directly use the electronic version of an instructional material, the disk or file shall be copy-protected, or the college or university shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(d) An individual, firm, partnership, or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College shall provide computer files or other electronic versions of the nonprinted instructional materials for use by students attending the University of California, the California State University, or a California Community College, subject to the same conditions set forth in subdivisions (a) and (b) for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional materials that is compatible with braille translation and speech synthesis software.

(e) For purposes of this section:

(1) “Instructional material or materials” means textbooks and other materials written and published primarily for use by students in postsecondary instruction that are required or essential to a student’s success in a course of study in which a student with a disability is enrolled. The determination of which materials are “required or essential to student success” shall be made by the instructor of the course in consultation with the official making the request pursuant to paragraph (4) of subdivision (a) in accordance with guidelines issued pursuant to subdivision (i). “Instructional material or materials” does not include nontextual

mathematics and science materials until the time software becomes commercially available that permits the conversion of existing electronic files of the materials into a format that is compatible with braille translation software or alternative media for students with disabilities.

(2) "Printed instructional material or materials" means instructional material or materials in book or other printed form.

(3) "Nonprinted instructional materials" means instructional materials in formats other than print, and includes instructional materials that require the availability of electronic equipment in order to be used as a learning resource, including, but not necessarily limited to, software programs, videotapes and audiotapes.

(4) "Structural integrity" means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and subheadings, footnotes, indexes, glossaries, and bibliographies. "Structural integrity" need not include nontextual elements such as pictures, illustrations, graphs, or charts. If good faith efforts fail to produce an agreement pursuant to subdivision (a) between the publisher or manufacturer and the university, college, or particular campus of the university or college, as to an electronic format that will preserve the structural integrity of the printed instructional material, the publisher or manufacturer shall provide the instructional material in ASCII text and shall preserve as much of the structural integrity of the printed instructional material as possible.

(5) "Specialized format" means braille, audio, or digital text that is exclusively for use by blind or other persons with disabilities.

(f) Nothing in this section shall be construed to prohibit a university, college, or particular campus of the university or college from assisting a student with a disability by using the electronic version of printed instructional material provided pursuant to this section solely to transcribe or arrange for the transcription of the printed instructional material into braille. In the event a transcription is made, the campus or college shall have the right to share the braille copy of the printed instructional material with other students with disabilities.

(g) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President

of the University of California may each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials pursuant to this section. If a segment establishes a center or centers, and a college or campus within the jurisdiction of the center chooses to participate in the center, each of the following shall apply:

(1) A college or campus designated as within the jurisdiction of a center shall submit requests for instructional material made pursuant to subdivision (a) to the center, which shall transmit the request to the publisher or manufacturer.

(2) If there is more than one center, each center shall make every effort to coordinate requests within its segment.

(3) The publisher or manufacturer of instructional material shall be required to honor and respond to only those requests submitted through a designated center.

(4) If a publisher or manufacturer has responded to a request for instructional materials by a center, or on behalf of all the centers within a segment, all subsequent requests for these instructional materials shall be satisfied by the center to which the request is made.

(h) Nothing in this section shall be deemed to authorize any use of instructional materials that would constitute an infringement of copyright under the Copyright Revision Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(i) The governing boards of the California Community Colleges, the California State University, and the University of California shall each adopt guidelines consistent with this section for its implementation and administration. At a minimum, the guidelines shall address all of the following:

(1) The designation of materials deemed "required or essential to student success."

(2) The determination of the availability of technology for the conversion of nonprinted materials pursuant to subdivision (d) and the conversion of mathematics and science materials pursuant to paragraph (4) of subdivision (e).

(3) The procedures and standards relating to distribution of files and materials pursuant to subdivisions (a) and (b).

(4) Other matters as are deemed necessary or appropriate to carry out the purposes of this section.

(j) Failure to comply with the requirements of this section shall be a violation of Section 54.1 of the Civil Code.

(k) This section does not apply to a request by an institution for a captioned format, as defined in paragraph (1) of subdivision (a) of Section 67302.5, of an instructional material, as defined in paragraph (4) of subdivision (a) of Section 67302.5.

SEC. 2. Section 67302.5 is added to the Education Code, to read:

67302.5. (a) As used in this section, the following terms have the following meanings:

(1) "Captioned" or "captioning" means the display of text corresponding to, and synchronized with, the spoken-word audio portion of instructional material.

(2) "Electronic format" means a computer file or other digital medium that embodies instructional material, is not itself captioned, but from which a captioned format may be created using commercially available technology.

(3) "Institution" means the University of California, the California State University, a California Community College, or any campus or location of any of those institutions.

(4) "Instructional material" means any audiovisual work, as that term is defined in Section 101 of Title 17 of the United States Code, that is created and published primarily for use by students in postsecondary instruction, and is required for a student's success in a course of study in which a student with a disability is enrolled. The determination of which materials are "required for student success" shall be made by the instructor of the course in consultation with the official making the request pursuant to subdivision (b) in accordance with guidelines issued pursuant to subdivision (i).

(5) "Publisher" means any individual, firm, partnership, or corporation that is engaged in the business, whether for profit or not for profit, of selling instructional material in which it owns or controls some or all of the copyright to that material. "Publisher" does not include any entity that is a subdivision of any state or other governmental body, other than the State of California.

(6) "Writing" includes facsimile transmission and e-mail.

(b) (1) A publisher that publishes instructional material used by students attending, or by instructors for use in classroom presentations at, the University of California, the California State

University, or a California Community College, shall, upon request by an institution on behalf of a student or instructor at that institution, do one of the following:

(A) Provide access to a captioned format of the instructional material directly to the student or the instructor by providing an Internet password, delivery of a disk or file, or in any other appropriate manner.

(B) Provide to the institution a captioned format of the instructional material.

(C) Provide to the institution an electronic format, if available, of the instructional material, unless the institution already has an electronic format in its possession, and a license permitting the institution to create a captioned format of the material, to the extent the publisher has the right to grant that license.

(2) A publisher shall respond to a properly addressed request that meets the requirements of subdivision (c) in the following manner, as applicable:

(A) Within 10 calendar days after the receipt of the request, the publisher shall provide to the institution a notice, in writing, as to which of the three actions in paragraph (1) it intends to take.

(B) If the publisher does not possess an electronic format of the instructional material, it shall advise the institution of that fact in the notice provided pursuant to subparagraph (A).

(C) If the publisher lacks sufficient rights to distribute, or license the institution to create, a captioned format of some or all of the instructional material covered by the request, it shall advise the institution of that fact in the notice provided pursuant to subparagraph (A), and shall provide both of the following to the institution, to the extent that the publisher is able to do so:

(i) An electronic format of the instructional material to which the publisher does not control the applicable rights.

(ii) The name and contact information of the person that the publisher believes to be capable of authorizing creation of a captioned format of the instructional material. Any person capable of authorizing the creation of the captioned format shall be deemed to be the publisher of that material for purposes of this section.

(D) If the publisher notifies the institution that it will provide an electronic format and a license permitting the institution to create a captioned format, it shall provide the electronic format

and the license within seven calendar days of providing the notice pursuant to subparagraph (A).

(E) If the publisher notifies the institution that it will provide a captioned format of the requested material, the publisher shall provide the captioned format as soon as it is possible to do so, but not later than 14 calendar days after providing the notice pursuant to subparagraph (A).

(3) If a publisher fails to respond to a request, as required by paragraph (2), within 10 calendar days of receiving the request, the institution shall be deemed to have received a license permitting the institution to create a captioned format of the instructional material.

(c) An institution, if it chooses to submit a request pursuant to subdivision (b), shall include in the request all of the following:

(A) Certification that the institution or an instructor at that institution has purchased the instructional material either (i) for use by a student with an auditory disability that prevents the student from using the instructional material in a noncaptioned format or (ii) for use in a class in which a student with such a disability is enrolled, or that a student with such a disability attending, or registered to attend, that institution has purchased the instructional material.

(B) Certification that the student has an auditory disability that prevents the student from using instructional material in noncaptioned format.

(C) Certification that the instructional material is for use by the student or an instructor in connection with a course in which the student is registered or enrolled at the institution.

(D) The signature of the coordinator of services for students with disabilities at the institution, or by an official responsible for monitoring compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the institution.

(E) At a minimum, an e-mail address and a fax number at which the person signing the request may be contacted.

(2) A publisher may require, in addition to the requirements enumerated in paragraph (1), a request to include a statement signed by the student agreeing to both of the following:

(A) He or she will use the captioned format of the instructional material solely for his or her own educational purposes.

(B) He or she will not distribute or reproduce the captioned format for use by others.

(d) (1) Any institution possessing an electronic format of an instructional material shall take reasonable precautions to ensure that the electronic format is not distributed to any third party, except as provided in paragraph (2) and subdivision (e), and shall, to the extent possible, maintain in effect all copy-protection measures embedded in any electronic format provided by a publisher.

(2) An institution may retain an outside vendor to assist it in the exercise of rights granted to it by a publisher or by this section, and shall ensure, pursuant to an agreement that the publisher and the institution shall both have the power to enforce, that the electronic format is not further distributed and that any captioned format made from it is provided only to the institution.

(e) (1) If a publisher provides to an institution a captioned format of instructional materials, the institution shall provide the captioned format to the student or instructor on whose behalf the request was made and may retain a copy of that captioned format.

(2) Except as provided in paragraph (4), if a publisher grants an institution a license to create a captioned format, the institution shall provide a copy of the resulting captioned format to the publisher and may retain a copy of the captioned format.

(3) Pursuant to paragraph (1) or (2), the institution may provide additional copies to any other of its students, any instructor employed by the institution for classroom use, any student at any other institution, or any other institution for classroom use, if the institution collects and forwards to the publisher all institutional and student certifications required under subdivision (b).

(4) The institution shall cease to distribute additional copies of a captioned format to any other institution if either of the following occurs:

(A) The institution receives notice that a captioned format has become commercially available from the publisher or other copyright owner of the instructional material. However, if this occurs, the institution may continue to allow its own instructors to use any captioned format that the institution previously created.

(B) The publisher, or other copyright owner, of the instructional material notifies the institution that the institution's captioned format contains material errors or omissions.

(5) An instructor who receives a captioned format, or access to a captioned format pursuant to subparagraph (A) of paragraph (1) of subdivision (b), shall not use the captioned format for any purposes except for the classroom use for which the captioned format was requested or, in accordance with paragraph (3), for use in other classes at the institution with which the instructor is affiliated at the time that a request was made pursuant to subdivision (b).

(f) (1) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California may each designate an office, or may by agreement designate a single office, to maintain a registry of publisher contact information. A registry office designated pursuant to this subdivision may be a center described in subdivision (g) of this section or subdivision (g) of Section 67302.

(2) A publisher intending to sell instructional materials in the state shall provide to the office designated pursuant to paragraph (1) the name and contact information of its office or employee designated to handle requests made under this section, or an Internet Web site containing that information. If a publisher fails to provide that information, a request under subdivision (b) may be sent to a publisher at the address of its primary place of business, to the attention of its rights and permissions department.

(g) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California may each establish one or more centers within their respective segments to process requests pursuant to this section. A center under this subdivision may be a center established under subdivision (g) of Section 67302. All of the following requirements apply with respect to any center established or designated for the purposes of this subdivision:

(1) If an institution designated as within the jurisdiction of a center chooses to process requests in the manner set forth in this subdivision, it shall submit all requests made under this section to the center, which shall transmit these requests to publishers.

(2) Each center shall make every effort to coordinate requests within its segment.

(3) A publisher shall not be required to respond to requests from institutions that a center has been designated to represent, unless those requests are communicated through the center.

(4) The center shall, in handling all electronic formats and captioned formats for the benefit of students enrolled in the institutions the center represents, have the same rights and obligations arising under subdivisions (d) and (e) as the institutions on whose behalf it acts.

(h) Access to a captioned format, an electronic format, or a license to create a captioned format pursuant to subdivision (b) shall be provided free of any fee or royalty that is additional to the initial purchase of the instructional material by the student, the instructor, or the institution.

(i) (1) The Board of Governors of the California Community Colleges and the Trustees of the California State University may, and the Regents of the University of California are requested to, adopt guidelines consistent with this section for its implementation and administration. It is the intent of the Legislature that the guidelines, if adopted, address all of the following:

(A) The designation of materials deemed "required for student success."

(B) The procedures and standards relating to distribution of files and materials pursuant to subdivisions (b), (d), and (e).

(C) The possibility of involving outside networks or partnerships between publishers and institutions to provide for access to instructional materials for students with disabilities and to facilitate the issuance of licenses by publishers under subparagraph (C) of paragraph (1), and paragraph (3), of subdivision (b).

(D) Other matters as are deemed necessary or appropriate to carry out the purposes of this section.

(2) For purposes of paragraph (1), the Board of Governors of the California Community Colleges, the Trustees of the California State University, and the University of California are encouraged, from time to time, in the reasonable discretion of the respective governing body, to convene an advisory group, at least one-third of the membership of which shall be representatives designated by publishers as having a substantial volume of transactions with institutions under this section.

(j) Nothing in this section shall be construed to require a publisher to produce or deliver an electronic format of instructional material if the publisher offers that instructional material for sale only in a form that is not computer-readable.

(k) Nothing in this section shall be construed as vesting any copyright or copyright interest in any captioned format in any person or entity other than the publisher.

(*l*) Nothing in this section shall be construed to authorize any use of instructional materials that would violate the takings clause of the Fifth Amendment to the United States Constitution or would constitute an infringement of copyright under the Copyright Revision Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(m) This section exclusively governs requests for captioned formats of instructional materials and Section 67302 does not apply to requests for captioned formats of instructional materials.

(n) The provisions of this section shall apply to the University of California State University, and the California Community Colleges only to the extent that the respective institution, by appropriate resolution, makes these provisions applicable.

Approved _____, 2009

_____

Governor