STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:		
DEPARTMENT OF SOCIAL SERVICES	)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
REGULATORY ACTION:	)	(Gov. Code, sec. 11349.3)
Title 22, California Code of Regulations; Manual of Policies and Procedures (MPP)	)	OAL File No. 02-1202-06 S
ADOPT, AMEND AND REPEAL SECTIONS 82001 ET SEQ.; NON-CONSECUTIVE; SEE ATTACHMENT "A"	)	

DECISION SUMMARY

This regulatory action reorganizes largely existing provisions regarding adult day care and adult day support centers so that each chapter will be complete in itself, replacing the combination of a central section of general regulations governing all community care facilities plus a separate, specialized chapter on adult day care and adult day support centers. The action also makes other changes and conforms these provisions to similar ones on criminal record clearances and exemptions for workers and volunteers in child care facilities.

On January 15, 2003, the Office of Administrative Law ("OAL") disapproved the proposed adoption, amendment, and repeal of sections 82001-82588.2, not consecutive, in Title 22, California Code of Regulations ("CCR") and in the Manual of Policies and Procedures ("MPP"), Community Care Licensing Division, for failing to follow the procedures required by the Administrative Procedure Act ("APA") and failing to comply with the Clarity, Necessity, and Consistency standards of the APA.[1]

[1] Unless otherwise specified, all references are to Title 22 of the California Code of Regulations ("CCR") and the MPP, which retains the same numbering as Title 22, but also contains so-called "handbook" provisions, most of which repeat statutory language or provide non-regulatory examples.

DISCUSSION

Regulations adopted by the Department of Social Services ("Department") regarding community care facility licensing must be adopted pursuant to the APA. See Health and Safety Code section 1530. Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless a statute expressly exempts or excludes the act from the requirements of the APA. (Gov. Code section 11346.) No exemption or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action may become effective, OAL must review it for compliance with both the procedural requirements of the APA and certain substantive standards.

A.

PROCEDURE

On November 30, 2001, the Department published its notice of proposed rulemaking for this action,[2] and, on December 2, 2002, the Department submitted an incomplete record of this rulemaking action to OAL. The record lacked several required documents and failed to follow required APA procedures.

Government Code section 11346.9 requires that each rulemaking record submitted to OAL contain, among other items, a Final Statement of Reasons ("FSOR") and an Updated Informative Digest as follows:

> "Every agency subject to this chapter shall do the following:
>
> "(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:
>
> "(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption, amendment, or repeal of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with Section 11347.1.
> "(2) A determination as to whether adoption, amendment, or repeal of the regulation imposes a mandate on local agencies or school

[2] Published 11-30-01, California Regulatory Notice Register 2001, 48Z, OAL notice file no. Z01-1120-19.

districts. If the determination is that adoption, amendment, or repeal of the regulation would impose a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

"(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

"(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

"(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses.

"(b) Prepare and submit to the office with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills."

This filing lacks: (1) the Final Statement of Reasons, including the summary of and response to comments and the explanation of the 15-day changes already shown on the submitted text; (2) the Updated Informative Digest; (3) the Rulemaking Statements, including the statements of mailing the 45 and 15 day notices;[3] and (4) material concerning the second 15-day notice (i.e.,

[3] See sections 86 and 44(b), title 1, CCR, for the requirements regarding statements of mailing notices.

the revised text clearly illustrating the successive changes, the 15-day notice made available to the public, the statement of reasons concerning the changes, any comments and responses, and the statement of mailing).[4]

The incomplete record presented necessarily limited OAL's review of the rulemaking action. Thus, OAL reserves the right to review the entire record de novo when the Department resubmits the action.

In addition, the record lacks the forms referenced, both the forms incorporated by reference at section 82003, page 18, and the ones referred to as the "forms provided by the agency" (sections 82018 and 92025) and "a form provided by the Department" (at section 82065(i)).

In addition to noting these procedural defects, and in order to assist the Department when it prepares the final record, OAL notes the following issues.

B.

Consistency/Clarity

Government Code section 11349(d) describes "Consistency" as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

Government Code section 11349(c) defines "Clarity" to mean "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[5]

Government Code section 11349.1(a) requires OAL to review proposed regulations in light of the accompanying record and make determinations in accordance with these Government Code section 11349 standards, among others.

1. Permit Reform Act – Consistency and Clarity

Section 82001(c) (9), page 4, defines "Completed Application" as

> "(A) The applicant has submitted and the licensing agency has received all required materials including: an approved fire clearance, if appropriate, from the State Fire Marshal; a criminal record clearance on the applicant and any other individuals as specified in section 82019, Criminal Record Clearance.

[4] See Government Code section 11346.8(c) and section 44, title 1, CCR, for requirements regarding post-notice modifications to the regulation text.

[5] Section 16, title 1, CCR, further defines the instances in which OAL presumes a lack of clarity in a regulation.

"(B) The licensing agency has completed a site visit to the facility/center."

Section 82027, "Initial Application Review," page 72, provides that within 90 days of the licensing agency's receipt of "the application," the agency shall notify the applicant in writing either that "the application is complete," or that it is deficient and in what way(s).

Section 82031, page 80, provides "(a) [w]ithin 90 days of the date a *completed application*, as defined in Section 82001(c)(8) [should be (9)], has been received, the licensing agency shall give written notice to the applicant" that the application has been approved or denied. (Emphasis added.)

Section 82027 complies with Government Code section 15376(a), part of the Permit Reform Act of 1981.[6] However, it does not fulfill section 15376(b), which requires the agency to specify a "period dating from the filing of a completed application within which the agency must reach a permit decision." Section 82031 appears at first to be meant to comply with subsection (b), but it also requires fire and criminal clearances and that the agency complete its site visit, which is not part of the "complete" application described in section 82027. This distinction between a "complete" and a "completed" application is confusing. Further, the 90 day time period in section 82031 would not even start to run until the agency completes its site visit, making the running of the agency's deadline completely depend on how quickly or slowly the agency visits the applicant's site.

Additional uses of the term include section 82030(a), page 78, which uses the term "completed application" in connection with issuing a provisional license, where it seems likely to refer to the "completed application" as defined (meaning that a visit has already occurred before a provisional license may be issued). However, section 82058, "Unlicensed Facility/Center Penalties," page 114, provides for a penalty of $200 per day for operating an unlicensed facility if the "operator has not submitted a *completed application* for licensure within 15 days of the notice of Operation in Violation of Law . . ." (Emphasis added.) The "completed application" itself stops the clock running on the finding of unlicensed operation and related penalties. Thus, even if the operator has submitted an application as described in section 82018 *et seq*., will the 15 days not stop running until the agency makes a site visit and the various clearances are obtained? May the visit which resulted in a finding of unlicensed operation count as the required agency licensing visit?

Another minor Permit Reform Act item arises with respect to section 82036(d), page 86, which states that fees shall be nonrefundable except as provided in Government Code section 15378. Gov. Code section 15378 states that the "secretaries and agency heads shall adopt regulations establishing an appeal process through which an applicant can appeal directly to the secretary or agency head for a timely resolution of any dispute arising from a violation of the time periods

[6] Government Code sections 15374-15378.

required by this chapter. The regulations shall provide for the full reimbursement of any and all filing fees paid by a permit applicant whose application was not processed within the time limits adopted by an agency pursuant to this chapter, and whose appeal to the secretary or agency head was decided in the applicant's favor." The Department itself does not have the authority to adopt regulations regarding this procedure, but the section would be clearer if it referred to any such regulations adopted by the Secretary of the Health and Human Services Agency.

These provisions do not appear to comply with the Permit Reform Act and are unclear, in part because they use similar or even the same terms to mean different things.

2. Disapproval Decision on OAL File No. 01-1231-01 S

Several potential clarity issues echo those raised in OAL's February 21, 2002, decision explaining the disapproval of the Department's regulations in OAL file no. 01-1231-01 S, some of which parallel the ones at issue here. (A copy of the earlier decision is enclosed). The Department seems to have corrected most of the clarity problems described in that decision, such as deleting references to "policy" from sections 82019.1(q) and (s), etc. (pp. 54-55), but some of the issues remain or cannot be evaluated without the complete record, such as whether the regulation text matches the language on the forms incorporated at section 82003, page 18, regarding former LIC 9188 (now 9182?) and LIC 508, since the forms are not in the record.

3. Other Clarity Issues Include

Section 82018 (a), page 28, "Application for License," requires that

> "Any adult, firm, partnership, association, corporation, limited liability company, county, city, public agency or other governmental entity desiring to obtain a license shall file with the licensing agency a verified application *on a form furnished by the licensing agency*." (Emphasis added.)

Section 82018(d) requires that the "application and supporting documents shall contain the following," followed by a mostly straightforward list of items (d)(1) through (d)(17), most of which are both clear and clearly necessary. However, subsection (d)(10) is unclear as it states "[i]nformation required by Health and Safety Code section 1520(e) is paraphrased below." This phrasing is inconsistent and not parallel with the rest of the items which make up a list of material, such as (d)(9), "[i]nformation required by Health and Safety Code section 1520(d)," followed by a handbook section quoting the statute. Subsection (d)(10) should either follow the same format or make the paraphrase part of the regulation text itself.

Subsection (d)(17) presents both potential clarity and consistency issues in that it requires "[s]uch other information as may be required pursuant to Health and Safety Code section

1520(g)." Section 1520 provides that any person desiring a license to "file with the department, pursuant to regulations, an application on forms furnished by the department, which shall include, but not be limited to: . . . (g) [a]ny other information that may be required by the department for the proper administration and enforcement of this chapter." It is not clear what information the Department might obtain under this subsection, or what guidelines or standards it might apply. It also appears likely to result in violations of Government Code section 11340.5, which prohibits state agencies from using guidelines or standards of general application which have not been properly adopted pursuant to the APA.

The Department should indicate whether it requires any particular forms to be used or whether any form is acceptable, as long as the information required by subsection (d) is provided -- and the forms will contain no additional requirements unless authorized in statute or regulation. It must clarify the requirements of subsection (d)(17) and specify the applicable standards it intends to apply as well.

Please note that the same issues also arise with respect to section 82025, "Bonding," on page 67.

Section 82019(f)(3), page 38, refers to "any other documentation required by the Department [e.g., LIC 508, Criminal Record Statement which is incorporated by reference]." Does this refer only to that material and information which the Department may require under statute and regulation? Perhaps the regulation should identify or more specifically refer to what might be "required"? Is it clear what the standards are for "any other information required by the Department"? The requirements must either be in statute or regulation, or be based on a case by case determination.

Section 82019.2(c), page 46, provides that the Department "*may* deny an exemption if: . . . ." (Emphasis added.) Is this denial discretionary? Under what circumstances will the Department grant an exemption request even if the applicant falls within the two listed conditions which are failure to provide requested documents or failure to cooperate with the Department in obtaining the exemption?

Section 82045(b), page 98, "Evaluation Visits," is unclear when it refers to "other visits" – does this mean any type of visit other than an evaluation visit?

Section 82064(e) (3), p. 125, refers to the "qualifications of an administrator as specified in Sections 82064(b) through (d), (e)(4) and (e)(5)." However, subsections (e)(4) and (e)(5) appear mutually exclusive, while the intent appears to be to include (b) through (d) in all cases. It might be clearer to refer to: "Subsections 82064(b) through (d) and either (e)(4) or (e)(5)."

Section 82065(i), page 130, "Personnel Requirements," requires specified employees and volunteers to "sign a statement, under penalty of perjury, *on a form provided by the Department*,

which contains either of the following: . . . . " (Emphasis added.) Is it clear that the form may not request information other than that authorized by statute or regulation? The record should contain a copy of the form for review as well.

Section 82066(b) (2), page 136, "Personnel Records," requires "[t]uberculosis test documents as specified in Section 82065(g) (3)," but that section requires a test rather than a document or specific documentation of the test results.

Section 82068, page 139: Following subsection (c)(8) is the language "Handbook begins here" and a sentence that may have come from statute (a statutory citation is stricken out), but it is not labeled or numbered.

Section 82092.2(a), line 4, page 205: The word "license" should be "licensee."

Even the limited review revealed additional minor clarity issues, such as erroneous internal cross-references (possibly not re-numbered after the Department revised the referenced sections' numbering especially in Article 8, starting on page 199), minor punctuation, typographical errors, and the like. These items would not have required disapproval in themselves, but the Department must correct them when it resubmits the complete file to OAL. I will provide a separate listing of these minor items.

C.

Necessity

As previously noted, this filing lacks the FSOR which would detail the extensive revisions made available for a second 15-day period of availability and public comment. Thus, the record lacks the requisite showing of necessity for these changes (see Government Code sections 11349(a), 11349.1(a), 11346.9(a)(1), and 11346.2(b), and section 10, title 1, CCR). The information in the Initial Statement of Reasons ("ISOR") regarding the provisions discussed above under "Clarity" is also inadequate to answer the questions which arose.

D.

Other Observations

We also note additional minor items which the Department should correct before it resubmits this action to OAL. The certification in Box B.8. of the Form 400 shows someone signing "for" the Director. However, the signature line is a certification which either the Director or someone delegated by the director must sign, with the actual signatory's name reflected in the last line

labeled “typed name and title of signatory.” See section 6, title 1, CCR. Also on the Form 400, Box B.2., “Title,” lists only the “MPP” and not also “Title 22” of the CCR as it should.

CONCLUSION

For the reasons set forth above, OAL has disapproved the proposed amendment of sections 82001 to 82588.2, not consecutive, of Title 22 of the CCR and the MPP. If you have any questions, please contact me at (916) 323-6805.

January 22, 2003

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For:

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