

**State of California
Office of Administrative Law**

In re:
Department of Social Services

Regulatory Action:

**Title: Manual of Policies and Procedures
(MPP)**

Adopt section: 30-778

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2018-1001-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This action by the Department of Social Services (Department) proposed to adopt procedures and criteria in the Manual of Policies and Procedures (MPP) for general exception requests for persons who have been found ineligible to provide In-Home Supportive Services on the basis of specified convictions as provided in Welfare and Institutions Code section 12305.87.

DECISION

On October 1, 2018, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On November 13, 2018, OAL notified the Department of the disapproval of this regulatory action. The reason for the disapproval was failure to comply with the “clarity” standard of Government Code section 11349.1. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DISCUSSION

Regulations adopted by the Department 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 (secs. 11340-11361). Pursuant to section 11346 of the Government Code, 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. No exemption or exclusion applies to the present regulatory action 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.

I. 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.

As discussed below, proposed MPP section 30-778 fails to comply with the clarity standard of the APA.

1. Proposed Section 30-778.527 provides:

When submitting the general exception request, the applicant provider shall also submit the following documentation:

...

.527 Three signed character reference statements. Only one of the three character reference statements may be written by a family member of the applicant provider.

Based on the above regulation text, members of the directly affected public could reasonably and logically interpret “family member” to have different meanings, thereby making it unclear whether a character reference will count toward the one family member limit. For example, does “family member” include only immediate family, such as parents and siblings, or does it include extended family, such as aunts, uncles, cousins, etc.? Although MPP section 30-002, subdivision f.(1), contains a definition for “family,” that definition is specifically designated “for income eligibility purposes” and not for all purposes, such as in the current proposed regulation. The above provision therefore can be reasonably and logically susceptible to more than one meaning and uses undefined terms not generally familiar to the regulated public in violation of Government Code section 11349, subdivision (c), and subdivisions (a)(1) and (a)(3) of section 16 of title 1 of the CCR.

2. Proposed Section 30-778.631, subdivision (a) provides:

A crime shall be considered violent if it resulted in harm or risk of harm to another individual. An applicant provider who has been convicted of a violent crime(s) shall be subject to a higher level of scrutiny than those who have been convicted of non-violent crime(s).

There are two clarity issues with this language:

2.1. First, the intended meaning of “harm” is not clear from the text. As written, any type of harm, such as physical, emotional, financial, property, or otherwise, could result in the crime being considered violent by the Department, thereby subjecting the applicant provider to “a higher level of scrutiny.” Although the text differentiates between “violent” and “non-violent” crimes, the lack of specificity of what type of harm makes a crime “violent” for purposes of a general exception request is not clear. The above provision therefore can be reasonably and logically susceptible to more than one meaning and uses undefined terms not generally familiar to the regulated public in violation of Government Code section 11349, subdivision (c), and subdivisions (a)(1) and (a)(3) of section 16 of title 1 of the CCR.

2.2. Second, there is uncertainty as to the meaning of the different levels of scrutiny to be applied to a general exception request and how the different levels of scrutiny are met. For example, a “higher level of scrutiny” is applied to “violent crimes” as determined by this provision. While Welfare and Institutions Code section 12305.87, subdivision (e), requires the Department to consider certain factors when evaluating the nature and seriousness of a crime for which the Department receives a general exception request, the statute does not specify the level

of scrutiny or review to be applied. If violent crimes are subject to a “higher level of scrutiny” than non-violent crimes, then what level of scrutiny is applied to non-violent crimes? Is the level of scrutiny referring to an evidentiary burden or some other standard of review? How would an applicant provider know how to meet this burden or whether it can be met given an applicant provider’s criminal circumstances? How would Department staff reviewing the general exception request determine whether the lower or higher level of scrutiny has been met by an applicant provider? Although subdivision (a) of MPP section 30-778.63 contains additional factors for the Department to consider if a crime is determined to be violent, it remains unclear how these factors are evaluated in determining whether an applicant provider has met the “higher level of scrutiny.” By establishing multiple levels of scrutiny without defining the standards of review for each level, the regulations can reasonably be interpreted to have more than one meaning and uses undefined terms not generally familiar to the regulated public in violation of Government Code section 11349, subdivision (c), and subdivisions (a)(1) and (a)(3) of section 16 of title 1 of the CCR.

3. Proposed Section 30-778.63, subdivision (b) provides:

The State shall determine if the disqualifying crime(s) involved a sex offense(s) for which a person was required to register under Penal code section 290(c). Any such crime(s) shall be evaluated under the strictest scrutiny, regardless of the level of violence used during the commission of the crime(s).

The above regulation text is unclear as to what is meant by “strictest scrutiny.” Similar to the “higher level of scrutiny” issue discussed above, “strictest scrutiny” is not defined or explained in the regulation text, leaving its meaning open to multiple interpretations. Is this level of scrutiny referring to an evidentiary burden or some other standard of review? How would an applicant provider know how to meet this burden or whether it can be met given an applicant provider’s criminal circumstances? How would Department staff reviewing the general exception request determine whether this strictest level of scrutiny has been met by an applicant provider? By establishing a level of scrutiny without defining the standards of review for the level, the regulation can reasonably be interpreted to have more than one meaning and uses undefined terms not generally familiar to the regulated public in violation of Government Code section 11349, subdivision (c), and subdivisions (a)(1) and (a)(3) of section 16 of title 1 of the CCR.

4. Proposed Section 30-778.63, subdivision (c) provides:

The State shall identify and evaluate the characteristics of any victim or intended victim of the applicant provider’s disqualifying crime(s). The crime(s) shall be considered especially serious if a victim or intended victim was elderly, disabled, or a minor at the time the crime was committed.

The above provision is unclear as to what it means if a crime is considered “especially serious.” While Welfare and Institutions Code section 12305.87, subdivision (e)(3)(A), requires the

Department to consider the nature and seriousness of the crime committed, the proposed regulation fails to explain what happens if the crime committed is considered “especially serious.” Does this mean that a particular level of scrutiny applies, and if so, which one? Is there a different evidentiary burden to overcome “especially serious” crimes versus less serious crimes? How would an applicant provider know whether a general exception could be granted and how would Department staff reviewing the general exception request determine whether to grant a general exception if the crime is considered “especially serious?” This provision can reasonably be interpreted to have more than one meaning in violation of Government Code section 11349, subdivision (c), and subdivision (a)(1) of section 16 of title 1 of the CCR.

5. Proposed Section 30-778.633, subdivisions (a), (b), (c), and (d):

Proposed section 30-778.633, subdivision (a) provides: “Unless the applicant provider presents convincing evidence of rehabilitation, if the applicant provider was disqualified due to a conviction of a sex crime, he/she shall be denied a general exception if he/she has been convicted of more than one disqualifying crime in the previous 10 years.” Similar language for different types of crimes is found in subdivisions (b) through (d). These provisions are unclear as to what is meant by “convincing evidence.” Is this a specific evidentiary standard similar to the levels of scrutiny discussed above, and if so, how would an applicant provider or Department analyst determine whether the standard has been met? In response to a written comment raising concerns about the meaning of this “convincing evidence” standard, the Department states:

The phrase “convincing evidence” does not refer to an increased level of evidence of rehabilitation that would be set for differently situated individuals. The phrase refers to the presentation of evidence that reaches a level that would “convince” the analyst evaluating the general exception request from the applicant of the applicant’s suitability to be granted a general exception. This may vary from individual to individual based on the circumstances surrounding the applicant’s criminal conviction. (Final Statement of Reasons, page 13.)

While the Department’s response to comment explains the intended meaning of the term “convincing evidence,” the response does not remedy the ambiguity in the proposed text itself. The term “convincing evidence” as used in these provisions can reasonably be interpreted to have more than one meaning and uses undefined terms not generally familiar to the regulated public in violation of Government Code section 11349, subdivision (c), and subdivisions (a)(1) and (a)(3) of section 16 of title 1 of the CCR.

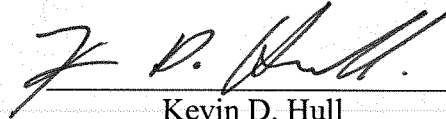
CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this Decision will be emailed to the Department on the date indicated below.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR, prior to resubmission of this regulatory action.

If you have any questions, please contact me at (916) 323-8916.

Date: November 20, 2018

A handwritten signature in black ink, appearing to read "K. D. Hull", is written over a horizontal line.

Kevin D. Hull
Senior Attorney

For: Debra M. Cornez
Director

Original: Will Lightbourne, Director
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