State of California
Office of Administrative Law

In re:
Department of Social Services

Regulatory Action:

Title 22, California Code of Regulations

Adopt sections: **130000, 130001, 130003, 130004, 130006, 130007, 130008, 130009, 130020, 130021, 130022, 130023, 130024, 130025, 130026, 130027, 130028, 130030, 130040, 130041, 130042, 130043, 130044, 130045, 130048, 130050, 130051, 130052, 130053, 130054, 130055, 130056, 130057, 130058, 130062, 130063, 130064, 130065, 130066, 130067, 130068, 130070, 130071, 130080, 130081, 130082, 130083, 130084, 130090, 130091, 130092, 130093, 130094, 130095, 130100, 130110, 130200, 130201, 130202, 130203, 130210, 130211**

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL Matter Number: 2018-1226-03

OAL Matter Type: Certificate of Compliance (C)

SUMMARY OF REGULATORY ACTION

This Certificate of Compliance action was submitted in order to make permanent the emergency regulations initially adopted in action no. 2017-1215-01EFP (readopted in action no. 2018-0613-02EFP). These regulations implement the Home Care Services Consumer Protection Act (AB 1217, Stats. 2013, ch. 790) and articulate the standards for applying for Home Care Organization (HCO) licensure, as well as operating and biennial visit requirements. Additionally, these regulations provide guidelines and standards for Home Care Aides (HCAs) who are either affiliated with HCOs or choose to apply for licensure independently.

DECISION

On December 26, 2018, the Department of Social Services (Department) submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On February 8, 2019, OAL notified the Department of the disapproval of this regulatory action. The reasons for the disapproval were failure to comply with the "necessity" and "clarity" standards of Government Code section 11349.1. The Department also failed to follow all required procedures under the California Administrative Procedure Act (APA). 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, Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (sections 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. NECESSITY

OAL must review regulations for compliance with the "necessity" standard of Government Code section 11349.1. Government Code section 11349, subdivision (a), defines "necessity" as meaning "...the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion."

To further explain the meaning of substantial evidence in the context of the "necessity" standard, subdivision (b) of section 10 of title 1 of the CCR provides:

> In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
>
> (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
>
> (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon

> policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency's need for a regulation, the APA requires a rulemaking agency to describe the need for the regulation and identify documents relied upon in proposing the regulation, if any, in the Initial Statement of Reasons (ISR), pursuant to Government Code section 11346.2, subdivision (b). In the instant case, the Department's rulemaking record includes an ISR, two separate addenda to the ISR, each of which supplements the ISR and was properly noticed pursuant to Government Code section 11347.1, and three documents relied upon in support of the proposed text.

Despite the volume of these materials, nearly all proposed regulation text and forms incorporated by reference remain unsupported by substantial evidence in the rulemaking record. Instead of providing evidentiary support or justification for a provision, the Department included a brief summary or restatement of the provision followed by a simple declaration that the provision was necessary and authorized by law.

For example, proposed section 130030, subdivision (b), was initially proposed to read:

> (b) A suboffice shall not have full-time staff. For purposes of this section, full-time means no more than 24 hours in a seven-day period.

This provision was addressed in the ISR as follows:

> Specific Purpose: This section is adopted to specify that a suboffice cannot have full time staff present for more than twenty-four hours within a seven-day period.
>
> Factual Basis: This section is adopted and is necessary to specify suboffice requirements as authorized by Sections 1796.42, 1796.51, 1796.52, 1796.53, and 1796.63 of the Health and Safety Code.

The cited sections of the Health and Safety Code do not impose the specific 24-hour maximum being proposed. In fact, the cited statutes do not require the Department to limit the working hours of employees at suboffices in any way. The absence of a statutory requirement to adopt these regulatory provisions signifies that the adoption was at the Department's discretion, and the APA requires the need for this adoption to be supported by substantial evidence in the record. The Department's ISR contains no such evidence; therefore, the Department failed to satisfy the necessity standard in proposing section 130030, subdivision (b).

In response to public comment received during the 45-day notice period, the Department subsequently modified section 130030, subdivision (b), to address a perceived clarity concern. The modified text reads:

> (b) A suboffice shall not operate more than 24 hours in a seven-day period.

In the related ISR addendum, the Department explained that "[t]his change is necessary to clarify that this regulation applies to the number of hours in a week that a Health Care Organization

(HCO) may operate a suboffice, and not the time-base of staff employed by the HCO." Whether or not this statement serves as an adequate response to the comment, it still does not provide substantial evidence of the need to adopt the particular regulation. The reader continues to wonder why the Department decided to limit the weekly operation of a suboffice to 24 hours.

This pattern of rephrasing the text and relying on statutory authority to demonstrate need, rather than stating the specific purpose of the text and providing substantial evidence of necessity as the APA requires, is pervasive throughout the Department's ISR and related materials. The Department must resolve all necessity issues before resubmittal to OAL.

II. 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.

In this rulemaking action, a number of proposed regulatory provisions fail to comply with the "clarity" standard. Some of these clarity problems are discussed below. All clarity concerns must be addressed by the Department prior to resubmission of this rulemaking to OAL.

Issue 1. Proposed subdivision (a) of section 130028, as amended pursuant to Government Code section 11346.8, subdivision (c), provides:

> (a) An application fee, as specified in Section 1796.49 of the Health and Safety Code shall be charged by the Department. After initial licensure, a renewal fee shall be charged by the Department every two years on the anniversary of the effective date of the license. The fees are necessary for enforcement and administration of Division 2, Chapter 13 of the Health Safety Code.
>
> (1) A fee of five thousand six hundred and three dollars ($5,603) for initial application shall be charged until updated pursuant to subdivision (2).
>
> (2) As often as necessary but no more than every twelve months, a fee for an initial application, in the amount determined by the Department and consistent with Health and Safety Code sections 1796.47 through 1796.49, shall be updated and published.

Subdivision (a)(2) presents multiple clarity issues. First, it is unclear whether "no more than every twelve months" means at least once every twelve months or no more often than once every twelve months. Second, the prospective nature of the text itself leaves the amounts of future fees unclear. Further, what does the Department mean by "published?" Properly noticed and adopted pursuant to the APA, or informally published elsewhere by the Department? These ambiguities violate the clarity standard of the APA, and must be resolved before resubmittal to OAL.

Issue 2. Proposed subdivision (d) of section 130100 states:

> (d) Prior to and as applicable subsequent to the Department issuing a license to, or an individual having contact with clients or confidential client information, any person specified in subdivision (b) [i.e., subject to a criminal record review] shall obtain a criminal record clearance or criminal record exemption as specified in Section 1522 of the Health and Safety Code.

Proposed subdivision (g) of section 130100 provides:

> (g) All individuals subject to a criminal record review [i.e., specified in subdivision (b)] shall prior to having contact with clients, prospective clients, or having access to confidential client information:

(1) Request and be approved for a criminal record clearance or criminal record exemption as required by the Department,

(2) [Cont.]

Subdivisions (d) and (g) do not appear to be consistent. According to subdivision (d), in some circumstances, "subsequent to" an individual listed in subdivision (b) having contact with clients or confidential client information, that individual must obtain a criminal record clearance. But subdivisions (g) and (g)(1) require all individuals listed in subdivision (b) to obtain a criminal record clearance "prior to" having contact with clients or confidential client information. This inconsistency constitutes a violation of subdivision (a)(1) of section 16 of title 1 of the CCR.

Issue 3. A series of forms are incorporated by reference throughout the proposed regulations, and the Department chose to also adopt the substantive content of the forms into the regulation text itself. In many instances, the text and the associated form do not match. For example, section 130066, subdivision (b), lists the requirements that ostensibly mirror those on incorporated form HCS 501 (rev. 6/17), but there are a few discrepancies. Subdivision (b)(4) of the text requires "Date of last Tuberculosis examination," but the form requires "Date of TB test upon hire." Subdivision (b)(9) requires "Position time base," but the form does not require this information. Similarly, the form requires "Additional TB test dates (please include test results)," yet the text does not. Finally, the form still includes a field for "Date of separation," but while the same requirement in subdivision (b)(13) was adopted by the Department during an emergency regulatory action that preceded this Certificate of Compliance, the text now indicates the Department's intent to strike the provision entirely. All such inconsistencies between proposed regulation text and forms proposed to be incorporated by reference must be resolved by the Department before resubmittal to OAL.

III. FAILURE TO FOLLOW APA PROCEDURES

Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking record contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6), requires, in part, the estimate of the cost or savings to any state agency. This paragraph further defines "cost or savings" as "additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations." Government Code section 11357 requires that DOF adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, DOF has developed, and requires regulatory agencies to use, the STD. 399 "Economic and Fiscal Impact Statement." (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in STD. 399 require the concurrence of DOF. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION

(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes the DOF to "...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation."

A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

A.1-Reimbursable Local Costs	B.1-State Costs
A.2-Non-Reimbursable Local Costs	B.2-State Savings
A.3-Local Savings	B.4-Other
A.6-Other	

In addition, the DOF's approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399....

On the STD. 399 in the rulemaking record for this proposed regulatory action, the Department checked boxes in sections A.2, B.1, and B.4 of the Fiscal Impact Statement to indicate non-reimbursable local costs, state costs, and other fiscal effects on state government, respectively.

Pursuant to SAM section 6615, when a state agency indicates that its proposed regulatory action will result in an increase in costs, then the STD. 399 is required to be submitted to DOF for review and a signature obtained from DOF indicating concurrence by DOF before submitting the STD. 399 as part of the rulemaking record for OAL's review. This did not occur. There is no signature from DOF on the Department's STD. 399. Thus, the Department failed to follow required APA procedures. A review and signature from DOF must be obtained and indicated on the STD. 399 before resubmitting this action to OAL.

CONCLUSION

For the reasons set forth above, OAL has 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 disapproval decision will be e-mailed to the Department contact person on the date this decision is signed below.

Any supplement to the ISR or other document the Department may create or otherwise propose to add to the record in order to address the necessity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1. Additionally, 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. The Department must resolve all other issues raised in this Decision of Disapproval before resubmitting to OAL.

If you have any questions, please contact me at (916) 323-6225.

Date: February 15, 2019

Eric Partington
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Director

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