

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re: )  
)  
) **DECISION OF DISAPPROVAL**  
**DEPARTMENT OF SOCIAL )**  
**SERVICES )** **OF REGULATORY ACTION**  
)  
) **(Gov. Code, sec. 11349.3)**  
**REGULATORY ACTION: )**  
)  
**Manual of Policies and Procedures )** **OAL File No. 01-0807-03 S**  
**(MPP) )**  
**ADOPT SUBSECTIONS: 33-120.3 )**  
**AND 33-805.3 )**  
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**DECISION SUMMARY**

The regulatory action established processes, procedures and standards for the Adult Protective Services Program. On September 19, 2001 the Office of Administrative Law (“OAL”) notified the Department of Social Services (“Department”) that the regulatory action was approved except for subsections 33-120.3 and 33-805.31 which were disapproved because they did not comply with the “clarity” standard contained in Government Code section 11349.1 and for incorrect procedure.

**A. CLARITY**

Government Code section 11349.1, subdivision (a)(3) requires that OAL review all regulations for compliance with the “clarity” standard. Government Code section 11349, subdivision (c) defines “clarity” to mean “...written or displayed so that the meaning of regulations will be understood by those persons directly affected by them.”

Section 16 of Title 1 of the California Code of Regulations (“CCR”) declares in relevant part as follows:

“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 exist:

(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 . . .

(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."

1. Proposed subsection 33-120.3 requires that:

"Each adult protective services agency shall submit the required statistical reports in accordance with instruction and time frames, and on the forms provided by the Department."

The phrase "in accordance with instructions and time frames, and on the forms provided by the Department" raises several clarity issues. Where are the instructions and required time frames? Are they in the unspecified forms or in some other document? How many forms are there and what are the forms' requirements?

OAL's principle function is to review proposed administrative regulations. Material set forth in a form may, or may not, have regulatory effect. When a regulation requires the use of a form, OAL must be able to read the form to see whether the form contains any regulations which are subject to its review. Even when a required form has no regulatory effect, OAL insists on specific identification of the form in order to preserve the authenticity of its approval of regulations which require its use. OAL is responsible for the review of regulations adopted by state agencies and their official compilation and publication. It is unwilling to approve and publish regulations which require the use of an unidentified form because there is no effective method available to prevent informal amendment of the regulation in the future, accomplished simply by the revision of the required form or agency approval of a substitute form that does not comply with the

procedures set forth in the Administrative Procedure Act (“APA”). Specific identification of a form including the name of the form and its date in the regulation reviewed by OAL assures their clear identification and confirms their approval by OAL. If the form contains any requirements not already specified in law either in the agency’s regulations or in applicable statutes, this would violate Government Code section 11340.5’s prohibition of agencies using “underground regulations.” Using a form which results in a regulatory effect does not insulate the resulting “regulations” from the requirements of the APA, nor does embedding rules or interpretations within a form insulate those rules from otherwise applicable APA requirements. Since the Department did not include any forms in the record, OAL cannot determine whether the forms contain “underground regulations”—that is, standards of general application which should have been but were not promulgated pursuant to the APA. And because the regulation does not identify any forms, it is impossible to determine whether the regulation is consistent with applicable law.

If the proposed regulations were to specify clearly all the requirements which the form requests, then the form would in fact be an “administrative” document “prepared pursuant to the regulations”—that is, one which does not contain “underground regulations.”

If the form both repeats requirements found in regulation and adds other requirements, it must be adopted as regulation, unless exempted by statute. The Department may choose to have the form printed as part of its regulations. Or, a practical alternative might be to incorporate the form by reference, using the procedure contained in section 20, Title 1, of the CCR.

2. Subsection 33-805.3 which was approved by OAL on September 19, 2001, effective October 19, 2001 states that:

“The case record may also contain any other information or documents that the adult protective services agency believes are necessary to maintain a proper record of the client’s case.”

Proposed Handbook subsection 33-805.31 declares that:

“Example: Other information or documents may include the SOC 343 (Investigation of Suspected Dependent Adult/Elder Abuse) or county equivalent form.”

Because this form was not in the rulemaking record there is no way for OAL to verify the date of the form, to determine if that form’s title is correct and to review the form’s content for compliance with the APA’s requirements. The forms issue discussed above in A1 also applies to proposed Handbook subsection 33-805.31. The following discussion highlights the importance of having the form in the rulemaking record.

Welfare and Institutions Code section 15658, subsection (a)(1) requires that “The written abuse reports required for the reporting of abuse. . . shall be submitted on forms adopted by the

[Department] . . .” It is not clear if the “Investigation of Suspected Dependent Adult/Elder Abuse” form is the written abuse report or if it pertains to a different aspect of the Adult Protective Services Program. If it is the written abuse report required by Welfare and Institutions Code section 15658 then only that report form can be used and proposed subsection 33-805.31 can not permit the option of using a county equivalent form. Additionally, Welfare and Institutions Code section 15658, subsection (a)(1) mandates the Department to consult with named agencies and other entities and subsection (a)(2) requires specified information on the form. Clarification is needed from the Department on this issue.

The phrase “county equivalent form” is also unclear. Is it the Department or the county that decides that the county form is equivalent? What is meant by equivalent?

## **B. INCORRECT PROCEDURE**

OAL must review rulemaking records submitted to it in order to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1, subd. (a).)

1. Section 20 of Title 1 of the CCR defines incorporation by reference as “. . . the method whereby a regulation printed in the CCR makes provisions of another document part of that regulation by reference to the other document.”

Subsection (e) of section 20 declares that

“(e) Where a regulation which incorporates a document by reference is approved by OAL and filed with the Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all provisions of the APA.”

Historically the Department has incorporated its forms by reference when they contain new regulatory material. Proposed Handbook subsection 33-805.31’s reference to the SOC 343 form (see Issue A2) appears to be an incorporation by reference. Clarification is needed from the Department. If the reference to the SOC 343 is an incorporation by reference then it does not meet the following procedural requirements of section 20. The text does not identify the form by date of publication or issuance. The file does not contain a copy of the form. The form was not identified in the Informative Digest of the Notice of Proposed Action. Please note that a fifteen-day availability of revised text and of the form must comply with the requirements of section 44 of Title 1 of the CCR and Government Code section 11347.1.

The final statement of reasons did not meet the following conditions of section 20:

“(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the

document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.”

Depending on how the Department redrafts this subsection it may be more appropriately placed in the regulation portion of the Manual of Policies and Procedures rather than in the Handbook portion.

### **CONCLUSION**

For the reasons set forth above, OAL has disapproved the adoption of subsections 33-120.3 and 33-805.31 of the Manual of Policies and Procedures. If you have any questions, please contact me at (916) 323-6809.

September 26, 2001

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