

**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:)
Title 22 and Manual of Policies)
and Procedures (MPP)) **OAL File No. 01-1231-01 S**
)
ADOPT : 102416.1)
AMEND: 80001, 80019, 80019.1,)
80066, 87001, 87019, 87019.1, 87101,)
87219, 87219.1, 87566, 87801, 87819,)
87819.1, 87866, 101152, 101170,)
101170.1, 101217, 102352, 102370,)
102370.1)
_____)

DECISION SUMMARY

The regulatory action deals with criminal record clearances, criminal record exemptions, personnel records and applicable definitions that apply to all community care facilities and to all child care centers. (California Department of Social Services File ORD#1200-26.) On February 14, 2002, the Office of Administrative Law (“OAL”) notified the Department of Social Services (“Department”) that the regulatory action was disapproved for failure to comply with the “clarity” and “necessity” standard(s) contained in Government Code section 11349.1.

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

(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 . . .

(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.”

Please Note: All references to “section(s)” refer to Title 22 of the CCR and the Manual of Policies and Procedures (“MPP”) unless identified otherwise. All references to page numbers are to the regulatory text.

1. There are two forms that are incorporated by reference: “Criminal Record Exemption Transfer Request” Form LIC 9188 (Rev. 8/00) and “Criminal Record Statement” Form LIC 508 (Rev. 7/00). Section 20, subsection (e) of Title 1 of the CCR mandates that:

“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.”

A. Form LIC 9188 provides in relevant part that: “The Department may consider transferring an individual’s active criminal record exemption from one state-licensed facility to another state licensed facility. The facility must submit the transfer request before the individual has client contact.”

It is not clear if the facility submits the transfer request to the Department or to the other state-licensed facility. This language is also internally inconsistent with subsection (f) of section 80019 which specifies that “an individual,” not the facility, may request the transfer of his or her criminal record clearance by providing “A signed Criminal Record Exemption Transfer Request (LIC 9188 (Rev. 8/00) to the Department.” It is not clear if only an individual or only the facility or both an individual and the facility may submit the transfer request and documentation.

Form LIC 9188 also requires in relevant part that “the facility licensee, administrator, or director who is seeking the exemption transfer must verify the individual’s identity and include a copy of the person’s California driver’s license or a valid photo identification issued by another state or the United States government if the person is not a California resident; a duty statement or job description; and a Criminal Record Statement (LIC 508).”

This language is internally inconsistent with subsection (f)(2) of section 80019 which requires

“A copy of the individual’s;
(A) Driver’s license,
(B) Valid identification card issued by the Department of Motor Vehicles, or
(C) Valid photo identification issued by another state or the United States government if the individual is not a California resident.”

The LIC 9188 allows either a copy of a California driver’s license or valid photo identification from another state or the U.S. government only if the person is not a California resident. But subsection (f)(2) of section 80019 does not limit the driver’s license to being only from California. Form LIC 9188 appears to prohibit the use of a California identification card because it restricts the identification card to non-California residents while subsection (f)(2)(B) of section 80019 permits the use of a California identification card. Also Form 9188 has a space for “LIS ID#” but that acronym is not spelled out or defined anywhere.

The clarity issues described above also apply to the following sections: 80019, subsection (p) on pages 16-17; 87019, subsection (f) on pages 24-25; 87019.1, subsection (p) on pages 35-36; 87219, subsection (c) on pages 43-44; 87219.1, subsection (p) on pages 54-55; 87819, subsection (a) on page 61; 87819.1, subsection (p) on page 77; 101170.1, subsection (p) on pages 95-96; 102370, subsection (g) on page 103 and 102370.1, subsection (o) on page 114 .

B. In four regulatory provisions (section 80019, subsection (f) on page 53; section 87019, subsection (f) on page 24; section 87219, subsection (c) on page 43 and section 103270, subsection (g) on page 103) the following identical language appears: “An individual may

request a transfer of their criminal record clearance . . . by providing the following documents:
(1) A signed Criminal Record Exemption Transfer Request LIC 9188 (Rev. 8/00)”
(Emphasis added.) Clarification is requested from the Department. Is Form LIC 9188 the correct form? Its caption of “criminal record exemption” appears to be internally inconsistent with the text’s description of transferring a “criminal record clearance.”

C. Form LIC 9188 requires the inclusion of “. . . a Criminal Record Statement (LIC 508). The LIC 508 must contain an explanation(s) of all convictions.”

A “conviction” is defined in section 80001, subsection (c)(18) on page 1 as:

“A criminal conviction in California; or
Any criminal conviction of another state, federal, military or other jurisdiction, which if committed or attempted in California, would have been punishable as a crime in California.”

The same definition is also contained in the following sections: 87001, subsection (c)(12) on page 21; 87101, subsection (c)(15) on page 58; 87801, subsection (c)(10) on page 59; 101152, subsection (c)(12) on page 82 and 102352, subsection (c)(6) on page 100.

Form LIC 508 declares in relevant part that “State law requires that persons associated with licensed facilities be fingerprinted and disclose any U.S. conviction.” (Emphasis added.) This form has boxes to check for “Have you ever been convicted of a crime in California? Yes or No. Have you ever been convicted of a crime from another state or federal court? Yes or No.” Form LIC 508 also has a portion that is to be filled out in detail. The instructions require specified information “If you have been convicted of a crime in California, another state, or in federal court.”

Form LIC 508’s limitation of disclosing only U.S. convictions is internally inconsistent with the regulatory definition of “conviction” which also includes “military or other jurisdictions, which if committed or attempted in California, would have been punishable as a crime in California.” Under the regulatory definition a person who had a conviction, for example, of rape that occurred outside the United States would have to disclose that, but Form LIC508 would not require disclosure of that conviction.

2. Section 80066 on page 19 deals with personnel record requirements for specified persons. Subsection (b) applies only to volunteers. It states in relevant part that “(b) Personnel records shall be maintained for all volunteers and shall contain the following: (1) . . . (2) Tuberculosis test documents as specified in Section 80065(g)(3).”

There is no “tuberculosis test document” mentioned in existing subsection (g)(3) of section 80065. All that is required is that a tuberculosis test be performed but subsection (g)(3) does not specify any tuberculosis test documentation.

3. Section 80019.1, subsection (w) on page 18 declares that:

“If the Department learns that an individual with a criminal record clearance or exemption has been convicted of a subsequent crime, the Department, at its sole discretion, may immediately initiate the appropriate administrative action to protect the health and safety of clients, without permitting the individual to apply for another or new criminal record exemption. The administrative action process shall constitute the exemption process.” (Emphasis added.)

It is not clear how the administrative action process can “constitute the exemption process” when the individual is not permitted to apply for a criminal record exemption. The regulation needs to state if the individual is not permitted to ever apply again for a criminal record exemption or if the prohibition is only for a specified time period.

4. Section 80001, subsection (s)(2) on page 2 defines a “simplified exemption” as one that is granted on the Department’s own motion “. . . if the individual’s criminal history meets specific criteria established by Department policy or regulation.” (Emphasis added.) Identical language is contained in sections: 87001, subsection (s)(2) on page 22; 87101, subsection (s)(3) on page 39; 87801, subsection (s)(4) on page 60; 101152, subsection (s)(4) on page 93; and 102352, subsection (s)(1) on page 101.

Section 80019.1, subsection (s) on page 17 provides that the Department may rescind an exemption under specified circumstances, including “. . . or that the exemption does not meet current exemption law, regulations or policy.” (Emphasis added.) Identical language is contained in sections: 87019.1, subsection (s) on page 36; 87219.1, subsection (s) on page 55; 87819.1, subsection (s) on page 78; 101170.1, subsection (s) on page 96; and 102370.1, subsection (r) on page 115.

Section 80019.1 subsection (q) on page 17 identifies as factors in deciding whether or not a transfer of an exemption will be approved as

- “. . . (5) whether the exemption was appropriately evaluated and granted in accordance with existing exemption laws, regulations or policy; or
- (6) Whether the exemption meets current exemption laws, regulations or policy.” (Emphasis added.)

Identical language is contained in sections: 87019.1, subsection (q) on page 36; 87219.1, subsection (q) on page 55; 87819.1, subsection (q) on page 78; 101170.1, subsection (q) on page 96 and 102370.1, subsection (p) on page 114.

What is meant by the phrase Department “policy”? If it refers to a standard of general application adopted by the Department to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure then it is a “regulation” as defined in Government Code section 11342.600 and is subject to the requirements of the Administrative Procedure Act (“APA”) unless there is an express statutory APA exemption.

If the “policy” or “policies” are regulations adopted pursuant to the APA then the phrase “policy” or “policies” is redundant because “regulations” are already specified in the language in issue. If the “policy” or “policies” are incorporated by reference into a regulation pursuant to

section 20 of Title 1 of the CCR they became part of the regulation and the phrase “policy” or “policies” is redundant because “regulations” are already specified in the language in issue.

Alternatively, if the “policy” or “policies” are regulations that have not been adopted pursuant to the APA and no APA exemptions apply, then the “policy” or “policies” violate Government Code section 11340.5, subdivision (a) which declares that:

“(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.”

Because the phrases “policy” and “policies” are vague, OAL cannot at this time determine what is meant by those phrases and must reserve the right to conduct a full APA review when the rulemaking is resubmitted. Clarification is needed from the Department.

5. Section 80019, subsection (f) requires an individual requesting a transfer of his or her criminal record clearance to provide specified documents, including

“. . . (2) A copy of the individual’s;

(A) Driver’s license,

(B) Valid identification card issued by the Department of Motor Vehicles, or

(C) Valid photo identification issued by another state or the United States’ government if the individual is not a California resident.” (Emphasis added.)

Existing section 80019, subsection (f)(2) has “or” between subsections (A) and (B), and (B) and (C) so it is clear that only one of the three items must be provided. The proposed amendment shows the deletion of “or” between subsections (f)(2)(A) and (B). If the Department’s intent is that only one of the three specified items is required then “or” should remain between (A), (B) and (C).

The regulation needs to specify if the driver’s license must be from California or if a driver’s license from any state is acceptable. Subsection (f)(2)(B) needs to specify that the valid identification card must be issued by the California Department of Motor Vehicles in order for that subsection to be internally consistent with the language contained in subsection (f)(2)(C).

The clarity issues described above also apply to the following sections: 80019, subsection (p) on pages 16-17; 87019, subsection (f) on pages 24-25; 87019.1, subsection (p) on pages 35-36; 87219, subsection (c) on pages 43-44; 87219.1, subsection (p) on pages 54-55; 87819, subsection (a) on page 61; 87819.1, subsection (p) on page 77; 101170.1 subsection (p) on pages 95-96; 102370, subsection (g) on page 103 and 102370.1, subsection (e) on page 114.

B. NECESSITY

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349, subdivision (a) defines “necessity” to mean that

“... 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.”

Section 10 of Title 1 of the CCR provides that in order to meet the “necessity standard” the rulemaking record must 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 knowledge by reason of study or experience which is relevant to the regulation in question.”

1. There is no “necessity” in the rulemaking record for the proposed regulatory provisions of the “Criminal Record Exemption Transfer Request” Form LIC 9188 (Rev. 8/00) and the “Criminal Record Statement” Form LIC 508 (Rev. 7/00).

CONCLUSION

For the reasons set forth above, OAL has disapproved the adoption of section 102416.1 and the amendment of sections 80001, 80019, 80019.1, 80066, 87001, 87019, 87019.1, 87101, 87219, 87219.1, 87566, 87801, 87819, 87819.1, 87866, 101152, 101170, 101170.1, 101217, 102352, 102370 and 102370.1 of Title 22 of the California Code of Regulations and the Manual of Policies and Procedures. If you have any questions, please contact me at (916) 323-6809.

February 21, 2002

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