

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
)
) **DECISION OF DISAPPROVAL**
DEPARTMENT OF) **OF REGULATORY ACTION**
CORRECTIONS)
) (Gov. Code, sec. 11349.3)
REGULATORY ACTION:)
) **OAL File No. 02-0215-04 S**
Title 15, California Code of)
Regulations)
)
ADOPT SECTION(S): 3426)
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SUMMARY OF REGULATORY ACTION

This regulatory action adopts the Early Intervention Program (EIP) which is designed to provide departmental employees who have sustained an industrial injury/illness with information regarding the assessment and processing of qualified claims and the available choices regarding benefit options and compensability. On April 2, 2002, the Office of Administrative Law (“OAL”) disapproved this regulatory action because the regulation was unclear in some areas.

DISCUSSION

Regulations adopted by the Department of Corrections (“Department”) concerning employee early intervention must be adopted pursuant to the Administrative Procedure Act (“APA”). Any regulatory act adopted by a state agency through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless the act is expressly exempted or excluded by statute from APA coverage. (Gov. Code, sec. 11346(a).) No exemptions or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action may become effective, it is subject to a review by the OAL for compliance with procedural requirements of the APA and for compliance with certain substantive standards. (Gov. Code section 11349.1(a).) This disapproval decision concerns compliance with these procedural requirements and substantive standards contained in the APA and should not be construed as a determination of compliance with the procedural requirements of the Ralph C. Dills Act.

SOME AREAS OF THE REGULATION ARE UNCLEAR.

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning or regulations will be easily understood by those persons directly affected by them.”

1. Subsection (b) of section 3426 as adopted by the Department in this rulemaking provides:

“All employees who have sustained the following qualified injury/illness shall be eligible for Early Intervention Counseling (EIC) ...”

Subsection (d)(4) of section 3426 as adopted by the Department in this rulemaking provides:

“Early Intervention Counselor (EIC) means an independent, non-departmental employee...”

The use of “EIC” to describe both the counseling services provided and the counselor himself or herself creates a potential clarity problem whenever the acronym is used in the regulation.

2. Subsection (d)(2) of section 3426 as adopted by the Department in this rulemaking provides:

“Early Intervention Selection Committee (EISC) means a committee comprised of the Director’s representatives in a number equal to the number of Employee Representative Associations who bargain with the Department on behalf of employee bargaining units, and one representative from each of those Associations.”

A commenter objected to this provision in that it establishes one central EISC which represents a change from the current early intervention program which established Local Selection Committees at each institution. In response to this comment, the Department states that the EISC is not just one committee that goes from institution to institution holding EISC meetings. (FSOR, p. 48) This needs to be made clear in the regulation.

3. Subsection (f) of section 3425 as adopted by the Department in this rulemaking provides:

“The [Early Intervention Selection Committee] shall:

(1) Review resumes of qualifications and authorize individuals to provide EIC services within the scope of the EIP.

(2) Order corrective action or revoke the authorization of an EIC to provide services after the EIC is given a written statement of the charges, if the following have occurred:

(A) Upon investigation of a serious complaint filed by an employee, the complaint is found to have merit by the EISC;

(B) The EIC fails to respond to a corrective action order; or

(C) The EISC determines inadequate EIC performance due to neglect of duty, misconduct, or illegal or unprofessional conduct.

(3) Give the EIC an opportunity to present a defense prior to revoking the EIC's authority to provide EIP services. The EISC's decisions shall be based on a simple majority of the members in attendance. The decision of the EISC is final and not appealable."

Subsection (f)(1) is unclear as to what "qualifications" are required of an early intervention counselor. If there are any standards imposed, they must be specified in the regulation.

Subsection (f)(2) provides that the EISC may order "corrective action" or may revoke the authorization of the early intervention counselor after the individual is given a written statement of charges. If there are any standard procedures or time frames involved in this process, they must be specified in the regulation. In addition, the actions that constitute "corrective action" must be made clear. This is particularly important since, unlike revocation of EIC authorization, subsection (f)(3) does not provide the early intervention counselor with an opportunity to present a defense prior to corrective action being ordered by the EISC. This may be unintentional.

Subsection (f)(2)(A) would authorize such corrective action or revocation of authorization if a "serious complaint" is found to have merit. Given the potential consequences involved, the types of complaints considered "serious" must be clarified in the regulation. Similarly, subsection (f)(2)(B) would authorize corrective action or revocation of authorization if the early intervention counselor fails to "respond" to a corrective action order. What if the EIC were to "respond" to a corrective order, but not in the hoped for manner? Again, given the potential of a revocation of authorization, the EIC action described in subsection (f)(2)(B) needs to be clarified.

4. Subsection (g) of section 3426 as adopted by the Department in this rulemaking provides in part:

"The EIC shall:

(1) Submit a resume of qualifications to the RTWC.

(2) Respond to injured/ill employees when referred by the local RTWC; ...

(7) Submit itemized billing to the RTWC for visits in accordance with the Vocational Rehabilitation Fee Schedule, as referenced in the California Code of Regulations (CCR), Title 8, section 10132 and 10132.1. . . .”

As also discussed with respect (f)(1), a person directly affected by subsection (g)(1) would not understand what “qualifications” if any, are required of an early intervention counselor.

Subsection (g)(2), does not provide any time frame within which an early intervention counselor is expected to respond to the local RTWC referral. This seems unintentional due to the nature of the service provided. It should be noted that the contact itself must be reported within 3 working days of the contact with the employee.

The requirement in subsection (g)(7) that the itemized billing be submitted in accordance with the Vocational Rehabilitation Fee Schedule needs further clarification as much of the schedule and sections 10132 and 10132.1 may not be applicable. In addition, if there are any other procedures or standards involved in submitting billings pursuant to subsections (g)(7) or (g)(8), these must be clarified in the regulation.

5. Subsection (j)(2) of section 3426 as adopted by the Department in this rulemaking provides that the Return-To-Work Coordinator shall coordinate the “local” EISC meetings. As discussed with respect to subsection (d)(2), this may need to be clarified.

6. Subsection (k)(2) of section 3426 as adopted by the Department in this rulemaking provides that the adjusting agency shall refer the injured/ill employee to a “Physician and Surgeon.” The term “Physician and Surgeon” needs to be clarified.

7. Subsection (d)(3) of section 3426 as adopted by the Department in this rulemaking provides that an Agreed Medical Panel Doctor means a “. . .Physician and Surgeon as defined Labor Code section 3209.3. . .” However, Labor Code section 3209.3 contains only a definition of “Physician.” Subsection (a) of Labor Code section 3209.3 provides:

“‘Physician’ includes physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice and defined by California state law.”

For this reason, subsection (d)(3) of section 3426 is unclear as to whether and Agreed Medical Panel Doctor includes only “physicians and surgeons holding an M.D. or D.O. degree” or all of the medical professionals contained within the definition of “Physician” in Labor Code section 3209.3(a).

7. Please also note that subsection (e)(3) of sections 3426 is missing one or more words.

We also note that subsection (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are

adopted. In this regard subsection (c) of section 3426 as made available to the public pursuant to section 11346.4 and 11346.5 of the Government Code provided:

“All employees with a claimed injury/illness who have an actual or anticipated long-term disability of thirty (30) days or more, who have an undeterminable or disputed injury shall be eligible for EIC.”

Subsection (b)(3) of section 3426 as adopted by the Department provides:

“All employees with a claimed injury/illness who have an actual or anticipated long-term disability of thirty (30) days or more, or who have an undeterminable or disputed injury shall be eligible for EIC.”

The insertion of the word “or” in subsection (c) conforms this provision to the language in paragraph IV.B. of the existing 16 page EIC document entitled “Workers’ Compensation Early Intervention Program.” Although two commenters objected to the dropping of the word “or” as unnecessarily restricting services to those with long term disabilities who have undeterminable or disputed injuries, it may be that everyone else read this section as if the “or” was there. Although under the circumstances it may be that no one would object to inserting the “or” into subsection (b)(3), and there may have been a misunderstanding between Department staff and the OAL reference attorney in this regard, technically inserting the “or” into the text enlarges the number of employees eligible for early intervention counseling from the text that was made available for comment. For this reason, this change should be included in the text when the other changes made to accommodate the concerns raised in this disapproval are made available to the public for comment pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

Section 44 of Title 1 of the California Code of Regulations specifies how sufficiently related changes are to be made available.

“(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement of confirming that the agency complied with the requirements of this section and stating the date upon which the notice

and text were mailed and the beginning and ending dated for this public availability period.”

DATE: 04/08/02

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