

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
)
)
) **DECISION OF DISAPPROVAL**
DEPARTMENT OF SOCIAL) OF REGULATORY ACTION
SERVICES) (Gov. Code, section 11349.3)
)
REGULATORY ACTION:)
Title 22, California Code of)
Regulations, Manual of Policies) **OAL File No. 03-1201-02S**
and Procedures (MPP))
)
Adopt sections 87725, 87725.1, and)
87725.2; Amend sections 87101,)
87111, 87222, 87565, 87566, 87569,)
87570, 87582, 87591, 87593, and)
87724)
_____)

DECISION SUMMARY

In this regulatory action, the Department of Social Services (“DSS”) adopts and amends regulations pertaining to Residential Care Facilities for the Elderly (“RCFEs”). The regulations principally relate to the care of persons with dementia in RCFEs, including the implementation of dementia care-related provisions contained in Statutes of 2000, Chapter 434 (AB 1753).

On January 14, 2004, the Office of Administrative Law (“OAL”) notified DSS of the disapproval of the above-referenced regulatory action. OAL disapproved the regulations because of a failure to follow required procedures and because of a failure to comply with the “Clarity” standard of Government Code section 11349.1.

DISCUSSION

Regulations adopted by DSS must generally be adopted pursuant to the provisions of the Administrative Procedure Act (the “APA;” Gov. Code section 11340 et seq.). (See Health and Safety Code section 1569.30 pertaining to RCFE regulations in particular.) 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 act from compliance with the APA. (See Gov. Code section 11346.) No exemption

or exclusion applied to the regulatory action here under review. Consequently, before these regulations could become effective, the regulations and the rulemaking record were reviewed by OAL for compliance with the procedural requirements and the substantive standards of the APA, in accordance with Government Code section 11349.1.

INCORRECT PROCEDURE

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. In the case of the regulatory action here under review, the rulemaking record does not contain documentation that two applicable APA procedural requirements were satisfied, as discussed below.

1. Compliance with Government Code Section 11346.8, Subdivision (d), and Government Code Section 11347.1

Government Code section 11346.8, subdivision (d), provides, in part, the following: “No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless the agency complies with [Government Code] Section 11347.1”

Government Code section 11347.1, subdivision (a), provides the following: “An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.” Government Code section 11347.1, subdivisions (b), (c), and (d), then set forth the specific required procedures for notifying the interested public of the addition of identified documents to the rulemaking record, for making the documents available for public inspection and comment for at least 15 calendar days, and for the state agency summarizing and responding to any public comments received pertaining to the added documents. Government Code section 11347.1, subdivision (e), provides that the rulemaking record shall contain a statement confirming that the agency complied with the requirements of section 11347.1.

In the case of the rulemaking here under review, DSS properly identified a list of documents relied upon in its Initial Statement of Reasons (in accordance with Government Code section 11346.2, subdivision (b)(2)). However, apparently in response to public comments received during the 45-day public comment period, DSS modified an originally-proposed definition of the term “Mild Cognitive Impairment” in regulation section 87101 and added three new documents to the rulemaking record to support the revised “Mild Cognitive Impairment” definition. The three added documents which were relied upon can be described as follows: (1) a document from the Alzheimer Society entitled “Mild Cognitive Impairment, Progression to Alzheimer Disease Study -- Province of Quebec;” (2) a document from the Alzheimer’s Disease Center entitled “ADC Involved in National Study of Mild Cognitive Impairment;” and (3) a document by Dr. Steven Ferris entitled “Mild Cognitive Impairment: An Early Stage of Alzheimer’s Disease.”

The three added documents were clearly relied upon in this rulemaking. The revised wording of “Mild Cognitive Impairment” in regulation section 87101 reflects language from each of these three documents. Pertinent excerpts of the three added documents are included in Exhibit G of the rulemaking file and listed as “Data, Studies, Reports Relied Upon by Department.” In addition, the Final Statement of Reasons (in Exhibit A of the rulemaking file) references these three added documents in its section entitled “Identification of Documents Upon Which Department is Relying.”

In this rulemaking, DSS did issue a “Notification of 15-Day Public Availability of Changes to Regulations and Supporting Documents and Information” dated October 16, 2003. By this notice, DSS properly made available to the public modifications to the regulation text in the manner required by Government Code section 11346.8, subdivision (c), and by California Code of Regulations (“CCR”), title 1, section 44. However, this notice did not specifically identify and make available for public review and comment the three added documents relied upon in the manner required by Government Code section 11347.1. The rulemaking file contains no other “15-day notices” of public availability.

It should be noted that the definition of the term “Mild Cognitive Impairment” is significant in this rulemaking because of the way this term is used in regulation section 87724, subdivision (a), in the determination of whether the requirements of section 87724 relating to “Care of Persons with Dementia” apply to a licensee. Therefore, it is important that the documents relied upon in connection the “Mild Cognitive Impairment” definition be made available to the public.

The three documents relied upon in defining the term “Mild Cognitive Impairment” need to be made available for public comment as required by Government Code section 11346.8, subdivision (d), and Government Code section 11347.1.

2. Compliance with Government Code Section 11359

Government Code section 11359, subdivision (a), states the following: “Except as provided in subdivision (b), on or after January 1, 1982, no new regulation, or the amendment or repeal of any regulation, which regulation is intended to promote fire and panic safety or provide fire protection and prevention, including fire suppression systems, equipment, or alarm regulation, is valid or effective unless it is submitted by, or approved in writing by, the State Fire Marshall before transmittal to the Secretary of State or the Office of Administrative Law.” (The exception provided in subdivision (b) of Government Code section 11359 is not applicable here.)

In its proposed amendments of regulation sections 87593 and 87724, DSS amends regulatory provisions which are intended to promote fire and panic safety. For example, in regulation section 87593, subdivision (e)(1), the following language is proposed for deletion: “Prior to acceptance, the licensee must have a dementia waiver, pursuant to Section 87116, to accept and retain residents with dementia who are considered nonambulatory because they are unable to mentally respond to a sensory signal approved by the State Fire Marshall or an oral instruction relating to fire danger.” Similarly, provisions of regulation section 87724 relating to the

“dementia waiver,” nonambulatory fire clearances, nonambulatory persons, fire and earthquake drills, and similar matters are proposed for amendment.

These proposed amendments of RCFE regulations which are intended to promote fire and panic safety require State Fire Marshall approval, as provided by Government Code section 11359. The rulemaking file here under review does not contain evidence that the required procedure of obtaining written State Fire Marshall approval was satisfied.

CLARITY

OAL must review regulations for compliance with the substantive standards of the APA, including the “Clarity” standard, 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 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 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
- (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 connection with the regulations here under review, OAL determined that two regulatory provisions did not satisfy the “Clarity” standard, as discussed below.

1. Regulation Section 87724, Subdivision (g)

Proposed regulation section 87724, subdivision (g), provides in part: “Residents should be allowed to keep personal grooming and hygiene items in their own possession, unless there is evidence to substantiate that the resident cannot safely manage the items.” [Emphasis added.]

The use of the word “should” in this context (instead of a word such as “shall”) makes the provision ambiguous and therefore the meaning is unclear. Is a requirement (and right) being established or not? Licensees (“directly affected” persons because they are legally required to comply with the regulation) cannot determine with certainty whether or not they are required to allow residents to keep personal grooming and hygiene items in their possession. Similarly, residents and their responsible persons (“directly affected” persons because they derive from the enforcement of the regulation a benefit that is not common to the public in general) cannot determine with certainty the rights of residents with respect to keeping their personal grooming and hygiene items.

The Final Statement of Reasons in this rulemaking includes the following statements regarding regulation section 87724, subdivision (g): (1) “The specific purpose of adopting this section is to allow residents to keep personal hygiene and grooming items in their possession unless it presents a health and safety risk.” (2) “The Department is adding this section to ensure dignity is provided to residents by allowing them to continue to have access to products used for grooming and hygiene.” (3) “The Department wants residents to be able to keep personal grooming and hygiene items in their own possession unless there is evidence to substantiate that the resident cannot safely manage the items.” These statements in the Final Statement of Reasons would tend to indicate that the intent was to establish a requirement (and right) relating to allowing residents to keep personal grooming and hygiene items in their own possession, unless there is evidence that the residents cannot safely manage the items; however, the use of the word “should” in the regulation text makes the regulatory provision ambiguous and therefore the meaning unclear. Consequently, the “Clarity” standard has not been satisfied.

In connection with this issue, please note that another RCFE regulation, section 87572 “Personal Rights,” provides in subdivision (a)(11) that each resident shall have the personal right “... to keep and use his/her own personal possessions, including his/her toilet articles ...”

2. Regulation Section 87725, Subdivision (b)

Proposed regulation section 87725, subdivision (b), states, in part, the following:

“Licensees who will discontinue advertising, promoting, or otherwise holding themselves out as providing special care, programming, and/or environments for residents with dementia or related disorders shall:

“(1) Provide written notification to the licensing agency and to the resident and the responsible person, if any, or the conservator, at least 30 calendar days prior to discontinuing advertising or promoting dementia special care, programming, and/or environments

“(2) Within 30 calendar days from notifying the licensing agency, the resident and the responsible person, if any, or the conservator, the licensee shall cease all advertisements pertaining to dementia special care and remove all written references that indicate that the licensee provides dementia special care, programming, and/or environments”

[Emphasis added.]

Upon reviewing the language of section 87725, subdivision (b), it is difficult to understand how subdivisions (b)(1) and (b)(2) are to be applied together in practice. Subdivision (b)(1) essentially provides that a licensee shall give “at least 30 calendar days” notice prior to discontinuing the advertising or promotion of dementia special care, programming, and/or environments. This would appear to mean that 30 days is the minimum number of days of prior notice before advertising and related activities must cease (and therefore the number of days of prior notice could also be a number such as 35, or 40, or 45, or any other number greater than 30). Subdivision (b)(2) essentially provides that “within 30 calendar days” of giving notice, a licensee shall cease all advertisements and remove all written references that indicate that the licensee provides dementia special care, programming, and/or environments. This would appear to mean that 30 days is the maximum number of days of prior notice before advertising and related activities must cease (and therefore the number of days of prior notice could also be a number such as 25, or 20, or 15, or any other number less than 30).

Given this wording of section 87725, subdivision (b), persons in the directly affected public (such as the licensees required to comply with the provision) might not easily understand exactly what is acceptable and required in terms of providing adequate notice and assuring timely cessation of advertising and promotional activities under the provision. Since the regulation is not written in a manner so that the meaning is easily understood, the “Clarity” standard has not been satisfied.

ADDITIONAL CONCERNS

OAL notes the following additional concerns with the regulations and rulemaking file:

- (1) With respect to the regulation sections being amended in this rulemaking, the final regulation text submitted to OAL for review contains a number of minor discrepancies in showing the text of existing regulations as currently printed in the CCR and in showing the amendments being made in underline and strikeout format.
- (2) On the Form 400, the “Notice Publication/Regulations Submission” form: (1) In Part B.2. of the form, the second regulation section listed under “Adopt” should be “87725.1”; and (2) In Part B.6. of the form, “Other” should be checked followed by “State Fire Marshall” (since the approval of the State Fire Marshall is required for these regulations).

- (3) For regulation section 87222, the reference citations would appropriately include section 1569.627 of the Health and Safety Code.
- (4) For regulation section 87724, OAL requests that upon resubmission the final regulation text be reformatted to show the amendments being made in a simple underline and strikeout format (for the benefit of the publisher of the CCR).
- (5) For regulation section 87724, subdivision (a), DSS may wish to revise the wording of this subdivision considering the possibility that a licensee could potentially both accept and retain residents with a diagnosis of dementia and accept and retain residents with a diagnosis of mild cognitive impairment.
- (6) In regulation section 87582, you renumber a provision pertaining to bedridden residents from (c)(5) to (c)(4). Another regulation, section 87451(a)(5), contains a cross-reference to section 87582(c)(5), which cross-reference will now require revision to 87582(c)(4).
- (7) Regulation section 87725.1 contains a reference to the date "February 1, 2004." Regulation section 87725.2 contains references to the dates "February 1, 2004" and "June 1, 2004." These dates will probably require revision when DSS resubmits these regulations.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-4237.

Date: January 20, 2004

BRADLEY J. NORRIS
Counsel

DEBRA M. CORNEZ
Senior Counsel

Original: Tameron Mitchell, Chief Deputy Director
cc: Anthony J. Velasquez, Chief, ORD