STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY: STATE SUPERINTENDENT OF PUBLIC INSTRUCTION	**)**	**DECISION OF DISAPPROVAL OF CERTIFICATION OF COMPLIANCE AND ORDER OF DELETION OR REPRINTING**
REGULATORY ACTION:	**)**	
Title 5	**)**	
California Code of Regulations	**)**	**(Government Code §§ 11346.1(f),**
Adopt section 18092.5	**)**	**11346.1(g) and 11349.3(b))**
Amend sections 18066, 18069, 18078,	**)**	
18081, 18083, 18084, 18092, 18103,	**)**	**OAL File No. 05-0902-01 C**
18106, 18109 and 18110	**)**	

DECISION SUMMARY

This filing is a certification of compliance for an emergency regulatory action to implement and make specific amendments to Education Code §8263. The proposed regulations address eligibility, recertification and fee requirements for child care and development services for both at risk children and children receiving child protection services. The amended §18078(g) of Title 5 of the California Code of Regulations ("CCR") incorporates by reference a Family Fee Schedule. The Office of Administrative Law ("OAL") had reviewed and approved the emergency regulations (OAL file number 05-0426-04 E) effective May 6, 2005. Please note that in order to keep the emergency regulations in effect while the State Superintendent of Public Instruction ("agency") resolves the issues contained in this opinion, the agency re-adopted the regulations on an emergency basis with minor grammatical modifications effective October 14, 2005 (OAL file number 05-1007-01 EE). On October 14, 2005, OAL notified the agency of the disapproval of the above-referenced regulatory action. The reasons for the disapproval of the proposed regulations are summarized here and explained in detail below.

I. The rulemaking record does not contain the document which was incorporated by reference; the public was not given proper notice of the document in the Notice of Proposed Rulemaking; and the Final Statement of Reasons does not include any reference to the document being incorporated by reference.

II. The response to comments received regarding the proposed action in the Final Statement of Reasons is inadequate. This issue is especially significant since the agency's response and subsequent modifications, if any, to the proposed text may impact whether the regulations will meet the standards of Authority, Clarity, Consistency, and Necessity.

DISCUSSION

Regulations adopted by the agency must generally be adopted pursuant to the provisions of the Administrative Procedure Act ("APA") (Gov. Code, §11340 *et seq*.). (See Ed. Code, §8255 *et seq*. pertaining to child care and development 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, §11346.) No exemption or exclusion is applied to the regulatory action here under review.

OAL is mandated to review each regulation adopted and submitted to it pursuant to the APA to determine whether the regulation complies with the substantive and procedural standards of the APA and with the standards set forth in title 1, CCR, §1 *et seq*. OAL, like the courts, may not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of the action (Gov. Code, §11340.1). Thus, before the instant regulatory action may become effective, it is subject to a review by OAL for compliance with the procedural requirements and substantive standards of the APA, in accordance with Government Code §11349.1.

OAL disapproval of the regulation is based exclusively upon the failure of the regulation to conform to the requirements of the APA and should not be interpreted otherwise. OAL reserves the right to review the proposed regulations and rulemaking record, upon resubmission by the agency, for compliance with the procedural requirements and each legal standard of the APA: Authority, Reference, Clarity, Consistency, Necessity, and Nonduplication.

I. INCORPORATION BY REFERENCE

Title 1, CCR, §20 provides, in part:

> (a) "Incorporation by reference" means the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.
>
> (b) Material proposed for "incorporation by reference" shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations.…
>
> (c) An agency may "incorporate by reference" only if the following conditions are met:
>
> (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.
>
> (3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.
>
> [¶]…[¶]
>
> (d) If the document is a formal publication reasonably available from a commonly known or identified source, the agency need not provide six duplicate copies of the document under Government Code section 11343(c).

OAL adopted title 1, CCR, §20 to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Essentially, this section requires that a document incorporated by reference must be made available for public comment and must be reviewed according to the same standards and procedural compliance as any other regulation.

In addition, the rulemaking file must include specific documents and information as required by Government Code §11347.3(b), especially subdivision (b)(10), which provides:

> (b) The rulemaking file shall include:
>
> [¶]…[¶]
>
> (10) The text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption.

A document which is incorporated by reference is part of the regulation which incorporates it (Title 1, CCR, §20(a)). Title 5, CCR, §18078(g) of the proposed regulation incorporates by reference a fee schedule:

> (g) "Fee Schedule" means the "Family Fee Schedule," issued by the department dated September 1, 2000, which is incorporated by reference. The "fee schedule" is used by child development contractors to assess fees for families utilizing child care and development services.

Consequently, this fee schedule must be transmitted to OAL as part of the regulation, pursuant to Government Code §11343(a) and (c), which provide that every state agency shall:

> (a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard.
>
> [¶]…[¶]

> (c) Deliver to the office, at the time of transmittal for filing a regulation or order of repeal, six duplicate copies of the regulation or order of repeal, together with a citation of the authority pursuant to which it or any part thereof was adopted.

In addition, the fee schedule must be reviewed as part of the regulatory action, pursuant to title 1, CCR, §20(b) and Government Code §11349.1(a), which provides in part:

> (a) The office shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Code of Regulations Supplement….

Although title 1, CCR, §20(d) may excuse an agency from providing six duplicate copies of the incorporated document with its submittal to OAL, the rulemaking file submitted for the instant regulatory action did not contain a single copy of the "Family Fee Schedule" for review, nor was there a copy of the fee schedule attached to the proposed regulation text submitted for filing with the Secretary of State's office.

In order to incorporate a document by reference, the agency must meet the specific conditions listed in title 1, CCR, §20(c). The conditions described in (c)(1) and (c)(2) require the Final Statement of Reasons ("FSR") to include specific information regarding the document being incorporated by reference. However, the FSR in the rulemaking record contains no statement or description to indicate that it would be cumbersome, unduly expensive, or otherwise impractical to publish the "Family Fee Schedule" in the CCR, as required by title 1, CCR, §20(c)(1). In addition, the FSR did not demonstrate that the document was available upon request or was reasonably available from a commonly known or specified source and did not specify how a copy could be obtained, as required by title 1, CCR, §20 (c)(2).

Title 1, CCR, §20(c)(3) lists another condition required in order to incorporate a document by reference. This condition requires the agency to clearly identify the document in the notice to the public. The agency did not include any clear identification of the "Family Fee Schedule" in the Informative Digest/Policy Statement Overview section or any other section of the Notice of Proposed Rulemaking in the rulemaking record. In addition, according to the agency contact person, the "Family Fee Schedule" was not attached to the proposed text which was included in the Notice. Consequently, the public was not given proper notice of the document, as required by title 1, CCR, §20(c)(3).

II. INADEQUATE RESPONSE TO COMMENTS

The response to comments received regarding the proposed action in the Final Statement of Reasons is inadequate. Government Code §11346.8(a) requires a state agency to "consider all relevant matter presented to it before adopting, amending, or repealing any regulation." To satisfy this requirement, an agency must demonstrate in the rulemaking record that it considered the relevant input it received during the noticed opportunities to comment. In addition, Government Code §11346.9(a)(3) provides:

> (a) Prepare and submit to the office [OAL] with the adopted regulation a final statement of reasons that shall include all of the following:
>
> [¶]…[¶]
>
> (3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.…

Pursuant to this section, the FSR must contain a summary and a response for each comment made during the 45-day comment period with an explanation as to the impact of the comment on the proposed regulatory action; and Government Code §11346.8(c) requires the same procedure for comments made during the 15-day comment period. It states:

> (c) [I]f a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.

The record of this rulemaking proceeding reveals that a number of written comments were submitted during the 45-day comment period and a 15-day comment period. These comments have been properly included in the rulemaking file. In addition, the agency has adequately summarized each comment in the FSR. However, all of the comments did not receive an adequate response from the agency. Three commenters raised specific objections and suggestions regarding the agency definition of child protective services in title 5, CCR, §18078(d) and the same description of those services in title 5, CCR, §18092(a). Title 5, CCR, §18078(d) provides:

> (d) "Child protective services" means children receiving family maintenance services pursuant to Welfare and Institutions Code section 16506 or family preservation services pursuant to Welfare and Institutions Code section 16500.5 through the county welfare department, and the family requires child care and development services as part of their family maintenance or family preservation case plan.

The purpose of this definition, according to the agency contact person, is to make specific the terms "protective services," "child protective services," and "child protection services" in Education Code §8263. This section provides in part:

> (a) [I]n order to be eligible for federal and state subsidized child development services, families shall meet at least one requirement in each of the following areas:
>
> (1) A family is … (D) one whose children are ***recipients of protective services***, or whose children have been identified as being abused , neglected, or exploited, or at risk of being abused, neglected or exploited.
>
> (2) A family needs the child care service because (A) the child is identified by a legal, medical, social service agency, or emergency shelter as (i) a ***recipient of protective services***....
>
> (b) Except as provided in Article 15.5 (commencing with Section 8350), priority for state and federally subsidized child development services is as follows:
>
> (1)(A) First priority shall be given to neglected and abused children who are ***recipients of child protective services***, or children who are at risk of being neglected or abused, upon written referral from a legal, medical, or social service agency….
>
> [¶]…[¶]
>
> (C) A family may receive child care services for up to 12 months on the basis of a certification by the county child welfare agency that child care services continue to be necessary or if the child is ***receiving child protection services*** during that period of time, and the family requires child care and remains otherwise eligible. [Emphasis added.]

As mentioned above, three commenters—Lynn Patten, Executive Director of Child Action, Inc.; Eve R. Hershcopf, Senior Staff Attorney of Child Care Law Center; and Chelle Sutyak, Program Manager of Casa de Amparo—raised objections and made recommendations regarding the proposed definition of "child protective services" during the 45-day comment period. Ms. Hershcopf restated her objection and recommendation during the 15-day comment period. The comments related to this issue are best illustrated in excerpts from Ms. Hershcopf's comments:

> The definition of "child protective services" inappropriately restricts child care based on the type of child welfare services a family receives, and should be expanded to include all the child welfare services enumerated in Welfare and Institutions Code §16501.
>
> [¶]…[¶]
>
> Although Education Code §8263(a)(1)(D) defines eligibility based on "one whose children are recipients of protective services" and §8263(a)(2)(A)(i) defines need based on a child being identified as "a recipient of protective services," the protective services referenced are, in fact, the child welfare services enumerated in Welfare and Institutions Code §16501(a). That section defines "child welfare services" to mean, among other things, "services provided on behalf of children alleged to be the victims of child abuse, neglect or

> exploitation," and notes that "the child welfare services provided on behalf of each child ***represent a continuum of services***, including emergency response services, family preservation services, family maintenance services, family reunification services, and permanent placement services." [Emphasis added by commenter.]

The agency's response to all three commenters in the FSR is:

> Modifications were made to the regulations to include emergency response and family reunification. Permanent placement was not added to the documentation of child protective services since permanent removal from the abusive environment does not meet the intent of the statute regarding children receiving protective services for child development related purposes.

During the 15-day comment period, one commenter, Eve R. Hershcopf, also raised specific objections and suggestions regarding the inclusion of language by the agency in this same subsection restricting eligibility based on whether the child was in the care of a specified caregiver. Ms. Hershcopf objected to the following language in the title 5, CCR, §18078(d) definition, which was added by the agency after the 45-day comment period: "…while in the care of a biological parent, adoptive parent, step-parent, or court-appointed legal guardian…."

Ms. Hershcopf stated in part:

> Children who are receiving any type of child protective services should be eligible for a child care subsidy no matter the legal status of the person who is "in loco parentis" and taking responsibility for the child. The language of Education Code §8263(b)(1)(A) is broad and clear … without any restriction on the person responsible for the child or the family setting in which the child is located. There is absolutely no basis for denying subsidized child care services to children who are recipients of child protective services and being cared for by someone other than a parent, step-parent or legal guardian.

Ms. Hershcopf recommended that the language be removed or, as a second alternative, add "court-appointed relative caregiver" to the list. The agency's response to this comment in the FSR is:

> Comment was noted; however, no modifications were made to the regulations. This section was modified as a result of comments received during the 45 day comment period to clearly indicate the specific circumstances of CPS under which priority is given to and children receive child development services without regard to any other need and eligibility requirements. If a child is placed with a court appointed relative caregiver, the child has been removed from the abusive environment and does not meet the intent of the statute regarding children receiving protective services for child development related purposes.

The FSR does not contain an adequate response to these comments in that the agency's response was insufficient as to how the regulation was modified to accommodate the objection or recommendation and as to the reason for not making any further change. The rulemaking record contains no facts, studies, data, or evidence to support the agency's contentions that restrictions on the continuum of services and on the child's caregiver are necessary for the eligibility determination in order to remain within the intent of the statute. On the contrary, the issues raised by the commenters present the possibility that the proposed regulations may not be consistent with the intent of the statute based on the plain meaning of the statute. These issues may either be addressed by providing evidence of legislative intent which supports the agency's contentions or by making appropriate modifications to the proposed regulations. OAL reserves the right to review the proposed regulations and rulemaking record, upon resubmission by the agency, for compliance with the procedural requirements and each legal standard of the APA: Authority, Reference, Clarity, Consistency, Necessity, and Nonduplication.

CONCLUSION

For these reasons OAL disapproved the agency's proposed action. If I may answer any questions about this decision or the APA substantive or procedural standards, please do not hesitate to contact me at (916) 323-4217.

Date: October 20, 2005

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GEORGE C. SHAW
Staff Counsel

for: WILLIAM L. GAUSEWITZ
DIRECTOR

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