

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
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DEPARTMENT OF SOCIAL)
SERVICES)
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REGULATORY ACTION:)
Title 22, California Code of)
Regulations)
)
)
Adopt Sections: 82003, 82005, 82006,)
82007, 82010, 82012, 82017, 82018,)
82019, 82019.1, 82020, 82021, 82023,)
82024, 82027, 82028, 82029, 82030,)
82031, 82034, 82035, 82036, 82040,)
82042, 82044, 82046, 82051, 82052,)
82053, 82054, 82055, 82055.1, 82056,)
82058, 82059, 82062, 82063, 82066,)
82068, 82069, 82071, 82072, 82073,)
82074, 82077.2, 82077.4, 82077.5,)
82086, 82087.5, 82090, 82091, 82092,)
82092.1, 82092.2, 82092.3, 82092.4,)
82092.5, 82092.6, 82092.7, 82092.8,)
82092.9, 82092.10, 82092.11, 82093)
)
)
Amend Sections: 80000, 80001,)
80011, 80019, 80027, 80036, 80068.5,)
80075, 80077.2, 80087, 80092.2,)
80092.8, 80092.9, 82000, 82001,)
82009, 82061, 82064, 82065, 82065.1,)
82065.5, 82068.2, 82068.3, 82075,)
82075.1, 82075.2, 82076, 82078,)
82079, 82087, 82087.2, 82087.3,)
82087.4, 82088, 82088.2, 82522,)
82568.5, 82570, 82577)
)

DECISION OF DISAPPROVAL
OF REGULATORY ACTION

(Gov. Code, sec. 11349.3)

OAL File No. 06-0605-02 S

Repeal Sections: 82500, 82501,)
82564, 82565, 82565.1, 82565.5,)
82568.2, 82568.3, 82575, 82575.1,)
82576, 82579, 82587, 82587.2,)
82587.3, 82587.4, 82588, 82588.2)
_____)

SUMMARY OF REGULATORY ACTION

This regulatory action implements section 1530.1 of the Health and Safety Code which requires that the Department of Social Services adopt regulations to combine adult day care and adult day support centers licensing categories into one category: adult day programs.

DECISION

On July 18, 2006, the Office of Administrative Law (OAL) disapproved the above referenced regulatory action for the following reasons: failure to comply with the clarity, consistency, necessity and reference standards of Government Code section 11349.1; failure to comply with the requirements for incorporation by reference; and failure to include all required documents.

DISCUSSION

The adoption of regulations by the Department of Social Services (“Department”) must satisfy requirements established by the part of the California Administrative Procedure Act (“APA”) that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by the Office of Administrative Law (“OAL”) for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. CLARITY

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 of regulations will be easily understood by those persons directly affected by them.”

a. New section 82070 requires licensees to maintain separate client records. Subdivision (b) specifies what information must be included. Subsection (b)(13) provides:

“In those cases in which the licensee handles the client’s cash, an account of the client’s cash resources, personal property, and valuables entrusted as specified in Sections 82026(h) through (k).”

There is no section 82026 in title 22.

b. Subsection (d)(1) of new section 82070 specifies information that shall not be removed from client records unless the same information is otherwise readily available. Subsection (d)(1)(G) and (d)(1)(H) include among these:

“(G) Functional assessment as specified in Section 82070(b)(12).
(H) Mental health assessment as specified in Section 82070(b)(13).”

However the subsection listings are in error as subsection 82070(b)(12) concerns the date of termination of services while subsection (b)(13) concerns clients cash resources. (See 1.a. above.)

c. New subsection 82075(f) provides:

“Staff responsible for providing direct care and supervision shall receive and maintain current training in first aid and cardiopulmonary resuscitation from persons qualified by agencies including, but not limited to, the American Red Cross.”

A person directly affected by this subsection would not easily understand what agencies, other than the American Red Cross, may qualify the trainers in first aid and cardiopulmonary resuscitation.

d. New section 82076 provides for food services. Subsection (a)(8) provides:

“Powdered milk shall not be used as a beverage but shall be allowed in cooking and baking. Raw milk, as defined in Division 15 of the California Food and Agricultural Code, shall not be used. Milk shall be pasteurized.”

New subsection (a)(8) should be more specific as to the location in Division 15 of the definition of “raw milk” as this reviewer was only able to locate definitions for “Guaranteed raw milk” and “Grade A raw milk.”

e. New section 82007 in subsection (a)(2) describes a type of facility that is exempt from licensure as an adult day program:

“Any clinic, as defined by Health and Safety Code Section 1202.”

Subsection (a)(5) of new section 82091 also refers to the Health and Safety Code section 1202 in listing health conditions that would preclude admission:

“Any other condition or care requirements which would require the day program to be licensed as a health facility as defined by Health and Safety Code Sections 1202 and 1250.”

However, neither the terms “clinic” nor “health facility” are defined by section 1202 of the Health and Safety Code. Instead, Health and Safety Code section 1202 provides a definition of “special permit”:

“Special permit’ means a permit issued in addition to a license authorizing the clinic to offer one or more special services, as defined in Section 1203 or regulations adopted pursuant thereto.”

f. New section 82018 requires the application for licensure and supporting documents to include specified information. The application form does not ask for the information specified in subsections (d)(2)(B) through (E), (d)(10), nor (d)(11). Is this information intended to be submitted in the form of supporting documents?

g. New section 82019 provides for criminal record clearance. Subsection (d)(3) provides:

“The licensee shall submit these fingerprints to the California Department of Justice, along with a second set of fingerprints for the purpose of searching the records of the Federal Bureau of Investigation, or comply with the requirements of Section 82019(f), prior to the individual’s employment or initial presence in the day program.”

Subsection (f) of section 82019 provides for requests for transfer of criminal clearance. However, existing subsection 80019(d)(3), upon which this regulation is based, instead requires compliance with the requirements of subsection (e). Subsection (e) of section 82019 provides:

“Prior to working, residing or volunteering in a licensed day program, all individuals subject to a criminal record review pursuant to Health and Safety Code Section 1522 shall do the following:

- (1) Obtain a California clearance or criminal record exemption as required by the Department; or
- (2) Request the licensee or applicant for a license to request a transfer of a criminal record clearance as specified in Section 82019(f); or
- (3) Request and be approved for a transfer of a criminal record exemption, as specified in Section 82019.1(r), unless, upon request for the transfer, the Department permits the individual to be employed, reside or be present at the day program.”

Is the cross reference to subsection 82019(f) in subsection 82019(d)(3) correct or is subsection 82019(e) intended?

h. New subsection 82019(i) provides:

“If the criminal record transcript of the individuals specified in Health and Safety Code Section 1522(a) and (b) discloses a plea or verdict of guilty or a conviction following a plea of nolo contendere for a crime other than a minor traffic violation for which the fine was less than \$300, and an exemption pursuant to Section 82019.1(a) has not been granted, the Department shall take the following actions” (Emphasis added.)

Although section 82019.1 provides for criminal record exemptions, those persons specified in subsection 82019.1(a) are not exempt but rather are those who warrant immediate removal from the adult day program pending consideration of the exemption request. Perhaps another subsection was intended.

i. New subsection (c) of section 82035 provides:

“If the licensee dies, an adult relative who has control of the property shall be permitted to operate a previously licensed day program under an Emergency Approval to Operate (LIC 9117) providing the following conditions are met”

New subsection (c)(2)(A) provides:

“Notwithstanding the instructions on the Application for License (LIC 200), the Department shall permit the relative to submit only the information on the front side of that form.”

The Application for a Community Care Facility or Residential Care Facility for the Elderly License (LIC 200) is a one page form and the instructions for LIC 200 only require information on the front side of the form.

j. New section 82054 provides for the assessment of penalties. New subsection (f)(1) provides:

“Immediate penalty assessment as specified in Section 82054(b), (c), and (d), shall begin on the day the deficiency is cited.”

This provision would appear to apply to subsection (e) as well. In fact, existing subsection (f)(1) of section 80054, on which section 82054 is based, cites subsections (c), (d) and (e). It is not clear why subsection 82054(e) was not referred to new subsection 82054(f)(1).

k. New section 82058 provides penalties for the operation of unlicensed adult day programs. New subsection (c) provides:

“If the unlicensed operator reports to the licensing agency that unlicensed operation, as defined in Health and Safety Code Section 1503.5, has ceased, the penalty shall cease as of the day the licensing agency receives the notification.”

New subsection (c)(2) provides:

“Notwithstanding, Section 82058(b), if the unlicensed day program operation has not ceased, penalties shall continue to accrue without interruption from the date of initial penalty assessment.”

In that subsection 82058(b) provides for the assessment of penalties while subsection 82058(c) provides for cessation of the penalties, it would appear subsection 82058(c)(2) intended to refer to section 82058(c).

l. New subsection 82061(a) provides:

“Each licensee shall furnish to the licensing agency reports as required by the Department including, but not limited to, those specified in this section.”

A person directly affected by section 82061 would not easily understand what reports other than those specified in section 82061 are required.

m. New section 82065 specifies personnel requirements. Subsection (e)(2) of section 82065 provides:

“Adults who supervise while clients are using a pool or other body of water from which rescue requires the rescuer’s ability to swim, shall have a valid water safety certificate.”

A person directly affected by subsection (e)(2) would not know if there are any limitations on whom may provide, and what constitutes, a “valid safety water certificate.”

n. New section 82066 concerns personnel records. Subsection (a)(12) of section 82066 requires additional records for “. . . employees that are required to be fingerprinted pursuant to Section 82019(b) . . .”

New subsection 82019(b) does not specify those employees that are required to be fingerprinted but rather those who are exempt from the requirement to be fingerprinted.

o. New section 82068 provides for admission agreements. Subsection (d) of section 82068 provides:

“Modifications to the original agreement shall be made whenever circumstances covered in the agreement change, and shall be dated and signed by the persons specified in Section 82068(d).”

A person directly affected by subsection 82068(d) would not know who must sign and date modifications as this subsection cross references itself.

p. New subsection (e) of section 82068.2 provides:

“The written Needs and Services Plan specified in Section 82068.2(a)(f), shall be maintained in the client’s file.”

The Needs and Services Plan is not specified in subsection (a) of section 82068.2 and this subsection listing should be deleted.

2. CONSISTENCY

OAL is required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “consistency” standard. “‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code, sec. 11349(d).)

a. New section 82090 provides for health and safety services. Subsections (b) and (b)(3) of section 82090 provide:

“The Department may grant an exception allowing acceptance or retention of a client who has a medical or health condition not listed in Section 82092, Restricted Health Conditions, if all of the following requirements are met:

(3) The licensee has developed a plan of care for the client as specified in Section 82068.2(f) and 82092.2(a)”

New section 82092.2 provides for restricted health care plans. Subsection (a) of section 82092.2 describes what must be included in such plans. Subsection (a)(6) of section 82092.2 provides:

“A date specified by the client’s physician or designee, who is also a licensed professional, when the plan must be reviewed by all parties identified in Section 82092.2(a)(1).”

Section 1507 of the Health and Safety Code regulates the provision of incidental medical services by community care facilities. Subdivision (c)(2)(B) provides:

“The client’s individualized health care plan shall be reassessed at least every 12 months or more frequently as determined by the client’s physician or nurse practitioner during the time the client receives incidental medical services in the facility.”

New subsections 82090(b)(3) and/or 82092.2(a)(6) should add the limitation that the plan must be reassessed at least every 12 months.

b. New section 82092.9 provides that the licensee may accept clients with a serious wound if specified conditions are met. Subsection (a)(3)(B) provides:

“The client’s family or primary caregiver may train the day program staff responsible for changing dressings if the requirements in Section 82075(b)(1)(A) through (C) are met.”

Section 1507 of the Health and Safety Code regulates the provision of incidental medical services by community care facilities. Subsection (c)(2)(C) of section 1507 provides:

“A licensed health care professional practicing within his or her scope of practice shall train the staff of the facility on procedures for caring for clients who require incidental medical services and shall periodically review, correct or update facility staff training as the health care professional deems necessary.”

As worded, it is not clear from subsection (a)(3)(B) of new section 82092.9 that a licensed health care professional must provide the training if changing dressing comes within the meaning of incidental medical services as described in section 1507 of the Health and Safety Code.

The same is true of new subsection (b)(1) of section 82075 if the provision of health related services described in 82075 constitutes incidental medical services as described in section 1507 of the Health and Safety Code.

Similarly, section 82068.2 requires the preparation of a Needs and Service Plan for each client. Although not new language, subsection (g) of section 82068.2 specifies who must be involved in the development of the plan. If the Needs and Services Plan were to constitute an individualized health care plan as described in subsection (c)(2)(A) of section 1507 of the Health and Safety Code, a licensed health care professional should be included.

c. New section 82054 describes penalties to be assessed. Subsection (e) of section 82054 provides:

“A deficiency subject to the immediate penalty assessment in Section 82054(d) that is repeated within a 12-month period of the last deficiency citation shall be cited and assessed an immediate penalty of \$150 and \$50 per day thereafter until the deficiency is corrected.” (Emphasis added.)

Subdivision (d) of Health and Safety Code section 1548 provides:

“Any facility that is assessed a civil penalty pursuant to subdivision (c) which repeats the same violation of this chapter within 12 months of the violation subject to subdivision (c) is subject to an immediate civil penalty of *one hundred fifty dollars (\$150) for each day* the violation continues until the deficiency is corrected.” (Emphasis added.)

The per day penalty described in subsection (e) of section 82054 should be increased to \$150.

d. New section 82007 provides exemptions from the licensing requirements for an adult day program. Subsection (a)(4) provides:

“Any care and supervision of persons by a relative, as defined in Section 82001(r), or conservator, as defined in Section 82001(c).”

This subsection implements Health and Safety Code section 1505. It is not clear that new regulation subsection 82007 (a)(4) is entirely consistent with subdivision (k) of Health and Safety Code section 1505 which provides:

“Any arrangement for the receiving and care of persons by a relative or any arrangement for the receiving and care of persons from only one family by a close friend of the parent, guardian, or conservator, if the arrangement is not for financial profit and occurs only occasionally and irregularly, as defined by regulations of the department. For purposes of this chapter, arrangements for the receiving and care of persons by a relative shall include relatives of the child for the purpose of keeping sibling groups together.”

3. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the Title 1 of the California Code of Regulations (CCR) provides:

“In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

“(1) a statement of the specific propose of each adoption, amendment, or repeal; and

“(2) information explaining why each provision of the adopted regulations 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 or knowledge by reason of study or experience which is relevant to the regulation in question.”

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the

regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3(b)(2) and (7).)

Although most of the language in this regulatory action was brought over from existing provisions regulating adult day care and adult day support centers, some of the provisions in this regulatory action are either new or come from existing handbook provisions as opposed to regulations. The rulemaking file must include “necessity” for new subsections 82052(e), 82065(f)(8) and (f)(9), 82065.1(d)(1), and 80027 (e)(1) through (e)(4) which fall into that latter category.

4. INCORPORATION BY REFERENCE

OAL adopted section 20 of Title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (c) of this section provides the requirements for a state agency that wishes to incorporate another document as part of a regulation by reference to that document. Subsection (c) of section 20 provides:

“An agency may ‘incorporate by reference’ only if the following conditions are met:

. . .

- (4) The regulation text states that the document is incorporated by reference and identifies the document by *title and date of publication or issuance*. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required. . .” (Emphasis added.)

Section 82076 of the regulations provides for the provision of food. New subsection (a)(10) of section 82076 provides:

“All home canned foods shall be processed in accordance with standards of the University of California Agricultural Extension Service. Home canned foods from outside sources shall not be used.”

In addition to violating subsection (c)(4) of section 20 of title 1 of the California Code of Regulations, failure to specify the title and date of publication or issuance of the particular version incorporated by reference makes the provision difficult to understand. One cannot understand from the text of the regulatory provision which particular text has been incorporated by reference.

Consequently this provision fails to satisfy the clarity standard of Government Code section 11349.1 as well. Further, a prospective incorporation by reference (one that automatically incorporates future changes to an incorporated document) is of questionable validity. While prospective incorporation by reference could cut down on periodic rulemaking to incorporate future changes made by the body that originally issued the incorporated document, it also eliminates the opportunity for public participation in the decision to give regulatory effect to those changes.

In addition, the rulemaking file did not contain a copy of the standards of the University of California Agricultural Extension Service intended to be incorporated by new subsection 82076(a)(10). Documents incorporated by reference by a regulation contained in the California Code of Regulations become part of that regulation and must be submitted along with the regulation text.

5. REFERENCE

OAL is also required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “reference” standard. “Reference” means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.” (Gov. Code, sec. 11349(e).)

New section 82065 includes section 42001 of the Vehicle Code and new section 82068 includes section 4803 of the Welfare and Institutions Code in their respective reference citations. This reviewer is unaware how these statutes are being implemented, interpreted, or made specific by these regulations.

6. TEXT

Lastly we note that in section 82000 the number “1502(a)(2)” should be underlined as new text; that “1523” has disappeared without strikeout from the authority citation for section 80027; and that “1523.1”, listed in the reference citation for section 80027 as existing text, is not an existing citation, but is instead “1523.” In form LIC-195, the words “and 1596.805” have disappeared from the second line of the version of the form that was made available to the public. There are also apparent errors in the handbook material contained on pp. 8 and 13.

Please also be advised that on June 22, 2006, the Department subsequently filed with OAL a regulatory action amending sections 80019, 80019.1 and 80054 of title 22 of the California Code of Regulations concerning criminal clearances. This regulatory action was approved by OAL on July 11, 2006. You may want to review the changes made therein as the language used in proposed sections 82019, 82019.1 and 82054 is largely lifted from sections 80019, 80019.1, and 80054 as they existed prior to these latest amendments.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: July 25, 2006

CRAIG S. TARPENNING
Senior Staff Counsel

For: WILLIAM GAUSEWITZ
Director

Original: Dennis Boyle, Director
cc: Alison Garcia