

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
)
)
DEPARTMENT OF SOCIAL SERVICES) DECISION OF DISAPPROVAL
) OF REGULATORY ACTION
)
REGULATORY ACTION:)
) (Gov. Code, sec. 11349.3)
Title 22, California Code of Regulations)
) OAL File No. 07-0625-02C
Adopt Sections: 86500, 86501, 86505,)
86505.1, 86506, 86507, 86508, 86509, 86510)
86511, 86512, 86517, 86518, 86519, 86519.1)
86519.2, 86520, 86521, 86522, 86523, 86524)
86526, 86527, 86528, 86529, 86531, 86531.1)
86531.2, 86534, 86535, 86536, 86540, 86542)
86544, 86545, 86546, 86552, 86553, 86554,)
86555, 86555.1, 86558, 86559, 86561, 86562)
86563, 86564, 86565, 86565.2, 86565.5,)
86566, 86568.1, 86568.2, 86568.4, 86570,)
86572, 86572.1, 86572.2, 86574, 86575,)
86576, 86577, 86578, 86578.1, 86579, 86580)
86586, 86587, 86587.1, 86587.2, and)
86588)
)
MANUAL OF POLICIES AND)
PROCEDURES)
)
AMEND SECTIONS: 11-400c, 11-402,)
45-101(c), 45-202.5, 45-203.4, AND)
45-301.1)

SUMMARY OF REGULATORY ACTION

This regulatory action is the Certificate of Compliance for previously filed emergency regulations that relate to Community Care Licensing Crisis Nurseries. On August 7, 2007 the Office of Administrative Law (“OAL”) notified the Department of Social Services (“Department”) that OAL disapproved the proposed regulations because they failed to comply with the Authority, Consistency, Clarity and Necessity standards contained in Government Code section 11349.1 and for incorrect Administrative Procedure Act (“APA”) procedures.

There were two emergency filings (OAL Files 06-1019-01EP and 07-0213-05EE) prior to the filing of this Certificate of Compliance. After being notified on August 7, 2007 by OAL that this Certificate of Compliance would be disapproved, the Department submitted a readoption of the prior emergency regulations to OAL (OAL File 07-0803-01EFP). The readopted emergency regulations were filed with the Secretary of State and became effective on August 7, 2007. All three of these emergency files were deemed emergencies exempt from OAL review and approval pursuant to SB 855, Statutes of 2004, chapter 64, section 11. This Decision of Disapproval applies only to the Certificate of Compliance.

DISCUSSION

Regulations adopted by the Department must be adopted pursuant to the APA. 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. (Gov. Code, sec. 11346.) No exemption or exclusion applies to the regulatory action under review. Before this regulatory action may become effective, it is subject to a review by OAL for compliance with procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).)

In addition to one Authority and one Consistency issue there were numerous provisions of the regulations that failed to meet the Clarity and Necessity standards and for incorrect APA procedures. Examples of some of those issues are contained in this disapproval. Those examples and all of the Authority, Consistency, Clarity, Necessity and APA procedural issues must be resolved before the regulations can be approved by OAL. All of the issues have been discussed with Department staff. Because the regulations require significant redrafting OAL reserves the right to conduct a complete APA review when the regulations are resubmitted.

A. AUTHORITY

Government Code section 11349, subdivision (b) defines Authority as “. . . the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.”

Authority may be “express” if it is explicitly granted by a provision of the state constitution or a state statute (Cal. Code Regs., tit. 1, section 14(a)(1)). Authority may also be implied when the regulation is necessary to achieve the purpose of a constitutional provision or a state statute. (Cal. Code Regs., tit. 1, section 14(a)(2).) The proposed text of section 86576, subsection (a)(6) raises an issue of Authority in federal law because the regulatory provision would also affect federal inspections.

Section 86576, subsection (a)(6), “Food Services”, requires that

“(a) Crisis nurseries shall provide meals to children, as follows:

. . . (6) Except upon written approval by the Department, meat, poultry and meat food products shall be inspected by state or federal authorities. Written evidence

of such inspection shall be available for all products not obtained from commercial products.” (Emphasis added.)

The exception in subsection (a)(6) would allow the Department to waive state or federal inspections of meat, poultry, and meat food products. No authority express or implied was cited in the rulemaking record or as an authority citation nor is OAL aware of any California or federal law that would grant the Department this authority. (See related “Clarity” Issue, Example 5.)

B. CONSISTENCY

OAL must review regulations for compliance with the “Consistency” standard of the APA, in accordance with Government Code section 11349.1. Government Code section 11349, subdivision (d), defines “Consistency” as meaning “. . . being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

Government Code section 11359 mandates that:

“(a) Except as provided in subdivision (b), on and 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 Marshal before transmittal to the Secretary of State or the Office of Administrative Law.

(b) Approval of the State Fire Marshal is not required if the regulation is expressly required to be at least as effective as federal standards published in the Federal Register pursuant to Section 6 of the Occupational Safety and Health Act of 1970 (P.L. 91-596) within the time period specified by federal law and as provided in subdivision (b) of Section 142.4 of the Labor Code, and as approved by the Occupational Safety and Health Administration of the United States Department of Labor as meeting the requirements of subdivision (a) of Section 142.3 of the Labor Code, unless the regulation is determined by the State Fire Marshal to be less effective in promoting fire and panic safety than regulations adopted by the State Fire Marshal.” (Emphasis added.)

Proposed section 86520 “Fire Clearance” and proposed section 86561 “Reporting Requirements,” subdivision (a)(7) which requires a report within 24 hours to the State Fire Marshall if there is a fire or explosion on the premises are regulations that would “. . . promote fire and panic safety. . .”. The Initial Statement of Reasons on pages 15 and 37 and the Final Statement of Reasons on pages 19 and 47 contain identical Factual Basis descriptions for sections 86520 and 86561: “These regulations are adopted as health and safety measures protecting children placed in crisis nurseries. . .” The rulemaking record contains no evidence that these regulations come within the exemption in Government Code section 11359, subdivision (b). Because these regulatory provisions were not submitted by the State Fire

Marshall, they need to be approved in writing by the State Fire Marshall and that documentation needs to be in the rulemaking record when it is resubmitted to OAL.

C. CLARITY

Subdivision (a)(3) of Government Code section 11349.1 requires that OAL review all regulations for compliance with the Clarity standard. Government Code section 11349, subdivision (c), defines "Clarity" as ". . . 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 California Code of Regulations ("CCR") which requires that:

"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 exists:

- (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; ..."

(b) Persons shall be presumed to be 'directly affected' if they:

- (1) are legally required to comply with the regulation;
- (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."

The regulations contain many Clarity issues. Below are eight examples.

Example 1. Proposed section 86518, subsection (c)(9) lists required licensing documents supporting the application for a license as a crisis nursery including ". . . (9) a financial plan of operation on forms provided or approved by the Department." (Emphasis added.)

It is not clear what forms are required and what they contain. Do these forms merely restate statutory language or existing regulations? Or, do the forms contain regulatory provisions that

have been adopted pursuant to the APA or regulatory provisions that have not been adopted pursuant to the APA and are therefore legally unenforceable?

Example 2. Proposed section 86519 “Criminal Record Clearance”, subsection (b)(5) states that:

“(b) Pursuant to Health and Safety Code section 1522(b)(2) the following persons are exempt from the requirement to submit fingerprints . . . (5) Members of fraternal, service and similar organizations who conduct group activities for children in a care, if all of the following apply . . .” (Emphasis added.)

It is not clear what is meant by “children in a care.”

Example 3. Proposed section 86519.1 “Criminal Record Exemption,” subsection (i) states that:

“(i) The Department has the authority to grant a criminal record exemption that places conditions on the individuals continued licensure, and employment or presence in a licensed crisis nursery.” (Emphasis added.)

The Department has authority to grant criminal record exemptions specified in Health and Safety Code section 1522 which is very lengthy. Other regulatory provisions cite the relevant Health and Safety Code section 1522 subdivisions in the text. A citation to the applicable Health and Safety Code subdivision should be added to subsection (i) for clarity.

Example 4. Proposed section 86555, “Administrative Review”, subsection (a) provides that:

“(a) A licensee or designated representative shall have the right to request a review of a notice of deficiency and notice of penalty within 10 working days of receipt of such notice(s).
(1) If the deficiency has not been corrected, civil penalties shall continue to accrue during the review process.”

Subsection (c) declares that:

“(c) If the reviewer determines that a notice of deficiency or notice of penalty was not issued or assessed in accordance with applicable statutes and regulations of the Department, or that other circumstances existed, the reviewer shall have the authority to amend or dismiss the notice.” (Emphasis added.)

Because the phrase “or that other circumstances existed” is generic and no limiting phrase such as “extenuating circumstances” followed by examples is given, a licensee or designated representative would not know what circumstances would persuade the reviewer to amend or dismiss the notice.

Example 5. Proposed section 86576, subsection (a)(6), “Food Services,” requires that:

“(a) Crisis nurseries shall provide meals to children, as follows:

... (6) Except upon written approval by the Department, meat, poultry and meat food products shall be inspected by state or federal authorities. Written evidence of such inspection shall be available for all products not obtained from commercial products.” (Emphasis added.)

Assuming arguendo, that authority existed for the underlined provision of section 86576, subsection (a)(6) (See Issue A), it is not clear how a crisis nursery would obtain this approval and what criteria would apply.

Example 6. Proposed section 86518, “Application for a License,” subsection (c)(3) requires applicants for a crisis nursery license to include “a signed form LIC. 165 from each member of the board of directors.” (Emphasis added.)

Section 86563, “Accountability,” subsection (d) mandates that crisis nursery licensees “...shall require that each member of the board of directors sign and date the form LIC. 165 as specified in Section 86518.” (Emphasis added.)

Because no version date is given for form LIC. 165, it is unclear what version of the form an applicant or a licensee must submit. As noted in Issue E.1. below, this form is not in the rulemaking file. However, a LIC. 165 captioned “Board of Directors Statement” and dated 10/06 is attached to the Form 400. Assuming that this is the correct form, both sections 86518 and 86563 require that each member of the board of directors sign the form. LIC. 165 contains the following internally inconsistent language which is also inconsistent with sections 86518 and 86563.

“...The members of the board of directors are required to read and sign the statement below. This form must be completed by all board members. The signing of this form by all members, and prospective members, or the board of directors is a condition of licensure. (Emphasis added.)

It is not clear who is a “prospective member.” Is it a person who has expressed an interest in being a board member or who is being considered as a potential member or has been selected but has not yet completed the formalities for board membership? Additionally, sections 86518 and 86563 require only board members to sign the LIC. 165. It is not clear why “...all members...or the board of directors...” are listed as separate parties unless “or” should be “of.”

Items 1 and 2 of the Instructions, which are part of the LIC. 165 require the facility name and facility number. Items 3 through 9 apply to the person signing the form. The Instructions on the form for Items 3 through 10 require that “The board member enter his or her name...” (Emphasis added.) But the General Information section of the Instructions requires that prospective board members must also “...sign this form before joining the board...”

There are only 9 items on the LIC. 165. It is not clear if Item 10 in the Instructions refers to “Date” which is part of Item 9 and needs to be renumbered as 10 or if there is a missing provision.

Example 7. Proposed section 86561, subsection (h) requires a monthly report using Form LIC. 9219 and subsection (h)(4) contains the maintenance requirements for Form LIC. 9219. Because no date is given for this form it is not clear which versions of this form a licensee would have to submit and also maintain.

Example 8. In numerous regulations “sections” is pluralized when in actuality the reference is to multiple subsections. For example, section 86501(l)(i) reads “. . . and training requirements specified in Sections 86565 (q) and (r),” or, section 86519, subsection (a) states “. . . all individuals specified in Health and Safety Code sections 1522(a) and (b). . . .”

D. 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, subdivision (b) 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 or knowledge by reason of study or experience which is relevant to the regulation in question.”

Page 33 of the Initial Statement of Reasons and page 42 of the Final Statement of Reasons which deals with section 86554 “Penalties” explains that Health and Safety Code section 1548 “. . . authorizes the Department to levy civil penalties to community care facilities due to non-compliance with applicable law and regulations, and requires the Department to develop regulations consistent with this section.”

Section 86554 contains numerous requirements that implement, interpret and make specific Health and Safety Code section 1548 including the contents of a notice of penalty and a notice of

deficiency, time frames for penalty assessments and when and under what circumstances penalties may cease.

The only necessity for the regulatory provisions is the following:

“The standards for penalties found in this section were taken from existing standards found in existing licensing regulations governing other children’s residential categories. The Department determined that these standards were necessary and appropriate for crisis nursery programs and to effectively create a new licensing category as mandated by SB 855, Chapter 664, Statute of 2004. This section was also adopted to ensure the health and safety of children placed in crisis nurseries.” (Emphasis added.)

This explanation is not specific enough because it does not identify where these existing standards are in the California Code of Regulations (“CCR”) and why crisis nurseries and the as yet unidentified “other children’s residential categories” have identical or similar situations that the requirements be the same.

Similar or identical language is given for almost all of the regulations. See for example the Initial Statement of Reasons and Final Statement of Reasons for sections 86501, 86520, 86521, 86522, 86524, 86528, 86531, 86531.1, 86531.2, 86534, 86535, 86540, 86542, 86544, 86545, 86546, 86552, 86553, 86555, 86555.1, 86558, 86559, 86561, 86562, 86563, 86564, 86565.2, 86566, 86568.1, 86568.2, 86568.4 and 86570.

E. INCORRECT APA PROCEDURES

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.)

1. The rulemaking file fails to comply with the incorporation by reference requirements of Title 1 of the CCR , section 20, subsection (c) which states:

“(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.

(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.

(5) The regulation text specifies which portions of the document are being incorporated by reference.”

The Final Statement of Reasons does not include the statements required by section 20, subdivisions (c)(1) and (c)(2).

The incorporation by reference of a document or part of a document into a regulatory provision effectively makes the incorporated by reference text a part of the regulatory provision, as though the incorporated text of the document is printed in its entirety as part of the regulatory provision. (Cal. Code Regs. tit.1, section 20(a).) For this reason the incorporated document must be included in the rulemaking record for OAL review and must have been made available to the public for comment. (Cal. Code Regs, tit 1, section 20(b).)

There are 14 forms specifically incorporated by reference into these regulations. They are: LIC. 200 (8/04), LIC. 165 (no date), LIC. 508 (1/03), LIC. 9182 (12/06), LIC. 300 A (9/03), LIC. 300 B (9/03), LIC. 300 C (9/03), LIC. 300 D (9/03), LIC. 301E (7/03), LIC. 9188 (9/03), LIC. 198 (2/01), LIC. 198A (2/01), LIC. 9219 (no date) and LIC. 9219A (7/07). However, none of these forms are actually included in the rulemaking record. Additionally, LIC. 165 and LIC. 9219 need dates in order to comply with section 20, subsection (c)(3).

The following five forms were identified in the notice of the 15-day public availability period of May 3, 2007 to May 18, 2007 as being added to the rulemaking record: LIC. 165 (10/06), LIC. 200 (8/04), LIC. 309 (6/01), LIC. 9182 (12/06) and LIC. 9198 (12/06). However, none of these forms are in the rulemaking record. LIC. 309 (6/01) was noticed, but it is not required nor referenced in any of the regulations and it was not attached to the Form 400.

It is not clear if the other forms missing from the rulemaking record had been made available to the public for comment. Clarification is needed from the Department. If the forms had not been made available then a 15-day public availability period is needed in order to add them to the rulemaking record.

Thirteen of the forms identified in the regulations are attached to the Form 400. They are: LIC. 165 (10/06), LIC. 198 (2/01), LIC. 198 A (3/99), LIC. 300 A (9/03), LIC. 300 B (9/03), LIC. 300 C (9/03), LIC. 300 D, (9/03), LIC. 301 E (7/03), LIC. 508 (11/03), LIC. 9182 (12/06), LIC. 9188

(9/03), LIC. 9219 (10/06) and LIC. 9219 A (10/06). Having these 13 forms attached to the Form 400 does not cure the defect of all 14 forms not being in the rulemaking record. Additionally, LIC. 9188 (9/03) is the version incorporated in the text but the LIC. 9188 attached to the Form 400 is dated 12/06. LIC. 9219 A is dated 7/07 in the text but the LIC. 9219 A form attached to the Form 400 is dated 10/06, and LIC. 9219 has no date in the text but the attached LIC. 9219 attached to the Form 400 is dated 10/06. If forms 9188, 9219 A and 9219 contain amendments of the prior forms, both the latest version and the prior version of the forms must be in the rulemaking file and either underline/strikeout or labeling the forms as "repeal" or "adopt" must be done in order to facilitate OAL review and to comply with section 8 of Title 1 of the CCR.


Because of all of the issues described above it is impossible to review the forms attached to the Form 400 with any certainty that they are the forms the Department intended to incorporate by reference.

2. Proposed section 86518, "Application for a License," subsection (b) requires an applicant for a license for a crisis nursery to file with the Department "... a verified application on Form LIC. 200 (8/04) and containing the following information..." followed by specified items. Form LIC. 200 (8/04) was not attached to the Form 400 and is not contained in the rulemaking file. OAL cannot at this time determine if Form LIC. 200 (8/04) contains only the regulatory requirements contained in section 86518 or if it contains regulatory provisions in addition to those in section 86518 which would make it a document incorporated by reference subject to all of the requirements of section 20 of Title 1 of the CCR and of the APA

CONCLUSION

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the Authority, Consistency, Clarity and Necessity standards contained in Government Code section 11349.1 and failed to meet APA procedural requirements.

Date: August 14, 2007


for BARBARA ECKARD
Senior Staff Counsel

For:

SUSAN LAPSLEY
Director

Original: John A. Wagner, Director
Cc: Sandra Ortega, Manager, ORD
Cc: Rick Torres