State of California
Office of Administrative Law

In re: **Emergency Medical Services Authority**	**DECISION OF PARTIAL DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: Title 22 **California Code of Regulations**	**Government Code Section 11349.3**
Amend section: 100105, new subsections (b), (c), and (d)	**OAL File No. 2010-0406-06 SR**

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Emergency Medical Services Authority (EMS Authority) proposed to adopt new sections 100102.1, 100103.1, 100103.2, 100106.1, 100106.2 and 100107.1, and to amend existing sections 100101, 100102, 100103, 100104, 100105, 100106, 100107, 100108, 100109, 100110, 100111, 100112, 100113, 100114, 100115, 100116, 100117, 100118, 100119, 100120, 100121, 100122, 100123, 100124, 100125, 100126, 100127, 100128, 100129, and 100130, in title 22 of the California Code of Regulations.

The regulatory action proposed substantial revisions to the EMS Authority's chapter of regulations pertaining to the Emergency Medical Technician-II (EMT-II) classification of emergency medical services personnel. As part of these revisions, the "EMT-II" classification was generally modified to become the "Advanced Emergency Medical Technician" (Advanced EMT) classification. The proposed regulation adoptions and amendments included provisions pertaining to Advanced EMT subject areas such as program definitions, requirements and responsibilities of local Emergency Medical Services Agencies, scope of practice and local optional scope of practice, trial studies, training program requirements, certification and recertification requirements, base hospital and medical control provisions, record keeping requirements, and fees.

DECISION

On May 18, 2010, the Office of Administrative Law (OAL) notified the EMS Authority of the approval in part and disapproval in part of this regulatory action. All sections of this regulatory action were approved except for new subsections (b), (c), and (d) of regulation section 100105.

The reasons for the disapproval of subsections (b), (c), and (d) of section 100105 were the following: (1) failure to comply with the "Clarity" standard of Government Code section 11349.1, (2) failure to adequately summarize and respond to each of the public comments received regarding these subsections, and (3) failure to comply with all required Administrative Procedure Act procedures with respect to these subsections. Each of these reasons for the disapproval is discussed in detail below.

DISCUSSION

Regulations adopted by the EMS Authority must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11365). 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 regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Moreover, Health and Safety Code section 1797.107, which sets forth the EMS Authority's general rulemaking authority under Division 2.5 of the Health the Safety Code, specifically provides that the EMS Authority "shall adopt, amend, or repeal . . . in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, such rules and regulations as may be reasonable and proper to carry out the purposes and intent of this division and to enable the [EMS Authority] to exercise the powers and perform the duties conferred upon it by this division not inconsistent with any of the provisions of any statute of this state." Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

A. CLARITY

OAL must review regulations for compliance with the "Clarity" standard of the APA, 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 California Code of Regulations (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 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; 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.

Clarity problems with regulation section 100105, subsections (b), (c), and (d)

In this regulatory action, the EMS Authority proposed new regulatory language for regulation section 100105, subsections (b), (c), and (d). Generally, these subsections would establish procedural requirements applicable to situations where a local Emergency Medical Services Agency (LEMSA) and/or a public safety agency considers a reduction of existing Paramedic services or a reduction of existing services utilizing Advanced EMTs accredited in the local optional scope of practice and the displacement of those services by initiating new basic Advanced EMT services. For purposes of the discussion of these provisions which follows, the phrase "reduction/displacement" will be used to refer to such a reduction of existing Paramedic services or of existing services utilizing Advanced EMTs accredited in the local option scope of practice and the displacement of those services by basic Advanced EMT services. Also, the phrase "basic Advanced EMT services" will be used to refer to services by Advanced EMTs certified to perform the standard Advanced EMT scope of practice (as set forth in regulation section 100106) but not locally accredited to perform additional optional skills (i.e., without a "local optional scope of practice" under regulation section 100106.1). The discussion which follows first provides a summary of each of the subsections of section 100105 at issue here and then identifies specific clarity problems with these subsections.

Subsection (b) of regulation section 100105 would generally provide that, when a LEMSA considers a reduction/displacement, the LEMSA must prepare an impact evaluation report indicating why the continuation of the existing level of services is not feasible or appropriate. The LEMSA's required impact evaluation process must include (1) an evaluation describing why the geography, population density and resources would not make continuation of the existing level of services more appropriate or feasible, and (2) a public hearing to receive input from the

public regarding the proposed reduction/displacement (subject to waiver if the topic of reduction/displacement has been specifically discussed previously in a different public hearing).

Subsection (c) of regulation section 100105 would generally provide that, when a public safety agency considers a reduction/displacement in connection with services it provides, the governing body of the public safety agency shall hold a public hearing. Furthermore, the public safety agency shall provide a written notice of the reduction/displacement to the LEMSA within a specified period of time, and the public safety agency shall provide "an evaluation report containing the expected impact to the type of service due to the reduction in services" within a specified period of time.

Subsection (d) of regulation section 100105 would generally provide that if the LEMSA determines that the conditions justifying a reduction/displacement are not justified or feasible pursuant to the impact evaluation report, the new basic Advanced EMT services shall not be approved. If the LEMSA finds that the new basic Advanced EMT services are justified pursuant to the impact evaluation, then the new basic Advanced EMT services may be approved by the LEMSA.

OAL carefully reviewed the specific language of subsections (b), (c), and (d) of regulation section 100105 and determined that the exact meaning of these provisions is not easily understood. As discussed below, we were unable to understand how these provisions would operate in practice in multiple respects, including the interrelationship between these provisions. We note that public commenters also expressed concerns regarding the clarity of these provisions (see the "Summary and Response to Public Comments" section of this decision).

The principal clarity problems relate to subsection (c), which sets forth requirements for public safety agencies considering a reduction/displacement. First, in examining subsection (c), the relationship between the public safety agency and the LEMSA to which the public safety agency must provide written notice and an evaluation report is not clear. It is likely that the EMS Authority's intent is that subsection (c) apply to public safety agencies to the extent that they operate within and are under the jurisdiction of a LEMSA, but that essential element establishing context is never clearly established in the regulation text.

A second clarity concern with subsection (c) pertains to the stated time frames for the public safety agency to provide written notice and an evaluation report to the LEMSA. Subsection (c) provides that the public safety agency shall "[g]ive the LEMSA no less than six (6) months written notice from the date the [reduction/displacement] is approved by the governing body [of the public safety agency] and prior to the implementation date of an Advanced EMT program." Subsection (c) further provides that the public safety shall "[p]rovide the LEMSA with an evaluation report containing the expected impact to the type of service due to the reduction in services no less than three (3) months from the date the [reduction/displacement] is approved by the governing body [of the public safety agency] and prior to the implementation of an Advanced EMT program." These time frames do not appear to make sense and are potentially confusing to public safety agencies and LEMSAs directly affected by these provisions. It is difficult to comprehend a scheme where the public safety agency first (three months from approval by the governing body of the public safety agency) provides an evaluation report to the LEMSA and

subsequently (six months from approval by the governing body of the public safety agency) provides written notice to the LEMSA. These provisions appear to be requiring the more detailed evaluation report before requiring the basic written notice. The provisions of subsection (c) setting forth the time frames for a public safety agency to provide written notice and an evaluation report to the LEMSA need to be re-examined and clarified.

A third clarity concern with subsection (c) pertains to the required content of the evaluation report which the public safety agency must provide to the LEMSA. The regulation text refers to requiring "an evaluation report containing the expected impact to the type of service due to the reduction in services." This regulatory language describing the evaluation report is brief and is likely to cause confusion regarding what is expected of a public safety agency subject to this reporting requirement. In contrast, subsection (b) sets forth a more comprehensive statement of the required content of an impact evaluation report when required to be prepared by a LEMSA. Referring to the subsection (c) language, one public commenter specifically stated: "It is unclear what the evaluation report would contain or the expected content. How does this differ from the LEMSA impact evaluation?" Greater clarity needs to be provided regarding the required content of a public safety agency evaluation report under subsection (c).

A fourth clarity concern with subsection (c) pertains to what happens after a public safety agency provides the required written notice and evaluation report to the LEMSA. When a public safety agency takes these actions, is the LEMSA then required to perform a full review (with its own evaluation report and a public hearing) in accordance with the requirements of subsection (b)? Subsection (c) is silent as to what happens after the public safety agency reports to the LEMSA. Subsection (b) could be interpreted as only applying to situations where the LEMSA is the party initiating the Advanced EMT services (and consequently not applying to situations where a public safety agency is initiating the reduction/displacement). Alternatively, subsection (b) could be interpreted as becoming applicable once a public safety agency reports to the LEMSA under subsection (c). Greater clarity needs to be provided regarding what happens after a public safety agency provides its written notice and evaluation report to the LEMSA. The interrelationship between the public safety agency requirements of subsection (c) and the LEMSA requirements of subsection (b) requires clarification.

A fifth clarity concern pertains to subsection (c) and its interrelationship with subsection (d). As indicated earlier, subsection (d) essentially provides for final LEMSA determinations of whether reductions/displacements "are not justified or feasible pursuant to the impact evaluation report" (and therefore not approvable) or alternatively whether reductions/displacements "are justified pursuant to the impact evaluation" (and therefore approvable). To what extent and how does the LEMSA decision process set forth in subsection (d) apply to public safety agency-initiated reductions/displacements pursuant to subsection (c)? The generalized references in subsection (d) to "the impact evaluation report" and "the impact evaluation" (without identification of the source and type of the impact evaluation report) make the scope of coverage of subsection (d) difficult to understand, especially in relation to public safety agency actions under subsection (c). Again, this issue pertains to the general ambiguity regarding exactly what happens after a public safety agency considering a reduction/displacement provides its written notice and evaluation report to the LEMSA.

For the reasons discussed above, it would be difficult for the "directly affected" public (such as LEMSAs and public safety agencies, and constituents of these agencies) to easily understand exactly what is required under proposed regulation section 100105, subsections (b), (c), and (d), and how the reduction/displacement review process is intended to function. These regulatory provisions need to be revised to provide clear standards for the directly affected public.

B. SUMMARY AND RESPONSE TO PUBLIC COMMENTS

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons include:

> 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 . . . .

Furthermore, where an agency makes substantial but sufficiently-related changes to its original regulatory proposal and provides for "15-day notice" of the changes pursuant to Government Code section 11346.8, subdivision (c), that statutory provision specifically includes the requirement: "Any written comments received regarding the change must be responded to in the final statement of reasons required by [Government Code] Section 11346.9."

Inadequate responses to public comments regarding regulation section 100105, subsections (b), (c), and (d)

During the initial 45-day notice period and during the subsequent February 26, 2010 through March 13, 2010 15-day notice period, the EMS Authority received a number of written public comments regarding the proposed language of subsections (b), (c), and (d) of regulation section 100105. Comments regarding these provisions were received from the following entities: California Professional Firefighters (CPF), San Diego County Emergency Medical Services (San Diego EMS), and Mountain-Valley Emergency Medical Services Agency. While the EMS Authority generally provided summaries and responses to these comments, a good number of the responses were incomplete or otherwise did not show meaningful consideration of the specific objections and recommendations being made by the commenters. Two examples of inadequate responses to the public comments follow:

Example 1: Subsection (c)(2) of regulation section 100105 sets forth the requirement for a public safety agency considering a reduction/displacement to provide an evaluation report to the LEMSA. The San Diego EMS commented regarding subsection (c)(2): "What is the meaning of this subsection? It is unclear what the evaluation report would contain or the expected content. How does this differ from the LEMSA impact evaluation?" The EMS Authority response to this

comment is: "Comment acknowledged. No change. This section specifies timelines and requirements for the public safety agencies." This response does not show meaningful consideration of the specific objection which was raised by the commenter regarding the alleged lack of clarity of subsection (c)(2) with respect to the required content of a public safety agency's evaluation report and whether the content differed from a LEMSA impact evaluation.

Example 2: A provision of subsection (b)(2) of regulation section 100105 requires a LEMSA considering a reduction/displacement to hold a public hearing to receive input from the public regarding the matter, but then allows for a waiver of this requirement as follows: "The LEMSA may waive the public hearing if the topic of [reduction/displacement] has been specifically discussed previously in a different public hearing." CPF expressed concern regarding this public hearing "waiver" provision, stating that (for a waiver to apply) the prior discussion in a different public hearing "should be more than just a public discussion, but an opportunity for the public to comment on the proposed reduction of service delivery." CPF asked that specific language be added to the regulation text to make it clear that for a waiver to apply the prior discussion in a different public hearing must have included an opportunity for "input from the public regarding the [reduction/displacement]." The EMS Authority response to this comment is: "Comment acknowledged. No change. The LEMSA is required to hold a public hearing, except when displacing Paramedics has been specifically discussed previously in a public hearing." This response does not show meaningful consideration of the specific recommendation being made by the commenter that the "waiver" provision should only apply where the prior discussion in a different public hearing specifically included the opportunity for input from the public regarding the proposed reduction/displacement. (The response is also somewhat inaccurate in that the regulation in its latest form covers not only the displacement of Paramedic services but also the displacement of services utilizing Advanced EMTs accredited in the local optional scope of practice.)

The EMS Authority needs to carefully review all of the public comments that it received pertaining to subsections (b), (c), and (d) of regulation section 100105 and review all of the agency's responses to these comments. For each pertinent comment, the EMS Authority needs to provide a complete, accurate response that shows meaningful consideration of the specific objection or recommendation being made by the commenter, as required by Government Code section 11346.9, subdivision (a)(3).

C. INCORRECT PROCEDURE

Government Code section 11346.8, subdivision (c), sets forth procedural requirements for "15-day notice" applicable when a rulemaking agency modifies its original regulatory proposal after the initial 45-day public notice and comment period. Specifically, this statutory provision states:

> No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to [Government Code] Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately

> placed on notice that the change could result from the originally proposed regulatory action. If 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 . . . . (Emphasis added.)

OAL has adopted several regulations to provide specificity with respect to the "15-day notice" requirements of Government Code section 11346.8, subdivision (c). These regulations include CCR, title 1, sections 40, 42, 44, and 46. In regulation section 44(a), the regulation sets forth the requirement that the 15-day notice mailing include "a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated." Regulation section 46, entitled "'Clearly Indicated' Changes," specifically states: "Changes to regulations in accordance with Government Code Section 11346.8(c) shall be made using a uniform method and shall illustrate accurately all changes to the original text." Section 46 further provides examples of methods which can be used for illustrating changes to regulation text, and concludes: "A written description of the method used shall appear as the first page of the changed text."

15-day notice problems with regulation section 100105, subsections (b), (c) and (d)

In this rulemaking, the EMS Authority generally complied with required APA procedures for noticing changes to regulation text during the 15-day comment periods. However, with respect to subsections (b), (c), and (d) of regulation section 100105, the noticing of regulation text changes was substantially deficient in connection with the regulation text made available to the public during the February 26, 2010 through March 13, 2010 15-day notice period.

Specifically, it was during that 15-day notice period that subsections (b), (c), and (d) were essentially expanded in scope to cover not only the reduction/displacement of Paramedic services but also the reduction/displacement of "services utilizing Advanced EMTs accredited in the local optional scope of practice." The EMS Authority's stated uniform method for "clearly indicating" new changes to the regulation text (as indicated on page 1 of the modified regulation text) was to illustrate the new changes in a double underlined and italicized format. While the addition of the phrase "or services utilizing Advanced EMTs accredited in the local optional scope of practice" was properly double underlined and italicized in two instances (both of which were in subsection (b) of section 100105), in nine other instances (including all references in subsections (c) and (d) of section 100105) the phrase "or services utilizing Advanced EMTs accredited in the local optional scope of practice" was added without clearly indicating the change in double underline and italics. Consequently, the public was not properly and accurately notified of the regulation text changes which were being made and which were available for public comment. Since these regulation text changes were of a substantial nature in that they served to essentially expand the scope of coverage of subsections (b), (c), and (d) of section 100105, proper notice in the regulation text was necessary. The requirements of Government Code section 11346.8, subdivision (c), and CCR, title 1, sections 44 and 46 were not satisfied.

CONCLUSION

For the reasons set forth above, OAL has disapproved subsections (b), (c), and (d) of regulation section 100105. If you have any questions, please contact me at (916) 323-6225.

Date: May 24, 2010

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