

**State of California
Office of Administrative Law**

In re:
Department of Social Services

Regulatory Action:

Title: Manual of Policies and Procedures

Adopt sections: 45-600, 45-601, 45-602,
45-604, 45-605, 45-606,
45-607

Amend sections: 31-002, 31-003, 31-075,
31-201, 31-205, 31-206,
31-225, 31-425, 31-503,
90-101

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-1002-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On October 2, 2015, the Department of Social Services (Department) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to amend existing sections and adopt new sections in its Manual of Policies and Procedures (MPP) to define terms related to the kinship guardianship assistance payment (Kin-GAP) program. It also proposes to describe the program eligibility requirements, the circumstances under which Kin-GAP may be extended, conditions for payment, and child support referral requirements.

On October 16, 2015, OAL notified the Department that OAL disapproved the proposed regulations because the regulations failed to comply with the clarity and necessity standards of Government Code section 11349.1 and the Department failed to follow procedures required by the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons:

1. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), and title 1, section 16 of the California Code of Regulations;

2. The proposed regulations failed to comply with the necessity standard of Government Code section 11349.1, subdivision (a)(1), and title 1 of the California Code of Regulations, section 10, subdivision (b); and
3. The Department failed to meet APA procedural requirements by omitting to:
 - 3.1. mail the notice of proposed action to every person who has filed a request for notice of regulatory actions with the state agency at least 45 days prior to the hearing and close of the public comment period, pursuant to Government Code section 11346.4, subdivision (a)(1);
 - 3.2. include in the rulemaking file a Standard Form 399 that has concurrence from the State Department of Finance, pursuant to Government Code section 11347.3, subdivision (b)(5);
 - 3.3. clearly identify documents to be incorporated by title and date of publication or issuance in the notices, pursuant to title 1 of the California Code of Regulations, section 20;
 - 3.4. include all required documents in the rulemaking file, pursuant to Government Code section 11347.3, subdivision (b); and
 - 3.5. summarize and respond to all of the public comments made regarding the proposed action pursuant to Government Code section 11346.9, subdivision (a)(3);

All APA issues must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

The adoption, amendment, or repeal of regulations by the Department must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed 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. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by 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 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 check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

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1. Clarity Standard

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16, title 1, of the CCR, OAL's regulation on “clarity,” which provides:

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...
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;”....
- (b) Persons shall be presumed to be “directly affected” if they:
 - (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this regulatory action, the Department failed to comply with the clarity standard of the APA.

1.1. Proposed MPP § 31-075.22

Proposed MPP section 31-075.22 states that “the child’s Kin-GAP eligibility case file records... shall be retained for a minimum of three years after the child’s Kin-GAP *case is closed* pursuant to [MPP] section 23-353.” (Emphasis added.)

MPP section 23-353 states that “public social service records (aid and services) [are required to be] maintained for three years from *the last date of aid or services.*” This provision does not discuss the date that the Kin-GAP case is closed, as suggested by the language in proposed MPP section 31-075.22. Instead, MPP section 23-353 discusses the last date of aid or services.

The proposed regulation is unclear because it is not easily understood when the three year period begins to measure the time period to keep records.

1.2. Proposed MPP § 31.206-317(c)

Proposed MPP section 31.206-317, subdivision (c), states that for “a child whom the permanency plan is a kinship guardianship, the case plan shall include... [t]he reason(s) why a permanent placement with a *fit and willing relative* through a kinship guardianship assistance arrangement is in the child’s best interests....” (Emphasis added.)

The term “fit and willing” is not easily understood by person directly affected as to what would be required for a relative to meet the criteria or standard for “fit and willing” that would be in the child’s best interest.

1.3. Proposed MPP § 45-602.21

This proposed regulatory section states:

45-602.21. The *approved home of a relative* as defined in Section 31-002(a)(9), must have been approved by the appropriate county prior to a child’s transfer to the Kin-GAP Program as evidence by a completed SOC 815. In the case of a *licensed home of a relative foster parent or resource family*, as defined in Section 45-601(r)(2), the home must have been approved by the appropriate county or agency prior to a child’s transfer to the Kin-GAP Program as evidence by the *pertinent licensing documentation*. [Emphasis added.]

First, the proposed language references MPP sections that incorrectly state the terms defined in the referenced MPP sections. MPP section 31-002, subdivision (a)(9), defines “approved foster family home,” as opposed to “approved home of a relative.” MPP section 45-601, subdivision (r)(2), defines “relative” as opposed to the terms “relative foster parent” or “resource family.”

Secondly, the information in the proposed regulation conflicts with that of the referenced MPP section. MPP section 45-602.21 requires approval of the home “as evidenced by the pertinent licensing documentation.” This implies that licensure is required. However, MPP section 31-002, subdivision (a)(9) states that an “approved foster family home” is exempt from licensure and approved as meeting the same standards as licensed foster family homes.

Moreover, the term “pertinent licensing documentation” can, on its face, be reasonably and logically interpreted to have more than one meaning. Those directly affected would not know which documents are deemed pertinent. It could mean any document or even no documents. Thus, the regulation is unclear because a person directly affected by the regulation would not

understand what “pertinent licensing documentation” would be necessary to demonstrate that the home has been approved.

1.4. Proposed MPP § 45-604.4

This proposed regulatory section states, in relevant part:

45-604.4. A federal Kin-GAP payment may be made on behalf of a sibling of a Title IV-E eligible child, regardless of the sibling’s Title IV-E eligibility status, when the following conditions are met:

.41 ...

.42 The kinship guardian and the county child welfare department, the probation department or the Indian tribe, with a Title IV-E agreement, agree to the *appropriateness of the arrangement*,...

[Emphasis added.]

The regulation can be reasonably and logically interpreted to have more than one meaning. The language “appropriateness of the arrangement” is unclear because it does not specify which standard or criteria would be used to determine the “appropriateness.” Thus, the regulation would not be easily understood by those directly affected by it.

1.5. Proposed MPP § 45-604.1 and § 45-605.1

For the federal Kin-GAP program, proposed MPP section 45-604.1 states that to be “eligible for federal kin-GAP, a child... shall meet the *requirements under the federal kin-GAP Program and the applicable requirements in Section 45-602.*” For the state Kin-GAP program, proposed MPP section 45-605.1 provides that to be eligible for state Kin-GAP, “the child... must meet the *requirements under the state Kin-GAP and all of the general requirements in Section 45-602 that apply.*” (Emphasis added.)

Proposed MPP section 45-604.1 appears to address the eligibility requirements under federal Kin-GAP, while proposed MPP section 45-605.1 appears to address the eligibility requirements under state Kin-GAP. However, the proposed language quoted above provides that there are additional eligibility requirements in section 45-602 for both programs. Section 45-602 does not specify or distinguish which provisions apply to the federal Kin-GAP and which apply to the state Kin-GAP program.

Thus, it is unclear which requirements in Section 45-602 are applicable to the federal Kin-GAP program and which are applicable to the state Kin-GAP program. Therefore, the regulation is unclear because it would not be easily understood by persons directly affected what the eligibility requirements are for the individual Kin-GAP program.

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1.6. Proposed MPP § 45-607.43

Proposed MPP section 45-607.4 establishes the last date of Kin-GAP payment. While proposed sections 45-607.41 and 45-607.42 provide dates, section 45-607.43 simply provides an event. Proposed MPP section 45-607.43 states:

Placement and care responsibility is transferred from the guardian to the county welfare or probation department, unless the condition described in .214 applies.

Section 45-607.43 refers to the condition in “.214.” The “condition described in “.214.” could be a reference to a condition described in any section that ends with “.214.” Thus, this proposed provision is unclear because it can be interpreted to have more than one meaning.

2. Necessity Standard

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines “necessity” to mean:

(a) ... 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.

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

(b) 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 purpose 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. [Emphasis added.]

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 (ISOR). (Gov. Code, sec. 11346.2, subd. (b).) The ISOR 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, subd. (b)(1).) The ISOR 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, sec. 11346.2, subd. (b) and sec. 11346.5, subds. (a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The ISOR submitted with this regulatory action that addresses the changes in the following proposed MPP sections is inadequate for purposes of meeting the necessity standard:

- 2.1. Proposed MPP § 45-602.21
- 2.2. Proposed MPP § 45-602.211
- 2.3. Proposed MPP § 45-602.51
- 2.4. Proposed MPP § 45-604.5
- 2.5. Proposed MPP § 45-605.51
- 2.6. Proposed MPP § 45-606.11
- 2.7. Proposed MPP § 45-607.2
- 2.8. Proposed MPP § 45-607.31
- 2.9. Proposed MPP § 45-607.7
- 2.10. Proposed MPP § 45-607.8

In some cases, the ISOR merely describes the effect of the new or revised provisions in the regulations rather than explains the reasons for the various provisions. This does not meet the necessity standard of Government Code section 11349.1 and section 10 of title 1 of the California Code of Regulations. In other cases, necessity is missing or is inadequate. The ISOR either omits to address a proposed provision or only addresses the necessity for a portion of the proposed provision.

It is important to note that material proposed to be incorporated by reference shall be reviewed in accordance with the same procedures and standards for a regulation published in the California Code of Regulations. (1 Cal. Code Regs., sec. 20, subd. (b).) Therefore, the ISOR must provide necessity for the content of the forms being incorporated by reference.

The ISOR is required to include an explanation of the need and the rationale for each proposed new provision or change to the existing regulations. The ISOR is further required to be made available to the public at least during the 45-day public comment period. Any addition to the ISOR that provides the missing necessity must be made available to the public for comment for at least 15 days prior to adoption of the regulations by the Department pursuant to Government Code section 11347.1, which provides, in relevant part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
 - (1) Persons who testified at the public hearing.
 - (2) Persons who submitted written comments at the public hearing.
 - (3) Persons whose comments were received by the agency during the public comment period.
 - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency....

3. Failure to Follow Required APA Procedures

The APA requires agencies to follow specific procedures. In this rulemaking action, the Department failed to: (1) mail the notice of proposed action at least 45 days prior to the hearing and close of public comment period, (2) include in the rulemaking file a Standard Form 399 (STD. 399) that has concurrence from the State Department of Finance (Finance), (3) properly incorporate documents by reference, (4) include all required documents in the rulemaking file, and (5) summarize and respond to all of the public comments.

3.1. Mailing of 45-Day Notice at Least 45 Days Prior to Public Hearing and Close of Public Comment

Government Code section 11346.4, subdivision (a)(1), requires a state agency to mail the notice of proposed action to every person who has filed a request for notice of regulatory actions with the state agency at least 45 days prior to the hearing and close of the public comment period.

In this regulatory action, the notice of proposed action was published in the California Regulatory Notice Register on October 17, 2014 (Register 2014, No. 42-Z), but the rulemaking record shows that it was emailed on October 22, 2015. To comply with Government Code section 11364.4, subdivision (a)(1), December 6, 2015, was the earliest date for a public hearing and close of public comment period. However, the rulemaking record shows that the public comment period was closed on December 3, 2015, and the public hearing was held on the same date.

To cure this deficiency, the Department must make the entire proposed regulatory text available for public comment a minimum of 15 days, pursuant to the 15-day comment period requirements.

3.2. Standard Form 399

Government Code section 11347.3, subdivision (b)(5) requires a rulemaking file to include the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6) requires, in part, the estimate of the cost or savings to any state agency. This subdivision further defines “cost or savings” as “additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.” Government Code section 11357 requires that Finance adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate, and other information, Finance has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement.” (SAM Chapter 6600, commencing with section 6601.) Specifically, at SAM section 6615, Finance has established when financial estimates contained in an STD. 399 require the concurrence of the Finance. Section 6615 states:

A state agency is not required in all instances to obtain the concurrence of [Finance] in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- | | |
|------------------------------------|---------------------|
| A.1 - Reimbursable Local Costs | B.1 - State Costs |
| A.2 - Non-Reimbursable Local Costs | B.2 - State Savings |
| A.3 - Local Savings | B.4 - Other |
| A.6 - Other | |

Currently in the rulemaking record, the Fiscal Impact Statement part of the STD. 399 depicts “other instances” in sections A.6 and B.4. Thus, the STD. 399 requires Finance concurrence. The rulemaking file does not include an STD. 399 which includes Finance concurrence and, therefore, the Department has failed to follow required APA procedures. A review and signature from Finance must be obtained and indicated on the STD. 399 before this rulemaking action can be resubmitted to OAL.

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3.3. Documents Incorporated by Reference

OAL adopted section 20 of title 1 of the California Code of Regulations to ensure that material incorporated by reference in regulations conforms to the requirements of the APA. Subdivision (b) of this section provides, in pertinent part:

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.... [Emphasis added.]

In order to be reviewed by OAL, a document incorporated by reference must be included along with the regulation text submitted to OAL with the rulemaking file. (Gov. Code, sec. 11343.)

Subdivision (c) of section 20 provides other requirements for a state agency that wishes to incorporate a document by reference in a regulation. Section 20, subdivision (c), states:

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.]

Proposed MPP section 45-602.42 makes reference to a document entitled "SOC 815" and proposed MPP section 45-604.5 requires a child's case file to contain a list of forms. The "SOC 815" document was not identified by title and date in the regulation text. Further, the "SOC 815" document as well as the majority of the forms listed in proposed MPP section 45-604.5 were not included in the rulemaking file, nor were they made available to the public for comment during the public availability period.

These documents were not properly incorporated by reference as required by section 20 of title 1 of the California Code of Regulations. They must be made available to the public for comment for at least 15 days pursuant to sections 11346.8(d) and 11347.1 of the Government Code. Upon resubmittal of the rulemaking file to OAL, these documents must be added to the rulemaking record for OAL's review.

3.4. Documents in Rulemaking File

The rulemaking file does not include all the required documents, pursuant to Government Code section 11347.3, subdivision (b), which states:

11347.3(b) The rulemaking file shall include:...

- (2) All published notices of proposed adoption, amendment, or repeal of the regulation...
- (7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment or repeal of the regulation...
- (10) The text of the regulations as originally proposed and the modified text of the regulations, if any, that were made available to the public prior to adoption.

First, the rulemaking record does not include the 15-day notice of availability for modified text. This notice must be included in the record upon resubmittal of the regulatory action to OAL.

Second, proposed MPP section 45-607.214 discusses a document entitled “ACL 11-78” but it is not included in the record. The proposed regulation states:

45-607.214. The child or nonminor former dependent is subsequently incarcerated and wardship is established. Consistent with *ACL 11-78*, the child remains eligible for Kin-GAP payment if the child returns to the care of the relative guardian and all other eligibility conditions are met. [Emphasis added.]

The referenced ACL 11-78 document must be included in the record upon resubmittal of the regulatory action to OAL. In addition, if the Department intended to incorporate this document by reference in the regulation, the Department must comply with section 20 of title 1 of the California Code of Regulations.

3.5. Summarize and Respond to 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 of and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons include:

- (a)(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.... [Emphasis added.]

In this rulemaking action, the Department provided a 45-day public comment period for its originally proposed text and an additional 15-day notice for substantive modifications to the

proposed text. The Department received a number of comments during these comment periods, but the Department did not summarize and respond to all of the comments.

For example, the Riverside County asked:

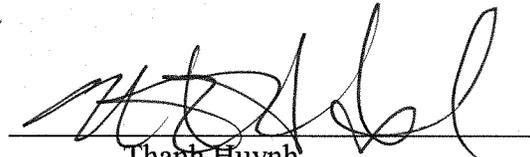
Page 16, 2.22, how would the county staff do this? We normally refer all families to child support. If we have a caretaker claim good cause, staff verification would need to be provided. Is this what they would mean by reviewing the decision?

This comment was not summarized or responded to in the final statement of reasons. Although this is only one example, the Department is required to summarize and respond to all comments received during the 45-day and 15-day comment periods before resubmitting the rulemaking action to OAL for review.

CONCLUSION

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: November 23, 2015



Thanh Huynh
Senior Attorney

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