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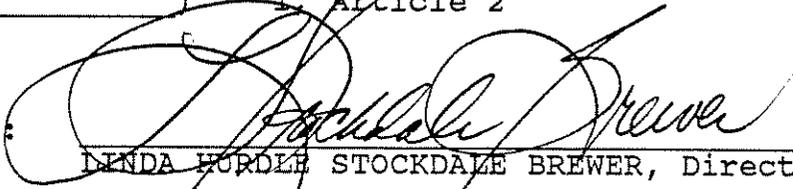
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW JAN 22 4 26 PM 1987

SACRAMENTO, CALIFORNIA

MARCH FONG EU  
SECRETARY OF STATE  
OF CALIFORNIA

In re:	)	1987 OAL Determination No. 1
Request for Regulatory	)	
Determination filed by	)	[Docket No. 86-007]
California Association	)	
of Rehabilitation	)	January 21, 1987
Facilities concerning	)	
the Department of	)	Determination pursuant to
Developmental Services'	)	Government Code Section
Individual Program Plan	)	11347.5; Title 1, California
Manual/1	)	Administrative Code, Chapter
	)	1, Article 2

Determination by:



LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz, Coordinating Attorney  
Rulemaking and Regulatory  
Determinations Unit

THE ISSUE PRESENTED/2

The California Association of Rehabilitation Facilities (Cal-ARF) has requested the Office of Administrative Law (OAL) to determine whether or not the Department of Developmental Services' (DDS or Department) Individual Program Plan Manual (IPPM), is a regulation as defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA)./3

THE DECISION/4, 5, 6, 7

The Office of Administrative Law finds that the above noted Manual (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA./8, 9

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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

In 1969 the Legislature passed the Lanterman Mental Retardation Services Act/10 (currently the Lanterman Developmental Disabilities Services Act)/11 in order to provide counseling to parents and relatives of developmentally disabled persons and to provide alternatives to institutionalization./12 To further these ends, the 1969 Act created a regional center program in California. The California State Department of Developmental Services (DDS) is the state agency currently charged with implementing the Lanterman Act./13

According to the California Supreme Court, to implement the Lanterman Act:

"... the Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, 'has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons' (section 4416) [all section references are to Welfare and Institutions Code] , while 'regional centers,' operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime' (section 4620).

Under the statutory scheme it is the regional centers, not DDS, that provide services to developmentally disabled persons and determine the manner in which those services are to be rendered. (See sections 4620, 4630, 4648, 4651.) DDS has the authority to promote uniformity and cost-effectiveness in the operations of the regional centers. For example, DDS is responsible for developing uniform systems of accounting, budgeting, and reporting (section 4631, subd. (a)), setting the rates for out-of-home care (section 4681), and auditing and paying funds to the regional centers (section 4780.5). . . .

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The rights of developmentally disabled persons and the corresponding obligations of the state toward them under the Lanterman Act are implemented in the Individual Program Plan (IPP) procedure. Under the Act, the regional centers are required to develop an IPP for each client. (section 4647.) The IPP must be prepared and reviewed and, if necessary, modified at least annually, and must include the following: an assessment of the client's capabilities and problems; a statement of time-limited objectives for improving his situation; a schedule of the type and amount of services necessary to achieve these objectives; and a schedule of periodic review to insure that the services have been provided and the objectives have been reached. (section 4646.) . . . [Our emphasis added; original emphasis deleted.]/14

Authority/15

Welfare and Institutions Code section 4691 provides DDS with rulemaking authority concerning community-based day programs for developmentally disabled persons./16 Section 4691(b) states in part:

"For the purpose of ensuring that regional centers may secure high quality services for persons with developmental disabilities, [DDS] shall adopt regulations establishing standards . . . ."  
[Emphasis added.]/17

Applicability of the APA to Department's Quasi-Legislative Enactments

The APA applies by its terms to all state agencies, except those "in the judicial or legislative department."/18 Since DDS is in neither the judicial nor the legislative "department," we conclude that APA rulemaking requirements generally apply to DDS./19, 20

Background

The following undisputed facts and circumstances have given rise to the present Determination.

The Legislature has concluded that the lack of clear standards has brought into question the quality of services provided to the developmentally disabled. Welfare and Institutions Code section 4541(a) provides:

"The Legislature finds and declares that assurance of high quality services to persons with developmental disabilities is adversely affected by the

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lack of clear standards, the lack of a method for setting rates of reimbursement based upon these standards, and the lack of effective enforcement of these standards." [Emphasis added.]

In Welfare and Institutions Code section 4541(c), the Legislature mandated preparation of a detailed plan by September 1, 1983,

". . . to implement standards for quality assurance, rates based upon the standards, a method to enforce the standards, and processes for the vendorization or accreditation of service providers." [Emphasis added.]

In 1984, the Legislature amended Welfare and Institutions Code section 4691 to read:

(a) the Legislature reaffirms its intent that community-based day programs be planned and provided . . . [and] that standards be developed to ensure high quality services. . . .

(b) For the purpose of ensuring that regional centers may secure high quality services for persons with developmental disabilities, the State Department of Developmental Services shall adopt regulations establishing standards. . . .  
[Emphasis added.]

An 82-page document titled the Individual Program Plan Manual (IPPM) was issued (as revised) by DDS in March 1983. As indicated above by the California Supreme Court, the Individual Program Plan procedure is the critical method of coordinating assessment, treatment, and quality control in the context of providing services to the developmentally disabled.

Cal-ARF, the requestor, defines itself as

"a nonprofit trade association whose members are providers of services who represent 80% of the work activity programs and 60% of the day training and activity centers . . . for the developmentally disabled of California. Cal-ARF serves approximately 13,000 developmentally disabled clients on a daily basis. . . ."/21

Responding to the above Individual Program Plan Manual (the challenged rule in this case), Cal-ARF filed a Request for Determination with OAL on April 13, 1986.

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In this Request, Cal-ARF describes the IPPM as

". . . a comprehensive document containing 'guidelines' and outlining the philosophy of the Individual Program Plan, the goals and objectives of the Plan, a complete description of each procedure required by the program, detailed instructions on preparing a client's Individual Program Plan and developmental record, methods for quality control, and a large number of forms to be used covering everything from client summary profiles to internal audit forms."/22

Cal-ARF also alleges that

". . . DDS has unilaterally adopted the IPPM, implemented it as if it were a regulation, and holds Cal-ARF members accountable to its provisions."/23

According to comments submitted by Protection and Advocacy, Inc.:

"As an appendix to the Regional Center Operations Manual (RCOM) which DDS has developed in consultation with the Association of Regional Center Agencies (ARCA), the IPPM is incorporated by reference into the contracts between DDS and each of the 21 regional centers pursuant to Welfare and Institutions Code sections 4620 et seq. (See RCOM §§1000 [sic] and 5502 . . . ; paragraph 10 of the contract between regional centers and DDS . . . ) The IPPM is specifically referenced in a division of the RCOM, Eligibility and Client Services, that provides operating guidelines which are not binding upon regional centers except to the extent that they reiterate existing statutory, regulatory or contract provisions. (RCOM §§1100, 1200 and 5502 . . . .)" [Emphasis in original.]/24, 25

Though reserving judgment on the bulk of the Regional Center Operations Manual (RCOM), OAL found in 1986 OAL Determination No. 10 that two specific RCOM provisions were invalid "underground regulations"/26

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II. DISCUSSION OF DISPOSITIVE ISSUES

There are three main issues before us:/27

- (1) WHETHER THE ISSUANCE OF THE CHALLENGED RULE CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE DEPARTMENT.
- (2) WHETHER THE CHALLENGED RULE IS A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE REFLECTS THE EXERCISE OF THE DEPARTMENT'S QUASI-LEGISLATIVE POWERS.

The term "quasi-legislative" is not defined in the APA./28 In determining whether a rule reflects the exercise of quasi-legislative power, we look to the judicial definition of "quasi-legislative."

According to the California Supreme Court, a quasi-legislative rule is one formulating a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case./29

According to the prologue and introduction to the IPPM, that Manual is a "manual of guidelines" (emphasis added) "designed to provide . . . instruction in the development of the client's IPP . . . ." [Emphasis added.]

Indeed, the IPPM consists of a number of general policies to which future IPP drafters are expected to conform.

The Individual Program Plan Manual clearly meets the judicial definition of "quasi-legislative." Therefore, we conclude that the Manual reflects the exercise of DDS' quasi-legislative powers.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . .  
." [Emphasis added.]

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Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, . . . manual, instruction [or] . . . standard of general application which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, . . . manual, instruction [or] . . . standard of application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342(b) involves a two-part inquiry.

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the Department or
- o govern the Department's procedure?

The answer to both parts of this inquiry is "yes."

For purposes of analysis, we will focus on one particular provision of the Individual Program Plan Manual, as one example of the numerous regulatory provisions in the Manual. Other regulatory provisions are discussed in note 9.

By way of background, we note that Welfare and Institutions Code section 4646(b) provides in part:

"The program plan shall include the following:

. . . .

(b) a statement of specific, time-limited objectives for improving the capabilities and resolving the problems of the person." [Emphasis added.]

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The IPPM provides:

"All IPP objectives are based on identified goals. An objective is a statement of a specific, measurable outcome to be accomplished by or for the individual within a designated time limit."/30 [Emphasis added.]

The IPPM then defines the statutory term "time-limited" as follows:

- (1) "Practical goals may be from one to five years in range, with only one to three generally reflected on the IPP." [Emphasis added.]/31
- (2) Regional centers are required to either use IPP forms (DS 1871 and DS 1871-A) appended to the Manual or to develop their own form "provided that their form requires the same information."/32 Instructions accompanying the forms dictate how the plan is to be prepared: "long range goals" are to be listed; "up to three long term areas of achievement. Success anticipated in time in excess of one year . . . ." [Emphasis added.]

"Objectives" are to be listed; "the objectives are designed as achievable within one year." [Emphasis added.]

By generally defining "time-limited" in this way, DDS has clearly interpreted and made specific the law administered by that Department. Whether DDS is perceived as "enforcing" or "issuing" the one to five year guideline, the guideline is nonetheless an illegal "underground regulation" under Government Code section 11347.5./33

We also note that the IPPM supplements the statute by creating and defining the term "goal"/34 and by providing that no more than three goals may be listed on each client's IPP./35

We note that the Department has by its recent actions in effect conceded that policies supplementing statutory provisions on IPPs should be formally adopted as regulations. On October 28, 1986, the Department filed with OAL a notice of proposed rulemaking which, among other things, defined "individual program plan" (55005(o)), required that activity center curricula be based on individuals' IPPs (55020(d)(1)), and set out requirements for the "individual service plan" (55040), a key document intended to "supplement" the IPP (55005(p)./36

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THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA./37 Two exceptions to APA requirements are arguably applicable here.

APA Exception Covering Contractual Provisions Previously Agreed to by the Complaining Party.

Contracts between the State and another party (the "other party" will be henceforth termed "the contractor") contain three basic types of material intended to impose duties upon the contractor:

- (1) provisions expressly requiring the contractor to comply with specified statutes or regulations that would in any event apply to the contractor;
- (2) provisions not meeting the APA's definition of "regulation";/38
- (3) provisions meeting the APA's definition of "regulation."

The third category concerns us here.

There is some authority for the proposition that contractual provisions previously agreed to by a contractor may not later be challenged by that contractor as an underground regulation./39

On the other hand, the APA contains no provisions for non-statutory exceptions./40 Further, a recent case held that a private contracting party was not estopped from challenging the legality of a "void and unenforceable" contract provision to which the party had previously agreed./41

From the record before us, it appears that the challenged Manual has been incorporated by reference into contracts between the Department and the regional centers. The regional centers, however, are not contesting the validity of the IPPM. Rather, the requestor is an association representing certain providers of services. Thus, an entity not a party to the contract is challenging the IPPM provision. Thus, assuming arguendo that there is a viable "contract exception" to APA requirements, that exception does not apply here because the party filing the challenge has not already agreed to the provision at issue.

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Implied Statutory Exemption from APA requirements--Welfare and Institutions Code sections 4646 and 4620

The final paragraph of Welfare and Institutions Code section 4646 provides:

"The state department [DDS], with the participation of regional center personnel, shall prepare a standard format for the preparation of individual program plans, which shall be used by all regional agencies." [Emphasis added.]

Welfare and Institutions Code section 4620 provides in part:

"In order for the state to carry out many of its responsibilities as established in this division, the state shall contract with appropriate agencies to provide fixed points of contact in the community for persons with developmental disabilities and their families . . . .

". . . [P]rivate nonprofit community agencies shall be utilized by the state for the purpose of operating regional centers." [Emphasis added.]

In a comment on Cal-ARF's Request, Protection and Advocacy, Inc. in substance raises the question of whether or not DDS has in effect been exempted by the Welfare and Institutions Code from adopting the IPPM pursuant to the APA.

We conclude that DDS is not exempt in this respect from APA requirements.

First, APA exceptions are narrowly construed to further the APA's basic goals -- meaningful public participation and effective judicial review. This approach to claims of exemption is discussed at length in earlier Determinations./42

Second, enacting the 1979 amendments to the APA, the Legislature not only terminated all prior APA exemptions in Government Code section 11346,/43 but also required that any future legislative exemptions be express./44 Both Welfare and Institutions Code sections 4646 and 4620 are pre-1979 statutes (i.e., chaptered prior to the 1979 APA amendments) which were not subsequently re-enacted in the form of express APA exemptions.

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Third, there is in any event no inconsistency between the APA and the two Welfare and Institutions Code sections under discussion. Welfare and Institutions Code section 4646 simply imposes an additional requirement: that regional center personnel participate in DDS' preparation of an IPP standard format./45

Welfare and Institutions Code section 4620 merely grants contracting authority and identifies the type of entities with whom the Department may contract.

We note that Government Code section 11347.5 specifically states that "no state agency shall issue . . . any guideline, . . . [or] manual . . . which is a regulation [as defined in the APA]." [Emphasis added.] Even when read together with the two Welfare and Institutions Code sections under discussion, it would appear that Government Code section 11347.5 must be interpreted to preclude the Department from evading APA requirements by incorporating one self-described "manual of guidelines" (the 84-page IPPM) into a second manual of guidelines (the 650-page Regional Center Operations Manual) and then incorporating the second manual into a contract./46

Lastly, any remaining doubt as to the intent of the Legislature in this regard is eliminated by consideration of a third Welfare and Institutions Code section concerning both contracts and regulations.

Section 4640 provides:

"Contracts between the department and regional centers shall specify the service area and the categories of persons that regional centers shall be expected to serve and the services to be provided. In order to assure uniformity in the application of the definition of developmental disability contained in this division, the Director of Developmental Services shall, by March 1, 1977, issue regulations that delineate, by diagnostic category and degree of handicap, those persons who are eligible for service by regional centers. In issuing the regulations, the director shall invite and consider the views of regional center contracting agencies, the state council, and persons with a demonstrated and direct interest in developmental disabilities." [Emphasis added.]

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Section 4640 mandates that certain policies not only be incorporated into contracts between the Department and regional centers, but also be adopted as regulations, -- with regional center representatives and others participating in the policy drafting process.

Obviously, the Legislature did not view participatory preparation and inclusion in contracts -- on the one hand -- and formal adoption as regulations -- on the other hand -- as activities that were in the very nature of things mutually exclusive.

We conclude, therefore, that none of the available APA exceptions applies to the challenged rule.

III. CONCLUSION

For the reasons set forth above, OAL finds that the DDS Individual Program Plan Manual (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

DATE: January 21, 1987

  
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HERBERT F. BOLZ  
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Rulemaking and Regulatory  
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for: LINDA HURDLE STOCKDALE BREWER  
Director

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NOTES

1. In this proceeding, the California Association of Rehabilitation Facilities was represented by David Rosenberg, Esq. of Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, 17th Floor, Sacramento, CA 95814. The Department of Developmental Services was represented by Harriet Hopgood.
2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-011), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum narrowly interpreting ambiguous statute). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation.
3. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, concern administrative adjudication rather than rulemaking.
4. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of

- Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall be published in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.) Implementing this directive, this and other determinations are presently being mailed to the presiding judges of all state and federal courts in California.
5. A timely comment was received from Protection and Advocacy, Inc.
  6. In this case, the Department elected not to submit a response to the Request for Determination. In general, we encourage affected agencies to submit responses in order to obtain full presentation of contrasting viewpoints. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.
  7. An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.
  8. We read the requestor's Prayer in the Request for Determination as asking that the Individual Program Plan Manual be found (1) a "regulation" and (2) subject to the requirements of the APA and therefore invalid and unenforceable unless adopted pursuant to the APA. We interpret the language of the Prayer requesting a finding of "null and void and of no force and effect" as equivalent to requesting a finding of "invalid and unenforceable" and nothing more.
  9. The Individual Program Plan Manual contains numerous regulatory provisions--too numerous to be listed here. Each of the regulatory provisions meets both prongs of the statutory definition of "regulation."

Brief mention will be made of several particular provisions as examples of the content of the Individual Program Plan Manual.

- (1) The IPPM supplements the statute by creating and defining the word "plan". ("A plan of action states who is responsible for what, in conjunction with whom, and how, where, and when it will happen." IPPM, p.8) (Emphasis in original.)

- (2) "For each objective listed in the IPP, there must be at least one specific plan of action." (p.8) (Emphasis added.)
- (3) "Such procedures [plans] must be consistent with normalization, the developmental model and the rights and desires of the individual." (p.8) (Emphasis added.)
- (4) Making specific the statutory term "assessment" (Welfare and Institutions Code, section 4646, paragraph 1) the IPPM (p.9) mandates that

"the client assessment process shall include:

Physical/Medical Assessment  
 Psychological or Developmental Assessment  
 Social Assessment  
 Client Development Evaluation Report (CDER)"

- (5) "Each detailed provider of service plan, such as the IEP [Individual Education Plan] or IHC [Individual Habilitation Component], shall become a component of the client's IPP." (p.13)
- (6) The IPPM also contains references to several compilations of criteria used to evaluate the "appropriateness, adequacy, effectiveness, and efficiency of the programs and services being provided to regional center clients." (p.27) These compilations include (a) the "Systems Evaluation Package" (SEP), (b) the "Standards for Services for Developmentally Disabled Individuals", and (c) the "A Normalization and Development Instrument" (ANDI) Manual. Because the question is not properly before us, we express no opinion as to whether or not the above noted compilations would pass muster under Government Code §11347.5.

Additional regulatory material is identified in text section II(2).

10. Stats. 1969, ch. 1594, Health and Safety Code §§38000, et seq.
11. Welfare and Institutions Code §4500 et seq.
12. 58 Ops.Cal.Atty.Gen. 171, 172 (1975).
13. In a 1978 Executive Branch reorganization, the California State Department of Health was divided into ten departments, one of which was DDS.

14. Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 389, 211 Cal.Rptr. 758, 760.
15. We discuss the affected agency's rulemaking authority (see Gov. Code, §11349(b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Gov. Code, §11349.1(a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

In the matter at hand, a commentor suggests that DDS may lack authority to adopt as regulations some portions of the IPPM. This contention may or may not have merit. We need not decide this matter until such a regulatory filing is submitted to us under Gov. Code, §11349.1(a). At that point in time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. Gov. Code, § 11349.1.

16. "Developmental disability" is defined in section 4512(a) of the Welfare and Institutions Code as:

"a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism[ ], but shall not include other handicapping conditions that are solely physical in nature. . . ."

17. Welfare and Institutions Code section 4405 provides in part that the Director of Developmental Services

"shall have the powers of a head of a department pursuant to Chapter 2 (commencing with Section 11150) of Part 1 of Division 3 of Title 2 of Government Code . . . ."

Government Code section 11152 states in part:

". . . So far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department . . . ." [Emphasis added.]

18. Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
19. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
20. Government Code section 11152 provides in part:

"So far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department . . . ." [Emphasis added.]

We interpret the phrase "So far as consistent with law" to mean (among other things) that regulations adopted under this section must be adopted in conformity with the law governing administrative regulations -- the APA.

21. Request for Determination, pp. 1-2.
22. Id., p. 3.
23. Id.
24. Letter of Dec. 8, 1986, p. 2.
25. We reject the notion that "non-binding operating guidelines" are permissible under current California law. Gov. Code § 11347.5; Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-33--B37; typewritten version, pp. 6-13; Supplemental Information Concerning 1986 OAL Determination No. 3 (Board of Equalization, August 14, 1986, Docket No. 85-004), California Administrative Notice Register 86, No.35-Z, August 29, 1986,

- pp. B-6--B-9; typewritten version, pp. 1-4. Cf. 64 Ops. Cal. Atty. Gen. 910, 917-918 (1981) (pre-dating Gov. Code § 11347.5).
26. (Department of Developmental Services, Nov. 26, 1986, Docket No. 86-006), n. 8; California Administrative Notice Register, No. 50-Z, December 12, 1986, n. 8).
27. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (points 1 and 2); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1, 2 and 3); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 144, 186 Cal.Rptr. 165, 175 (point 1); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
28. See Government Code section 11346, which provides:
- "It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]
29. Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 111 (quasi-legislative acts are reviewable by ordinary mandamus (Code Civ. Pro., sec. 1085) or action for declaratory relief (Code Civ. Pro., sec. 1060); whereas, quasi-judicial or adjudicatory acts are reviewable by administrative mandamus (Code Civ. Pro., sec. 1094.5)); as cited in 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-34 and n. 14; typewritten version, p. 7 and n. 14.

30. IPPM, p. 5.
31. Id.
32. Id., p. 29.
33. See note 25, above.
34. IPPM, p. 5.
35. The latter directive is contained in instructions accompanying the forms appended to the IPPM.
36. California Administrative Notice Register, No. 45-Z, November 4, 1986, pp. A-5--A-8.
37. The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
  - a. Rules relating only to the internal management of the state agency. Government Code section 11342(b).
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. Government Code 11343(b).
  - c. Rules that "establish[ ] or fix[ ] rates, prices or tariffs".
  - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. Government Code section 11342(b).
  - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. Government Code section 11343(a)(3).
  - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (quoted in full in note 28) (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and

unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 807, 821, 171 Cal.Rptr. 604, 612 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions.

38. See Government Code §11342(b).
39. City of San Joaquin, Roth and Nadler, cited in note 37, above.
40. Government Code §11346, quoted in note 28, above.
41. City of San Leandro, cited in note 37, above.
42. 1986 OAL Determination No. 8 (Department of Food and Agriculture, Oct. 15, 1986, Docket No. 86-004), California Administrative Notice Register No. 44-Z, October 31, 1986, pp. B-32--B-33; typewritten version, pp. 16-17.
43. Except as provided in Government Code §11346.1.
44. 1986 OAL Determination No. 2 (Coastal Commission), cited above in note 29, Notice Register, p. B-40, typewritten, p. 19; 1986 OAL Determination No. 8 (Department of Food and Agriculture), cited above in note 42, Notice Register, p. B-32; typewritten, p. 16.
45. Government Code §11346; 1986 OAL Determination No. 2 (Coastal Commission), cited above in note 29, Notice Register, p. B-40, typewritten, p. 20.
46. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), Notice Register No. 24-Z, June 13, 1986, p. B-28; typewritten version, pp. 17-18.
47. We note that Welfare and Institutions Code §4640 provides that DDS "shall . . . issue regulations." [Emphasis added.] We are not persuaded by the argument that by enacting a statute mandating an agency to adopt a particular regulation the Legislature thereby implicitly waives APA public notice and hearing requirements on all other facets of statutes administered by that agency. See 1986 OAL Determination No. 8 (Department of Food and Agriculture, Oct. 15, 1986, Docket No. 86-004), California Administrative Notice Register 86, No. 44-Z, Oct. 31, 1986, p. B-34; typewritten version, p. 18.

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