ENDORSED FILED
IN THE OFFICE OF

91 MAR 28 PM 4:43

MARCH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Herb and Emily Weber concerning Far Northern Regional Center's rules relating to "vendorization," its preference for single residential buildings housing six or fewer residents, and the Department of Developmental Services' alleged adoption of such rules[1]	1991 OAL Determination No. 2 [Docket No. 90-004] March 28, 1991 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: JOHN D. SMITH, Interim Director

Herbert F. Bolz, Coordinating Attorney
Mathew Chan, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The primary issue presented to the Office of Administrative Law is whether or not policies of a private non-profit corporation (a "regional center" under contract to a state agency) concerning "vendorization" and preference of single residence housing are "regulations," without legal effect unless adopted in compliance with the Administrative Procedure Act. A second issue is whether the Department of Developmental Services (the contracting state agency) has in effect "adopted" these two policies, and if so, whether the policies should be deemed to be "regulations."

The Office of Administrative Law has concluded, first, that since a regional center is not a "state agency," the challenged policies cannot be "regulations." Secondly, the housing preference policy has not been adopted by the Department of Developmental Services; and, the vendorization policy, which had been previously adopted by the Department without compliance with the Administrative Procedure Act, has already been determined to be a "regulation." The vendorization policy has since been duly adopted as a "regulation" pursuant to the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] (1) whether or not policies of a private non-profit corporation (Far Northern Regional Center ("FNRC")) concerning "vendorization" and preference of single residence housing are "regulations," without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"); and (2) whether the Department of Developmental Services ("DDS") has in effect "adopted" these two policies, and if so, whether the policies should be deemed to be "regulations."

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) the challenged rules pertaining to "vendorization" were adopted by both DDS and FNRC;

(2) FNRC's stated preference for single residential housing, if indeed adopted as a rule, was adopted solely by that regional center;

(3) FNRC is neither a "state agency" nor an agent of the state;

(4) the rules adopted solely by FNRC are not "regulations" subject to the requirements of the APA;

(5) adoption of the "vendorization" policy by DDS prior to its compliance with the APA has already been determined to be a "regulation" as defined in Government Code section 11342, subdivision (b), and in violation of Government Code section 11347.5, subdivision (a);[9] this policy, however, was adopted by DDS pursuant to the APA on June 26, 1990.

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
>
> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][10]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

In 1969, the Legislature passed the Lanterman Mental Retardation Services Act[11] (currently the Lanterman Developmental Disabilities Services Act ("Lanterman Act"))[12] in order to provide counseling to parents and relatives of developmentally disabled persons and to provide alternatives to institutionalization.[13]

According to the California Supreme Court,[14] 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,[[15]] '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)." (Emphasis added.)

The funding for services for the developmentally disabled is funneled by DDS through the 21 regional centers in California (including FNRC) to the providers or "vendors" of the services, e.g., residential care facilities.

Authority [16]

DDS's general rulemaking power is established by Welfare and Institutions Code section 4405 and Government Code section 11152. Welfare and Institutions Code section 4405 provides in part:

> ". . . 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 the Government Code . . . ." (Emphasis added.)

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.)

For purposes of this Determination, Welfare and Institutions Code section 4748 provides DDS with specific rulemaking authority as it applies to residential facilities for developmentally disabled persons.[17] Section 4748 states in part:

> ". . . the State Department of Developmental Services shall develop and implement regulations for use by the regional center or its designee to assure uniformity of the care and services to be provided to persons registered with the regional centers who reside in residential facilities." (Emphasis added.)

It is clear that DDS is empowered to adopt regulations "for use by the regional centers." Section 4748 thus implies that regional centers themselves are not authorized to adopt "regulations." In addition, we are aware of no statute which grants regional centers such power.

Background: This Request for Determination

This Request for Determination was submitted by David Rosenberg, Diepenbrock, Wulff, Plant & Hannegan, on behalf of Herb and Emily Weber (together referred to as the "Requester"), owners and operators of licensed adult residential facilities located in Magalia, California and Paradise, California.

FNRC is a private nonprofit corporation under contract with DDS to provide services to persons with developmental disabilities in Butte, Glenn, Lassen, Modoc, Plumas, Shasta, Siskiyou, Tehama and Trinity Counties. According to the Mr. Rosenberg, shortly after FNRC had been contacted by a party interested in purchasing one of the Requester's adult residential facilities, FNRC issued a letter to all "Residential Providers," reminding them that "vendorization is nontransferable." The letter, dated January 24, 1990, stated in part:

> ". . . Anyone with whom [a residential provider] is seriously negotiating a sale and who plans to continue offering residential services to [FNRC] clients, should immediately be referred to [FNRC].
>
> "The new owner must apply for vendorization and complete FNRC requirements. There is no guarantee that the facility will be vendorized. In all cases, [FNRC's] preference is for a single building housing six-or-fewer residents in single or double bedrooms."

On January 31, 1990 and February 12, 1990, Mr. Rosenberg wrote FNRC asking for identification of the rules or regulations which specify the requirements for vendorization and upon which FNRC based its position regarding the non-transferability of vendorization and preference for single building housing of six or fewer residents.

FNRC's response to that inquiry was provided by Kirk M. Manuel, Attorney at Law,[18] in a letter dated February 21, 1990. That letter stated:

> "With respect to your request for further information regarding the non-transferability of vendorization, enclosed for your use please find copies of the pertinent portions of the vendorization manuel [sic] as well as Far Northern Regional Center's policy regarding new, expanded or modified programs. Both documents clearly provide for the non-transferability of vendorization.
>
> "As to Far Northern's 'preference for a single residential building housing six or fewer residents' that simply means that Far Northern Regional Center has found such a set up to physically approach the ideal in terms of care of developmentally disabled clients. Of course, this represents only one aspect of the overall determination involved and could not in and of itself constitute 'preferential treatment' as intimated in your letter. Far Northern Regional Center has accepted other physical facilities as suitable."

On February 22, 1990, Mr. Rosenberg wrote to OAL asking that OAL determine whether or not FNRC and DDS are utilizing "underground regulations" -- i.e., rules, policies, or guidelines which fall within the APA definition of a "regulation," but were not formally adopted under the requirements of the APA. The Request for Determination identified the following issues:

> "(a) Can FNRC implement and enforce policies and procedures regarding 'vendorization,' 'non-transferability of vendorization,' and requirements and criteria for vendorization based upon the same vendorization manual which the OAL has previously found to be an invalid 'underground' regulation?
>
> "(b) Can FNRC implement and enforce policies and procedures regarding 'vendorization,' 'non-transferability of vendorization,' and requirements and criteria for vendorization based upon the so-called FNRC policies, such as the 'Far Northern Regional Center - Policy New, Expanded,

or Modified Programs' which have not been adopted as a regulation and filed with the Secretary of State in accordance with the APA?

"(c) Is FNRC's policy (whether written or unwritten) that 'in all cases, our preference is for a single residential building housing six-or-fewer residents . . .' as it relates to residential facilities invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA?

"(d) Is DDS's express or tacit approval of FNRC's actions invalid and unenforceable as a regulatory action without APA sanction?

On August 3, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[19] along with a notice inviting public comment.

On September 17, 1990, OAL received a Response to the Request for Determination ("Response") from DDS. DDS argues, in part, that OAL's previous declaration that the Vendorization Procedure Manual ("VPM") constituted "underground regulations" and DDS's formal adoption of the VPM as regulations[20] under the requirements of the APA renders the vendorization issues moot. With respect to the third and forth issues raised by the Requester, DDS additionally argues that to the extent the regional center's preference for single building housing represents a "purchase of service" policy developed by FNRC, such a policy is at the sole prerogative of the regional center, is not subject to control by DDS, and does not require promulgation as a "regulation" pursuant to the APA.

II. DISCUSSION

Before reaching the dispositive issues at hand, we briefly address DDS' contention that certain issues raised in this Determination are moot. Initially, we note that DDS' argument is not new. It has been raised in previous determinations and been summarily rejected.[21]

DDS formally adopted the vendorization rules contained in the VPM as emergency regulations on June 26, 1990.[22] Following completion of the rulemaking requirements of the APA, those regulations gained permanent status on October 29, 1990. Section 54326, subsection (a)(1), of Title 17 of the California Code of Regulations expressly prohibits the transfer of "vendorization." While FNRC is bound, under the terms of its contract with DDS, to follow the newly adopted VPM regulations contained in the California Code of Regulations, <u>the validity of FNRC's own policy concerning</u>

"vendorization" prior to the adoption of such regulations has not been resolved. In addition, the fact that the VPM has now been adopted as regulations does not have any impact on the question of whether or not FNRC's preference for single residential housing (a rule not included in the VPM) is a "regulation" required to be adopted pursuant to the APA.

We now turn to the main issues before us, which are:[23]

(1) DO THE CHALLENGED RULES ORIGINATE FROM A "STATE AGENCY" WHOSE RULEMAKING ACTIONS ARE SUBJECT TO THE REQUIREMENTS OF THE APA?

(2) DO THE CHALLENGED RULES FALL WITHIN THE APA DEFINITION OF A "REGULATION?"

A.

FIRST, WE IDENTIFY THE SPECIFIC RULES BEING CHALLENGED ("CHALLENGED RULES") IN THIS DETERMINATION AND THE SOURCE OF THOSE RULES.

The challenged rules appear to fall into two categories:

(1) policies and procedures regarding "vendorization", non-transferability of "vendorization," and criteria for "vendorization;" and

(2) the policy regarding preference for single building housing.[24]

The first set of challenged rules, pertaining to aspects of "vendorization" is reflected by both the VPM and FNRC's own written policy regarding, "New, Expanded, or Modified Programs." We have previously determined that the rules contained in the VPM were "underground" regulations "adopted" by DDS.[25],[26]

With respect to the second category of challenged rules, DDS argues that FNRC's stated preference for single building housing, if indeed a guideline for preferential treatment, represents a unique "purchase of service" policy which is not subject to DDS control. The Requester asserts that FNRC has issued a rule of general application and apparently claims that DDS has itself "adopted" the rule through an expressed or tacit approval of that policy.

SECOND, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE.

DDS

DDS is a "state agency" as that term is defined in Government Code section 11000.[27] Government Code section 11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."[28] Since DDS is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to DDS.[29]

In addition, DDS is made subject to the APA by Government Code section 11152, which 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 read the word "law" to refer to the statutes pertaining to rulemaking, i.e., the APA. Furthermore, we are aware of no specific[30] statutory exemption which would permit DDS to conduct rulemaking without complying with the APA.

FNRC

The Legislature, in its enactment of the Lanterman Act, specifically distinguished regional centers from state agencies. Welfare and Institutions Code section 4620 states in part:

> "The legislature finds that the services provided to individuals and their families by regional centers is of such a special and unique nature that it cannot be satisfactorily provided by state agencies. therefore, private non-profit community agencies shall be utilized by the State for the purpose of operating regional centers." (Emphasis added.)

It is undisputed that FNRC is not a "state agency." What is disputed, however, is whether or not FNRC is an "agent" of the state and, if so, whether FNRC is required to comply with the rulemaking requirements of the APA. We find that FNRC is not an "agent" of the state and therefore do not reach the second issue.

Civil Code section 2295 defines an agent as "one who represents another, called the principal, in dealings with

third persons." Courts have long recognized that one of the essential characteristics of an agency relationship is the principal's right to control.

> "A major consideration in determining an agency relationship exists is whether an employer retains a right of control over one whom he employs not only as to the result of work done but also as to the mode of accomplishing the work. [Citations.] Conversely, lack of control over the method and details of work tends to show an independent contractual relation rather than one of agency. [Citations.]
>
> "Nevertheless, the control which an owner may exert in his general supervisory power over work done at his behest may be a broad general power of supervision without changing a relationship from employer-independent contractor to one of agency. 'The owner may retain a broad general power of supervision and control--including the right to inspect, . . . the right to work, . . . the right to prescribe alterations or deviations in the work, . . . --without changing the relationship from that of owner and independent contractor or the duties arising from that relationship.' [Citation.]"[31] (Emphasis added.)

The requester argues that DDS's pervasive control over regional centers, as manifested by the terms of contract and statutory and regulatory provisions, demonstrates the existence of an agency relationship. We disagree. Any control which DDS has over the regional centers are, at best, of a general nature.

The California Supreme Court, in the case of Association for Retarded Citizens--California v. Department of Developmental Services ("ARC")[32] has made it crystal clear that DDS has no control over how the regional centers provides services. The court, in specifying the different roles of DDS and the regional centers said:

> "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. [Citations.] 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 [citation], setting rates for out-of-home care [citation], and auditing and paying funds to the regional centers [citation.] In short, whereas the responsibility of the regional centers is broadly to

> provide each developmentally disabled person with services that enable him to live a more independent and productive life in the community [citations], the responsibility of DDS, as the Attorney General has concluded on other occasions, is basically limited to promoting the cost-effectiveness of the operations of the regional centers, and does not extend to the control of the manner in which they provide services or in general operate their programs [citations]."[33] (Emphasis added.)

The Court went on to say:

> "From our review of the provisions of the [Lanterman] Act, we reach the following . . . conclusions. . . . the regional centers and DDS have distinct responsibilities in the statutory scheme; that of the regional centers is to provide each developmentally disabled person with the services to which he is entitled under the Act; that of DDS is to promote the cost-effectiveness of the operations of the regional centers, but not to control the manner in which the provide services.[34] (Emphasis added.)

The Requester cites numerous cases in support of the contention that regional centers are agents of the state. The main case relied upon by the Requester appears to be Pacific Grove-Asilomar Operating Company v. County of Monterey ("Pacific Grove").[35] That case, however, is easily distinguishable.

In Pacific Grove, the agreement between the state and the non-profit corporation contained extensive provisions for control by the state. The court noted 25 specific state controls and concluded that "it is clear that [the non-profit corporation] pursuant to the . . . contract is under the absolute control of the state."[36] The state has no such control over FNRC.[37] While the contract[38] does require compliance with "all California statutes, laws, and regulations applicable to nonprofit corporations,"[39] such statutes, laws, and regulations do not control each aspect of the day-to-day operation of the regional centers.[40] The Legislature clearly intended each regional center to exercise its own discretion in providing for services to developmentally disabled persons. This is indicated in Welfare and Institutions Code sections 4630 and 4651. Section 4630 states in part:

> "The contract between the state and the contracting agency shall not:
>
> ". . .

> "(b) Prevent a regional center from employing innovative programs, techniques, or staffing arrangements which may reasonably be expected to enhance program effectiveness."

Section 4651 states:

> "It is the intent of the Legislature to encourage regional centers to find innovative and economical methods of achieving the objectives contained in individual program plans of persons with developmental disabilities.
>
> "To the extent feasible, within the limitations of state law and available funds, the department shall encourage and assist regional centers to use innovative programs, techniques, and staffing arrangements to carry out their responsibilities."

The other cases cited by the Requester (Evans v. Newton,[41] Kerr v. Enoch Pratt Free Library,[42] Geneva Towers Tenants Organization v. Federated Mortgage Investors,[43] Mathis v. OIF, Inc.,[44] Ginn v. Matthews,[45] Sokol v. Public Utilities Commission,[46] and Public Utilities Commission v. Pollak[47]) also fail to bolster the Requester's claim that FNRC is an agent of the state. These cases focus on a determination of what constitutes "state action" for purposes of civil rights violations and other constitutional inquiries; they do not address the law of principal and agent.

In considering the statements of the California Supreme Court, the provisions of the Lanterman Act and the absence of specific controlling provisions contained in the FNRC/DDS contract, we find that FNRC is not an agent of the state.[48]

FNRC's policies are not subject to the requirements of the APA.

B.

DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b)?

Government Code section 11342, subdivision (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.)

By definition, "regulations" are "adopted" by "state agencies." As we have concluded that FNRC is neither a "state agency" nor an agent of the state, the rules adopted solely by FNRC cannot be "regulations." While DDS is a state agency, the record before us does not demonstrate that DDS has specifically "adopted" FNRC's stated preference for housing. The challenged rule on that issue is clearly not a "regulation." As for the rules pertaining to "vendorization," we have already determined that any such rules adopted by DDS (prior to formal adoption under the APA) constitute invalid "underground" regulations.[49]

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the challenged rules pertaining to "vendorization" were adopted by both DDS and FNRC;

(2) FNRC's stated preference for single residential housing, if indeed adopted as a rule, was adopted solely by that regional center;

(3) FNRC is neither a "state agency" nor an agent of the state;

(4) the rules adopted solely by FNRC are not "regulations" subject to the requirements of the APA;

(5) adoption of the "vendorization" policy by DDS prior to its compliance with the APA has already been determined to be a "regulation" as defined in Government Code section 11342, subdivision (b), and in violation of Government Code section 11347.5, subdivision (a); this policy, however, was adopted by DDS pursuant to the APA on June 26, 1990.

DATE: March 28, 1991

HERBERT F. BOLZ
Coordinating Attorney

MATHEW CHAN
Staff Counsel

Rulemaking and Regulatory
Determinations Unit[50]

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS8-473-6225
Telecopier No. (916) 323-6826

1. The Request for Determination was submitted by David Rosenberg, Attorney at Law, on behalf of Herb and Emily Weber. Mr. Rosenberg is with the law firm of Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, Suite 1700, Post Office Box 3034, Sacramento, CA 95812-3034, (916) 444-3910. The Department of Developmental Services was represented by Michael B. Mount, Assistant Chief Counsel, 1600 9th Street, Sacramento, CA 95814, (916) 323-7796.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is 30 rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

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. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket

No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." 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.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. 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.

   The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00 ($4.65 if mailed).

9. Government Code section 11347.5 provides:

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

   "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office

may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.

11. Stats. 1969, ch. 1594, Health & Saf. Code, secs. 38000, et seq.

12. Welfare and Institutions Code sections 4500 through 4846.

13. Contracting for Placement Services and Case Management for Disabled, 58 Ops.Cal.Atty.Gen. 171, 172 (1975).

14. Association for Retarded Citizens--California v. Department of Developmental Services (hereafter "ARC") (1985) 38 Cal.3d 384, 389, 211 Cal.Rptr. 758, 760.

15. In a 1978 Executive Branch reorganization, the California State Department of Health was divided into ten departments, one of which was DDS.

16. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (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 Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (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.

    The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that 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. (Only persons who

have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public 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, sec. 11349.1.)

17. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as follows:

> ". . . 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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature."

18. Mr. Manuel is with the law firm of Simpson, Maire & Lopez, 169 Hartnell Avenue, P.O. Drawer 4607, Redding, CA 90089, (916) 223-5716.

19. California Regulatory Notice Register 90, No. 31-Z, August 3, 1990, p. 1156.

20. The emergency regulations were adopted on June 26, 1990 (OAL file no. 90-0619-06E), and became effective on July 1, 1990. The formal adoption of the regulations occurred with the filing of the Certificate of Compliance with the Secretary of State on October 29, 1990 (OAL file no. 90-0928-03C).

21. E.g., 1989 OAL Determination No. 17 (Department of Industrial Relations, Division of Labor Standards Enforcement, December 29, 1989, Docket No. 89-005), CRNR 90, No. 3-Z, January 19, 1990, p. 106;1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002), CANR 86, No. 38-Z, September 19, 1986, p. B-18.

22. DDS' VPM was adopted as sections 54300 through 58448 of Title 17 of the California Code of Regulations.

23. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and 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.

24. In its Response, DDS points out that FNRC's policy pertaining to single residence housing is not mandatory; it merely constitutes a stated preference. DDS has indicated that the "preference" is only one of the aspects of the overall determination of whether a facility is suitable.

25. 1986 OAL Determination No. 10 (Department of Developmental Services, November 26, 1986, Docket No. 86-006), CANR 86, No. 50-Z, December 12, 1986, p. B-9.

26. The fact that FNRC adopted the same rule as DDS does not in itself make FNRC's policy subject to the requirements of the APA. However, if there were evidence to demonstrate that a significant number of regional centers had incorporated the same DDS rules in their individual policies, then one could argue that the regional centers were acting in concert with DDS to enforce the same VPM provisions that had been declared invalid. In that case, the regional centers' policy regarding the non-transferability of vendorization, like the VPM non-transferability rule, could also be declared an "underground regulation." (Compare 1989 OAL Determination No. 2 (Department of Corrections, February 1, 1989, Docket No. 88-004), CRNR 89, No. 7-Z, February 17, 1989, p. 371 with 1990 OAL Determination No. 8 (Department of Corrections, April 12, 1990, Docket No. 89-014), CRNR 90, No. 17-Z, April 27, 1990, p. 681.)

27. Government Code section 11000 states in part:

> "As used in this title [Title 2. Government of the State of California] 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

Section 11000 is contained in Title 2, Division 3 (Executive Department), Part 1 (State Department and Agencies), Chapter 1 (State Agencies) of the Government Code.

28. Government Code section 11342, subdivision (a).

29. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all

state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

30. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as the "internal management" exemption.

31. Stilson v. Moulton-Niguel Water District (1971) 21 Cal.App.3d 928, 935-936, 98 Cal.Rptr. 914, 918.

32. Supra, 38 Cal.3d 384, 211 Cal.Rptr. 758.

33. ARC, supra, 38 Cal.3d at pp. 389-390, 211 Cal.Rptr. at p. 760.

34. Id., supra, 38 Cal.3d at p. 391, 211 Cal.Rptr. at p. 761.

35. (1974) 43 Cal.App.3d 675, 689.

36. Id., 43 Cal.App.3d at p. 689, 117 Cal.Rptr. at p. 883.

37. DDS' Response distinguishes Pacific Grove as follows:

> "The relationship between the state and regional centers is entirely different. Although they are non-profit corporations,organized under the laws of the State of California, the Legislature has expressly provided that they are not state agencies and that the contractual provisions between the department and the regional center may not impinge upon the legal rights of private corporations, including the right of the regional center employees to self-organization and representation through collective bargaining. (See §§ 4620 and 4630(c) and (d).) In addition, regional centers have their own operations and purchase of service budget, and they make their own decision on how these funds are expended. The board members are not selected by the department, but are selected by the contracting agency, so long as they meet the requirements of section 4622. All staff of the regional center, including the executive director, are hired by the contracting agency, subject to the personnel policies and practices of that agency, and the

benefit provisions and collective bargaining agreements, if any, pursued by the employees. The regional center can be located anywhere in the service area, and the development of IPP's [Individual Plan Procedure's] and implementation of purchase of service decisions is the sole prerogative of the regional center. Thus, the department does not control the day-to-day operations of the regional center, and the relationship between department and the regional centers is clearly distinguishable from that described in [Pacific Grove.]"

38. We note that the contract provided by the Requester appears incomplete. Aside from the cover page, the submitted contract contains terms and conditions which are numbered from eight to forty-eight. The apparent omission of provisions one through seven is noteworthy considering that the Association of Regional Center Agencies has alleged in a response to a related Request for Determination (OAL Docket No. 90-008) that:

> "The contract between DDS and every regional center specifies that the contractor (Regional Center) shall act in an independent capacity and not as officers, employees, or agents of the state of California. (Article I, Section 2 of Regional Center Master Contract.)" (Emphasis in original.)

39. Provision number 11 of FNRC's contract with DDS.

40. The contract also provides for the incorporation by reference of the VPM, which has been formally adopted as regulations pursuant to the APA.

41. (1966) 382 U.S. 296, 299, 15 L.Ed.2d 373, 377.

42. (4th Cir. 1945) 149 F.2d 2212.

43. (9th Cir. 1974) 504 F.2d 493, 487-488.

44. (9th Cir 1976) 545 F.2d 97.

45. (9th Cir. 1976) 533 F.2d 477, 481.

46. (1966) 65 Cal.2d 247, 252, 253.

47. (1952) 343 U.S. 451, 462, 96 L.Ed.2d 1068, 1077.

48. As we have concluded that FNRC is not an agent of the state, we need not address the question of whether rules adopted by an agent of the state are subject to the APA.

49. 1986 OAL Determination No. 10 (Department of Developmental Services, November 26, 1986, Docket No. 86-006), CANR 86, No. 50-Z, December 12, 1986, p. B-9.

50. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.