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MARION FONG SU
SECRETARY OF STATE
OF CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

In re:)	1991 OAL Determination No. 6
Request for Regulatory)	
Determination filed by)	[Docket No. 90-008]
Association for Retarded)	
Citizens, Alameda County;)	October 3, 1991
and the Association for)	
Retarded Citizens, San)	Determination Pursuant to
Diego; concerning the)	Government Code Section
Department of)	11347.5; Title 1, California
Developmental Services')	Code of Regulations,
Regional Center)	Chapter 1, Article 3
Operations Manual and)	
certain Regional Center)	
Operations and Community)	
Services Division)	
memorandums')	

Determination by: MARZ GARCIA, Director

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Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not (1) the "Regional Center Operations Manual" and (2) specified administrative bulletins are "regulations," and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Manual and three of the challenged bulletins contain "regulations."

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not (1) the Regional Center Operations Manual ("RCOM"), (2) Regional Center Operations memorandums RCO 89-26, RCO 89-8, RCO 89-3, RCO 88-31, RCO 88-30 and (3) Community Services Division memorandum CSD 89-2 are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4, 5, 6, 7, 8}

OAL finds that:

The RCOM is subject to the requirements of the APA; the RCOM contains numerous "regulations" as defined in Government Code section 11342, subdivision (b), which are in violation of Government Code section 11347.5, subdivision (a).⁹

The challenged memorandums issued by DDS are subject to the requirements of the APA; RCO 89-26, portions of RCO 88-31, and CSD 89-2 contain "regulations" as defined in Government Code section 11342, subdivision (b), which are in violation of Government Code section 11347.5, subdivision (a); no conclusions are reached concerning the validity of specific provisions of memorandums not submitted to OAL with the request for determination.

R E A S O N S F O R D E C I S I O N

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 Act¹¹ (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 to the providers or "vendors" of the services, e.g., residential care facilities. The interests of these regional centers are represented by the Association of Regional Center Agencies ("ARCA").¹⁶

Authority¹⁷

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 (part of Chapter 2)
states :

"Subject to the approval of the Governor, the head of each department may arrange and classify the work of the department and consolidate, abolish, or create divisions thereof. 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 and may assign its officers and employees such duties as he sees fit. For the betterment of the public service, he may reassign any employees under the chief of any division, such duties as he sees fit." (Emphasis added.)

Welfare and Institutions Code section 4748 provides DDS with specific rulemaking authority concerning residential facilities for developmentally disabled persons. 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.)

Since section 4748 directly empowers DDS to adopt regulations "for use by the regional centers," it is reasonable to infer that the 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, an attorney with the law firm of Diepenbrock, Wulff, Plant & Hannegan, on behalf of the Association for Retarded Citizens, Alameda County ("ARC-AC"), and the Association for Retarded Citizens, San Diego ("ARC-SD"). Both ARC-AC and ARC-SD (jointly referred to as "the Requester") are private, non-profit corporations which are providers of community-based services to developmentally disabled persons. The services provided by these corporations include day programs, residential programs, infant-care programs, transportation services, and others.

The Request for Determination challenges DDS's and the regional centers' use of the Regional Center Operations Manual ("RCOM"), five Regional Center Operations memorandums ("RCO 89-26," "RCO 89-8," "RCO 89-3," "RCO 88-31," and "RCO 88-30" or collectively "RCOs") and one Community Services Division memorandum ("CSD 89-2"). The Requester alleges

that the RCOM is issued by DDS through its Community Services Division and that DDS insists that it be utilized by the regional centers. The Requester also alleges that the RCOs and the CSD were developed by DDS and recognized in the RCOM. The RCOM has been incorporated by reference into each of the contracts between DDS and the regional centers.

On September 28, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁸ along with a notice inviting public comment. Several comments were received,¹⁹ including one from ARCA, submitted on October 29, 1990. On November 13, 1990, OAL received DDS's Response to the Request for Determination. An addendum to that Response ("Revised Response") was submitted on December 12, 1990, following a reply to the initial Response by Mr. Rosenberg.²⁰

II. DISCUSSION

DDS contends, among other things, that "non-binding" rules are not subject to the APA. As this view appears to be the basis for many of DDS's arguments, we begin by addressing its merits.

We first point out that DDS's characterization of a provision as being a "suggestion" or merely "advisory" does not make it so. Whether a state agency rule constitutes a "regulation" hinges upon its effect and impact on the public,^{21, 22} not on the agency's characterization of the rule or the document which contains the rule.²³

More importantly, the question of whether a rule is binding or non-binding is not a factor in determining whether the rule constitutes a "regulation" under the APA. Government code section 11342 defines "regulation" as "every rule [or] regulation . . . adopted by any state agency to implement, interpret or make specific the law enforced or administered by it . . ." (Emphasis added.) Neither the word "binding," nor any other word of similar meaning, appears anywhere in that definition. Although a rule forthrightly described as "binding" by the issuing agency may present the most obvious case of an APA violation, a rule need not be proven to be "binding" in order to constitute a "regulation" within the meaning of Government Code section 11342.²⁴

This conclusion is supported by Government Code section 11347.5, which states:

"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 [it] has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." [Emphasis added.]

In Stoneham v. Rushen,²⁵ the California Court of Appeal noted that a rule which constituted a standard of general application "requir[es] satisfactory APA compliance before its use or enforcement. To reach the contrary conclusion suggested by the Director [of Corrections] would effectively 'strip the statutory requirement that regulations be promulgated pursuant to the APA of all of its force.' (Hillery v. Rushen, supra, 720 F.2d at p. 1136.)" (Emphasis added.)

The use of the disjunctive "or" in section 11347.5 and by the court in the Stoneham case is significant. Section 11347.5 specifically forbids four distinct agency actions: (1) issuing, (2) utilizing, (3) enforcing, or (4) attempting to enforce underground regulations. Accordingly, state agencies are not only prohibited from enforcing "underground regulations," they are also prohibited from issuing or using them.^{26, 27}

DDS also argues that since RCO 89-8 and RCO 88-31 are no longer in effect, a determination as to whether those rules should have been adopted pursuant to the APA is moot. We disagree. Parties required to comply with rules established by those RCOs are entitled to a Determination of whether or not those RCOs were valid and enforceable.²⁸

We now turn to the main issues before us:²⁹

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ACTIONS OF DDS AND THE REGIONAL CENTERS?
- (2) WHETHER THOSE PORTIONS OF THE CHALLENGED RULES WHICH WERE ADOPTED BY DDS CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342?
- (3) WHETHER THOSE PORTIONS OF THE CHALLENGED RULES WHICH ARE DEEMED "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ACTIONS OF DDS AND THE REGIONAL CENTERS.

In this instance, we are faced with a two-part analysis. First, does the adoption of the RCOM, the RCOs and the CSD constitute quasi-legislative action? Second, if the answer to the first question is "yes," is such quasi-legislative

action by DDS and/or the regional centers subject to the APA?

Agency actions fall into three broad categories: quasi-legislative, quasi-judicial, and administrative. The rulemaking portion of the APA generally governs the exercise of quasi-legislative power by Executive Branch agencies; the administrative-hearing part of the APA governs the exercise of quasi-judicial power by specified agencies.³⁰ As stated in 1 California Public Agency Practice, section 20.06:³¹

"Agency actions may be divided into three basic categories: administrative, quasi-judicial, and quasi-legislative. An agency may use a combination of these powers to carry out its responsibilities; however the California APA requires quasi-legislative power to be exercised in accordance with its formal rulemaking procedures. . . . A quasi-legislative action involves the formulation or adoption of a broad, generally applicable policy or rule of conduct that is based on general public policy and is intended to govern future decisions.^[32] A quasi-judicial action involves the application of a rule to the peculiar facts of an individual case in a quasi-adjudicatory context, such as in a license revocation proceeding.^[33] There are two types of 'administrative' actions: (1) carrying out an express and unambiguous legal requirement (set forth in the California Constitution, statutes, regulations, or court orders), such as informing a permit applicant that his or her application cannot be processed absent the statutorily mandated fee; and (2) pure case-by-case determinations. As stated in California Coastal Farms v. Agricultural Labor Relations Board,^[34] pure case-by-case determinations do not involve the implementation of an [sic] general policy by ad hoc means.^[35] In that case, the agency developed a set of guidelines to limit picketing in response to complaint in a particular case; the court upheld the agency's decision to address the immediate problem without articulating rules of general applicability. The practice of pure case-by-case determination must be distinguished from the much different situation in which the agency announces a rule of general applicability without first publishing that rule in the California Code of Regulations, and then proceeds to enforce the rule. For example, in San Diego Nursery Company v. Agricultural Labor Relations Board,^[36] the court ruled against an agency that had announced an uncodified general policy and then proceeded to apply it in specific situations. In short, an agency need not develop a general rule to cover a problem left unresolved in pertinent codified law, but if it does have such a general rule (possibly developed through

administrative adjudication), this rule must be formally adopted pursuant to the California APA absent an express statutory exception from California APA requirements."³⁷ (Emphasis added; some notes omitted.)

Since the term "quasi-legislative" is not defined in the APA,³⁸ it is appropriate to look to judicial definitions of the term to determine whether the adoption of a specific rule reflects the exercise of quasi-legislative power. In its Agency Response, DDS states:

"A quasi-legislative act is one 'intended to govern future . . . decisions, rather than the application of rules to the peculiar facts of an individual case.' (Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 168.) A quasi-legislative act is one that 'declare[s] [a] public purpose and make[s] provision for [the] ways and means of its accomplishment . . . [citations omitted.]'" (Hubbs v. People ex rel. Dept. Pub. Wks (1974) 36 Cal.App. 3d 1005, 1008.) In contrast, a ministerial or administrative act is one that is

"necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or . . . [is] devolved upon it by the organic law of its existence . . . (Id. at pp. 1008-9.)"

"In Hubbs, the court refused to find that the Department of Public Works [predecessor of CalTrans] had to adopt regulations under the A.P.A. in order to raise rents on property it acquired for future highway use. The court reasoned that the legislative act was the adoption of a statute that created a duty to acquire land for future highway use. When the Department . . . carried out this duty by leasing the property and raising the rents as appropriate, it was performing an administrative function to carry out the legislative policy. (Id. at p. 1009.) The court further reasoned that state was acting as a landlord and it was not required to promulgate regulations under the A.P.A. to raise the rent on land it owns. (Ibid.)"

Hubbs was decided in 1974. In 1976, the same panel of judges that had decided Hubbs distinguished it in a case in which CalTrans had allegedly adopted underground regulations establishing a submission deadline and other criteria for local government funding applications. In City of San Marcos v. California Highway Commission, Department of Transportation,³⁹ the Court considered an argument that a challenged CalTrans policy setting a deadline for submission of local government applications for state road construction

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funds did not violate the APA because it was not "quasi-legislative" in character.

After reviewing the trial court finding that the challenged application deadline rule was an underground regulation, the City of San Marcos court stated:

"It was acknowledged by all concerned that the department [CalTrans], in carrying out its responsibilities under [Streets and Highways Code] sections 2456 and 2457, and the authority to make allocations under section 2453 as delegated to it by the commission, necessarily needed some period of time within which to review the application of any entity seeking an allocation in order to determine whether it had complied with the statutory conditions for the assertion of its priority. Moreover, it is clear that the department had the implied power to adopt reasonable rules and regulations necessary for the efficient administration and exercise of the express power to review those applications. [citations omitted.] The question is whether the regulation asserted falls within the purview of the [APA]."

"Subdivision (b) of section 11371 [currently section 11342] provides in relevant part, that for the purpose of the statute, 'Regulation' means 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, except one which relates only to the internal management of the state agencies. . . . ' It is obvious that the requirement is the 1973 resolution fixing a deadline for the receipt of a 'valid and correct application,' as modified by letter to February 15, 1975, and the accompanying list of the minimum documents that must be included in a local agency's application, are standards which the commission and the department purported to adopt to implement the provisions of section 2456 of the Streets and Highways Code . . . , which the Legislature entrusted to the department to administer, and, as well, to govern the procedure to be followed by the department in making the mandated review. They therefore would come within the provisions of the act which govern when a regulation will become effective (sec. 11422 [currently, 11346.2]), the manner of giving notice of the proposed adoption of the regulation (sec. 11423 [currently, 11346.4]), the matter to be included in the notice (sec. 11424 [currently, sec. 11346.5]), the opportunity for interested persons to be heard with respect to the proposed regulation (sec. 11425 [currently, sec.

11346.8]), and filing and publication of the regulation (secs. 11380-11385 and secs. 11409-11415)." (Emphasis added.)⁴⁰

Next, the City of San Marcos Court summed up the CalTrans argument that the Court should follow Hubbs and decide that the application deadline rule was not quasi-legislative in nature. The City of San Marcos Court distinguished Hubbs, noting:

"In Hubbs we held that the power conferred on [the Department of Public Works, predecessor to CalTrans] to lease property acquired for future highway needs, did not carry with it the power or duty to make rules and regulations having the force of law [i.e., the statute did not grant the agency implied authority to adopt regulations]. We concluded, 'With respect to defendant, it is not required to perform duties as a landlord additional to those required of private landlords. Accordingly, neither it nor the department, as its agent, was required to enact rules and regulations for the conduct of the landlord-tenant relationship here involved. [Citation omitted.] Here, on the other hand, [CalTrans] had to make provision for ways and means of carrying out the review required by the Legislative purpose embodied in the statute, a function we recognized as legislative in character in Hubbs (citation omitted). In fact, insistence on [CalTrans'] right to create a deadline and prescribe the material to be furnished demonstrates the quasi-legislative nature of the rules." (Emphasis added.)⁴¹

In Hubbs and in City of San Marcos, the critical inquiry was whether or not the agency in question had been delegated quasi-legislative power to issue the rules in question. If such power had not been delegated by the statute being implemented, then actions taken implementing the statute could not be "quasi-legislative" in nature for APA purposes. In Hubbs, the Court found that the agency lacked implied rulemaking authority. In City of San Marcos, by contrast, the Court found that the agency possessed implied authority to adopt regulations to implement a specific statute. The matter at hand, the controversy over the RCOM, resembles City of San Marcos. DDS clearly has rulemaking authority. Further, that authority is not merely implied from a statute as in the City of San Marcos case, it is expressly stated in Welfare and Institutions Code section 4748. In fact, section 4748 mandates DDS to exercise its express rulemaking authority: "[DDS] shall develop and implement regulations" for use by regional centers (emphasis added).

In addition to its reliance on the Hubbs case, DDS argues that the very nature of the RCOM militates against a finding that adoption of the RCOM constitutes quasi-legislative

action. DDS describes portions of the RCOM as provisions mutually agreed upon between DDS and the regional centers (contained in the Administrative Directives Division ("ADD") sections 3000-4999 of the RCOM) -- i.e., binding on the regional centers under the terms of the contract.

DDS argues that the binding portion of the RCOM "merely carries out the policies established by the Legislature in the Lanterman Act concerning the nature and content of the department's contracts for regional centers."⁴² DDS asserts that its adoption of the ADD portion of the RCOM, therefore, is "not a quasi-legislative judgment promulgating a new regulation or standard but rather a specific application of laws and existing regulations."⁴³

The Welfare and Institutions Code sections cited by DDS (4629; 4631, subsec. (b); 4640; and 4657⁴⁴) do not prove its claim. Those statutory provisions discuss only the general nature and contents of contracts between DDS and the regional centers. Insertion of the RCOM provisions (which outline specific requirements) into those contracts, therefore, does not simply constitute the application of law.

In addition, DDS points out that numerous provisions of the RCOM are informational only, and that adoption of such provisions is not a "quasi-legislative" act -- since DDS does not require regional centers to use those sections to govern future decisions. We have already stated that we cannot accept DDS's contention that anytime a rule is characterized by the issuing agency as informational, advisory, or non-binding, that the issuing agency is thereby relieved of the statutory obligation to adhere to APA rulemaking requirements.

DDS also contends that "[n]umerous sections merely restate what is already contained in either statutes or regulations."⁴⁵ The fact that a provision restates existing law, however, does not mean that it does not govern future decisions. DDS's claim that the RCOM provisions are mere restatements of existing law will be addressed in that part of our analysis in which we discuss whether the provisions constitute "regulations."

In the matter of the RCOM, we conclude that the challenged rules are quasi-legislative in nature because they (1) constitute general rules intended to govern future decisions and (2) constitute ways and means for carrying out DDS' statutory directive (Welfare and Institutions Code section 4748, quoted above) to adopt regulations for use by regional centers.

DDS also argues that the adoption of RCO 89-8, RCO 89-3, RCO 88-31 and CSD 89-2 are not quasi-legislative acts.⁴⁶ DDS

asserts that RCO 89-8, RCO 88-31, and CSD 89-2 are administrative or ministerial in nature as they either involve contractual provisions or simply provide information; RCO 89-3 is administrative or ministerial because regional centers are not required to follow it. As discussed above, these arguments are unpersuasive.

In our view, the challenged RCOM, RCOs and CSD include general policies intended to govern future decisions -- i.e., the challenged rules are quasi-legislative in nature. We now analyze the applicability of the APA to such actions by DDS and/or the regional centers.

WE BEGIN BY RECOGNIZING THAT ONLY RULES ADOPTED BY STATE AGENCIES CAN BE DETERMINED TO BE "REGULATIONS," SUBJECT TO THE REQUIREMENTS OF THE APA.

The term "regulation" is defined by Government Code section 11342, subdivision (b), as follows:

"'Regulation' means 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.]

Government Code section 11347.5, subdivision (a), provides as follows:

"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. [Emphasis added.]

The language of the above-quoted statutes effectively prohibits OAL from finding that rules adopted by a non-state agency constitute "regulations" in violation of section 11347.5, subdivision (a). Thus, the key question to answer is whether DDS and FNRC are state agencies for purposes of determining APA applicability.

DDS

The term "state agency," as used in the APA, is defined in Government Code section 11000 as follows:

"As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

It is undisputed that DDS falls within the above-quoted definition of a "state agency." Government Code section 11342, subdivision (b), further indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."⁴⁷ Since DDS is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to DDS.⁴⁸

We are aware of no specific⁴⁹ statutory exemption which would permit DDS to conduct rulemaking without complying with the APA.

Regional Centers

The Requester concedes that FNRC is not a "state agency." It argues, however, that regional centers are nonetheless required to comply with the rulemaking requirements of the APA on the theory that the regional centers are "agents" or "instrumentalities" of the state (i.e., DDS). The Requester apparently equates an "agent" or "instrumentality" of the state with a "state agency" for purposes of triggering APA application. That position is contrary to statutory and case law.

The law appears unambiguous. Government Code sections 11342, subdivision (b), and 11347.5, subdivision (a), both use the term "state agency" without elaboration. Government Code section 11000, which provides the meaning of a "state agency" as used in sections 11342 and 11347.5, does not include an "agent" or "instrumentality" of the state. Reading those statutes together, it must be concluded that in determining the applicability of the APA, the definition of "state agency" does not include private entities, even if they are "agents" or "instrumentalities" of the state.

In People v. A-1 Roofing Service, Inc.,⁵⁰ the reviewing court addressed the issue of whether certain rules and regulations issued by the South Coast Air Quality Management District ("SCAQMD") were properly adopted. The defendant therein argued that the SCAQMD is a state agency and is therefore required to file its rules and regulations with the Secretary of State and have them published in the official code in order to make them valid. The court's response to that contention was as follows:

"While regulations of state agencies must follow this procedural route, the short answer to defendant's contention . . . is that, as noted above, the SCAQMD is expressly provided to be a local agency [not a "state agency"]

Defendant refers to [Health and Safety Code] section 40700, which states that 'A district is a body corporate and politic and a public agency of the state.' In our view that section only states the obvious; the SCAQMD and other such districts are not private agencies. The section does not declare that the district is a 'state agency.'"⁵¹
(Emphasis added.)

The case reflects an understandable reluctance to judicially expand upon or to creatively interpret the unambiguous statutory definition of a "state agency." There is simply no "wiggle room" in that definition or in the use of that term in the definition of a "regulation" to permit a reading of the law to require "agents" or "instrumentalities" of the state to adopt rules pursuant to the APA.

If the Legislature had intended the APA to apply to rules adopted by entities other than "state agencies" as defined by Government Code section 11000, it certainly knew the words to use to accomplish that goal. The various provisions which define a "state body" under the Bagley-Keene Open Meeting Act illustrate this point. The general scope of the Act is established by Government Code section 11127, which states:

"Each provision of this article shall apply to every state body unless the body is specifically excepted from that provision by law or is covered by any other conflicting provision of law." (Emphasis added.)

Section 11121 states:

"As used in this article 'state body' means every state board, or commission, or similar multimember body of the state which is required by law to conduct official meetings and every commission created by executive order"

Section 11121.2 states:

"As used in this article, 'state body' also means any board, commission, committee, or similar multimember body which exercises any authority of a state body delegated to it by that state body."

Section 11121.7 states:

"As used in this article, 'state body' also means any board, commission, committee, or similar multimember body on which a member of a body which is a state body . . . serves in his or her official capacity as a representative of such state body and which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation." (Emphasis added.)

Section 11121.8 states:

"As used in this article, 'state body' also means any advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons." (Emphasis added.)

Sections 11121.2, 11121.7 and 11121.8 expand the definition of a "state body" (as originally set forth in section 11121) and broaden the applicability of the Open Meeting Act. No such statutory expansion of the definition of "state agency" broadening APA applicability exists.

In addition, the question of whether actions of a "state agent" are equivalent those of a "state agency" was directly addressed in the case of Torres v. Bd. of Commissioners of the Housing Authority of Tulare Co.⁵² The issue in that case was whether the State Agency Open Meeting Act, which applies to all state agencies, applies to a housing authority. In ruling that the State Act did not apply to the housing authority, the California Court of Appeal stated:

" . . . the State Act was meant to cover executive departments of the state government and was not meant to cover local agencies merely because they were created by state law. A housing authority is no more a state agency under these acts than is a city or a county. The fact that such entities [sic] from time to time administer matters of state concern may make them state agents for such purposes but not state agencies under the Open Meeting Acts." (Emphasis added.)⁵³

While the Torres case did not specifically address the scope of the term "state agency" as that term is defined in Government Code section 11000 for purposes of APA review, the analogy logically follows -- i.e., the fact that an entity may be an "agent" of the state for some purpose does not ipso facto transform that entity into a "state agency" for APA rulemaking purposes.^{54 55}

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In the matter at hand, regional centers are certainly subject to applicable statutes, regulations, and valid contractual provisions. Additionally, it might be that under the governing statute, the only rules that regional centers might legally utilize on certain topics would be rules duly adopted by DDS. Similarly, regional center actions would appear to be subject to judicial review. However, we are not aware of any authority to support the proposition that in enacting the APA, the Legislature intended in general that private entities, whatever their relationship with state agencies, would themselves be subject to APA rulemaking requirements. As discussed, case law favors the opposite view.

At this point, it is necessary to separate those portions of the challenged rules which were adopted by DDS -- i.e., rules which must comply with APA requirements -- from the portions which were adopted by individual regional centers -- i.e., rules not subject to the APA.

As stated on its cover page, the RCOM is issued by DDS, Community Services Division. DDS contends, however, that the RCOM is, in fact, a product of the Contract Administration Committee of the ARCA.⁵⁶ DDS describes its role as "a conduit for the information to be passed on to regional centers."⁵⁷ In short, while DDS does not deny issuing the RCOM, it apparently denies that the rules contained in the RCOM stemmed from DDS.⁵⁸

DDS misses the point. Regardless of the original source of the rules, adoption of the rules by DDS renders such subject to the requirements of the APA.⁵⁹ DDS did not merely print the RCOM, DDS issued it.⁶⁰

DDS does not deny responsibility for the issuance of the challenged RCOs or the challenged CSD. (These memorandums were issued on stationery with DDS letterhead.)

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, 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.]

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

- "(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 [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]"
[Emphasis added.]

In Grier v. Kizer,⁶¹ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

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

Second, has the challenged rule been adopted by the agency to either

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

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."
[Emphasis added.]⁶²

A. Part One - Do the Challenged Rules Establish Rules or Standards of General Application or Modify or Supplement Such Rules or Standards?

The answer to the first part of the inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.^{63, 64}

RCOM

DDS argues, under City of San Joaquin v. State Board of Equalization,⁶⁵ that a contractual provision cannot be a standard of general application for APA purposes.⁶⁶ We disagree.

The City of San Joaquin case is inapposite. The court in that case ruled that the procedure in question was not regulatory in nature and thus did not require adoption under the APA. That court stated, "the manner to be used by the Board [of Equalization] in allocating the taxes which it collects is an appropriate subject for contractual negotiation between the interested parties."⁶⁷ (Emphasis added.) The mere fact that a court concluded that those particular provisions were appropriate for inclusion into a contract does not support DDS's claim.

In any event, the precedential value of City of San Joaquin has been seriously undermined. In the recent case of Grier v. Kizer,⁶⁸ the California Court of Appeal stated:

"In view of the Supreme Court's subsequent recognition in Armistead of the distinction between purely internal rules which merely govern an agency's procedure and rules which have external impact so as to invoke the APA [citation omitted], San Joaquin's holding that statistical accounting techniques are exempt from the APA appears to have lost its precedential value. After Armistead, it would appear an accounting procedure resulting in a possibly disproportionate allocation of tax revenues would be the appropriate subject of a regulation adopted pursuant to the APA, allowing interested parties to be heard on the merits of the proposed rule."^{69, 70} (Emphasis added.)

DDS also argues that the ADD provisions of the RCOM are not rules of general application as the application of those rules are limited to the terms of the contract and the law which governs contracts. Here, it appears that DDS has confused "application" with "enforcement." Those concepts are not interchangeable. Application of the RCOM is

distinguishable from enforcement of the contract which incorporates the RCOM.

With respect to the "informational" provisions of the RCOM, DDS argues that they are not standards of general application as DDS does not require that the regional centers follow them. DDS's reasoning is that if an agency does not use, enforce or implement a rule, it cannot have any effect or impact upon the public and therefore cannot be a standard of general application. The test for determining whether a rule is a standard of general application, however, does not depend on whether the rule is binding. Instead, the appropriate analysis for determining whether a rule constitutes a standard of general application is whether it applies to all members of a class, kind or order.

The provisions of the RCOM undoubtedly apply to all members of a class, specifically, all regional centers and providers of services for the developmentally disabled. The RCOM is allegedly incorporated into each of the contracts between DDS and the regional centers. Because the RCOM provisions affect procedures of the regional centers and the providers of services, they ultimately impact on the developmentally disabled as well. Accordingly, we conclude that the RCOM has general application.

RCOs and CSD 89-2

DDS concedes that RCO 88-31 and CSD 89-2 contain standards of general application. It argues, however, that the remaining challenged RCOs are not standards of general application because (1) RCO 89-26 applies only to a limited category of residential providers; (2) RCO 89-8 involves a contract provision; (3) RCO 89-3 is not binding on regional centers; and (4) RCO 88-30 applies only to clients in state developmental centers. We disagree.

We note that RCO 89-26 affects all residential providers and regional centers in the state by "revising the process for submitting program proposals for new Alternative Residential Model (ARM) Level 4 and negotiated rate facilities in non-ARM regional centers." Thus, RCO 89-26 has general application.

DDS's arguments for RCO 89-8 and RCO 89-3 have already been found unpersuasive (in our discussion of the general applicability of the RCOM), and we need not elaborate. We simply note that RCO 89-8 and RCO 89-3 apply to all regional centers in the state.

Lastly, RCO 88-30 refers to "a new policy . . . for use by various developmental centers regarding the referral for regional center placement services or out-of-facility

medical services for clients with AIDS-related conditions, including HIV seropositivity." There is no indication of limited application of the new policy. Clearly the referred-to policy would affect the developmental centers and the regional centers, and have impact on clients.

B. Part Two - Do the Challenged Rules Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Govern the Agency's Procedure?

RCOM⁷¹

DDS argues that the ADD portion of the RCOM does not contain provisions that implement, interpret or make specific the law because incorporation of the RCOM into its contract with the regional centers was, itself, an application of the law. DDS states that "[t]he contractual provisions of the RCOM comply with the department's statutory mandate to enter into contracts with the regional centers that contain the provisions required by the Lanterman Act."⁷² Like its "quasi-legislative" argument, this argument presupposes that the specific provisions in the RCOM are required by the Lanterman Act. As we have already discussed, that assessment is not accurate. Incorporation of the RCOM into contract does not merely constitute the performance of a statutory duty or the application of law.

DDS also points out that the promulgation of regulations and the preparation of contracts are not mutually exclusive endeavors and the fact that the Legislature intended for certain areas to be contained both in contract and in regulation does not make the contract an "underground regulation." The challenge presented in this Determination, however, is not directed toward any provision of the contract per se; rather, it is directed toward the adoption of rules which have been incorporated into the contract. The critical question is whether an "underground regulation" can be shielded from attack under the APA because it has been made part of the contract. As fully explained in the exemption portion of our discussion, the answer to this question is "no."

With respect to the "informational" provisions of the RCOM, DDS argues that they do not implement, interpret or make specific the law since DDS does not require that the regional centers comply with them.⁷³ We repeat that the question of whether or not the RCOM provisions are binding is irrelevant. As stated in a previous determination:⁷⁴

"[t]he dispositive question is not whether the rule requires action or inaction, but whether it interprets,

implements, or makes specific the law the agency is charged with enforcing."

The Grier Court similarly stated:

"[W]hether a[n uncodified] regulation requires affirmative conduct by an affected party is not dispositive. In Stoneham v. Rushen, supra, 137 Cal.App.3d at page 736, 188 Cal.Rptr. 130, the adoption of a standardized scoring system to determine an inmate's classification invoked the APA because it was 'rule of general application significantly affecting the male prison population', although it does not appear the new system imposed an additional burden on the inmates."⁷⁵

According to DDS, the RCOM contains numerous restatements of existing law -- i.e., statutes and regulations. There is no dispute that a provision which simply repeats existing law does not interpret, implement or make specific the law. Generally, however, DDS has not demonstrated which RCOM section repeats or restates which specific provision of existing law. Basically, DDS relies on OAL to find support for DDS's argument. When a claim is made that a challenged rule is not a "regulation" because it merely repeats the law, it is incumbent on the party making that claim to prove its point. Furthermore, DDS is extremely familiar with the detailed provisions of DDS statutes and regulations, and clearly is in the best position to identify RCOM provisions which merely reiterate existing law. Except for isolated instances, DDS has failed to identify the specific provisions of duly enacted law that are allegedly being repeated by particular RCOM sections.

Within OAL's resources, we have made our best effort to review existing statutes and regulations to determine if a particular RCOM section constitutes a repetition of existing law. With that in mind, we present examples of current⁷⁶ RCOM provisions that implement, interpret or make specific the law, or govern agency procedure.⁷⁷ RCOM provisions which govern the procedures of regional centers would generally be deemed to implement, interpret, or make specific the statute authorizing DDS "to promote uniformity and cost effectiveness in the operations of the Regional Centers."⁷⁸

2100

Section 2100 of the RCOM defines "mental retardation,"⁷⁹ "cerebral palsy," "epilepsy," and "autism" for purposes of determining whether a person qualifies to receive services for a "developmental disability" as that term is defined in Welfare and Institutions Code section 4512, subdivision (a).⁸⁰ Section 2100 also establishes guidelines for the diagnosis of "mental retardation" and "autism."⁸¹

4104 and 4108

Section 4104 requires the regional centers to ensure that clients actively seek SSI/SSP benefits in order to secure contribution for the cost of the developmental disability services provided.

Section 4108 establishes specific procedures for the handling of personal and incidental allowance ("P&I") to ensure that those clients receiving SSI be paid their P&I expenses over and above the rate being paid to the care facility.⁸²

5728

Section 5728 outlines the responsibilities of the regional center when a minor seeks release from a state hospital and such a request is opposed by the minor's parent, guardian or conservator. It dictates specific action to be taken by the regional center under particular circumstances.⁸³

5736

Section 5738 requires regional centers to make a reasonable effort to locate community placement before referring a client for state hospital admission.

5816

Section 5816 authorizes the regional center to pay "time and a half" for additional respite hours for services provided when the return of the client's family is delayed. It also requires the regional center to make arrangements with the family for direct payment to the vendor when the allotted hours of respite care for that family have been used up.⁸⁴

7002

Section 7002 defines "special incident" and establishes specific reporting requirements for the occurrence of special incidents.⁸⁵

7602

Section 7602 sets forth inter-regional center transfer procedures. For instance, it requires requests for transfer to be made on the regional center transmittal form and requires the records of active cases to include "a current CDER, IPP [Individual Program Plan] and a transfer summary in accordance with the format agreed to by chief counselors."

7610

Section 7610 pertains to "shared case management" between regional centers. It establishes when shared case management will be provided, the role and responsibilities of the originating center, and the role and responsibilities of the receiving center.

7701

In part, section 7701 outlines conditions under which a minor resident, whose custodial parents or guardians moved out of state with the intention of establishing residence in another state, continues to be eligible for regional center services.

Other examples of RCOM provisions which interpret, implement or make specific the law, or govern agency procedure, are also found in the "Appendix" portion of the RCOM.⁸⁶

Appendix XIV. "Guidelines Regarding Informed Consent"
Appendix XIV defines "friend" for purposes of applying Health and Safety Code section 416.5⁸⁷ to include a professional person such as a counselor or social worker.⁸⁸

Appendix XV. "Guidelines for Determining 'Dangerousness' in Prospective State Hospital Admissions"
Appendix XV defines "dangerousness" for purposes of determining state hospital admissions. DDS states that "the guideline is necessary because the Welfare and Institutions Code section 6500 does not define 'dangerousness to self/others.'"⁸⁹

Appendix XXI (A) "Regional Center - State Hospital/Developmental Center Telephone Admissions Conference Procedures."⁹⁰

This appendix sets forth such rules as follows:

- "1.2.1 The Program Catalogue for Persons With Developmental Disabilities shall be the resource document to designate regional center admission preferences.
- "1.2.2 A regional/geographic restriction to 'north only,' 'south only,' or 'Los Angeles area only,' etc., may be used only when extenuating circumstances warrant such a restriction.
- "1.2.3 Priority shall be given to the return of a client to the SHDC from which the client was released if an appropriate program exists there and the client was released within the previous two-year period."

As the above examples illustrate, the RCOM contains numerous sections throughout which interpret, implement or make specific the law, or govern agency action. The regulatory provisions are not restricted to the ADD portion of the RCOM.

RCOs⁹¹

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RCO 89-26 clearly governs agency procedure. It states in part:

"In order to utilize a consistent approach in establishing new residential programs, the Department is revising the process for submitting program proposals for new Alternative Residential Model (ARM) Level 4 and negotiated rate facilities in non-ARM regional centers. Effectively immediately, the procedures for applying for negotiated rate and ARM Level 4 approval are as described below."

The RCO goes on to prescribe the effective period of the established rate (numbered paragraphs 1, 3 and 6) and well as to identify specific items required to be included in the application for the negotiated rate (numbered paragraph 2). DDS states that the RCO "is permitted by the authority of Welfare and Institutions Code sections 4681 and 4681.1."⁹² A review of those sections show that RCO 89-26 does indeed implement, interpret or make specific those laws. It does not, however, indicate that the Legislature intended to authorize "underground regulations" or to grant an express exemption to the requirements of the APA.⁹³

According to ARCA, RCO 89-8 pertains to the fiscal year 1989-90 Community Placement Plan.

"The purpose of the RCO is to inform the regional centers that there are some start-up funds that are available and how they need to prepare their requests for those funds. The RCO then contains a Form A and a Form B with instructions on how to complete those forms."⁹⁴

From our limited review of the incomplete RCO 89-8 provided by the Requester, it is unclear whether or not participants of the Community Placement Plan are required to complete forms A and B in order to qualify for the start-up funds.

RCO 89-3 provides forms that "should" be used to fulfill a written report requirement. The written report requirement, however, is stated in the RCOM; it is not established by the challenged RCO. Since OAL was not provided with a copy of the form, we cannot determine whether the form and the instructions for completion of the form contain regulatory matter. It appears, however, that there is no requirement for use of the form in completing the written report requirement.

RCO 88-31 states:

"Regional centers shall reimburse at rates up to but not exceeding those reflected in [the revised Schedule

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of Maximum Allowances for institutions and agencies, effective May 15, 1988]."

RCO 88-31 thus appears to implement, interpret and make specific Welfare and Institutions Code sections 4681 and 4681.1.

RCO 88-30 refers to the policy adopted by the Department's Developmental Centers Division for use by the various developmental centers regarding the referral for regional center placement services, etc.. By itself, the RCO merely serves as the cover letter. The record does not contain the referred-to policy. Accordingly, we cannot determine whether or not the RCO, along with the referred-to corresponding policy, constitutes a "regulation."

Of the five challenged RCOs submitted for review, we conclude that RCO 89-26 and RCO 88-31 implement, interpret and make specific the law while RCO 89-3 does not. Lacking complete copies of RCO 89-8 and RCO 88-30, we refrain from making any determination concerning those challenged rules.

CSD 89-2

CSD 89-2 sets forth standards and guidelines under which regional centers may use purchase-of-service funds to pay for respite care. The CSD establishes requirements that regional centers must follow in contracting with care facilities for the purpose of having them maintain permanent respite beds. It also requires regional contracting for respite care to adhere to specified respite standards and to monitor the care facilities' compliance with the prescribed standards.

The CSD no doubt governs the procedures of all regional centers seeking to contract for respite care in order to promote uniformity and cost effectiveness. As such, the CSD implements, interprets and makes specific the law.

The above-noted sections of the RCOM, RCO 89-26, RCO 88-31, and CSD 89-2 meet the definition of a "regulation."

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

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.^{95, 96}

Contracts

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DDS argues that the ADD portion of the RCOM is simply part of its contract with the regional centers and that the APA does not apply to contracts. Implicit in DDS's argument is the proposition that "underground regulations" are shielded from APA challenge by inclusion into a contract. They are not.

Fatal to DDS's contention is the lack of any express statutory language which provides that agency rules placed in contract provisions are exempt from APA review. Applying Government Code section 11346, which requires that exemptions be expressly stated in statute, we must presume that no such exemption exists.

In addition, it appears the Legislature intended that there be no exemption for contract provisions. Exempting public contracts was--and is--a clear policy alternative. The federal APA, first enacted in 1946, exempted "matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts" (emphasis added) from rulemaking requirements.⁹⁷ In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "any interpretative rule or any rule relating to public property, public loans, public grants or public contracts" (emphasis added) from APA notice and hearing requirements.^{98, 99} It therefore seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting rules contained in public contracts from notice and comment requirements.

Perhaps the California Legislature reasoned that providing an exemption for contract provisions would not be consistent with the basic goals of the APA--i.e., to provide for meaningful public participation in agency decisionmaking. The APA provides that all parties affected by proposed rulemaking be given the right to hearing and an opportunity to comment on the proposed rules. The right to comment would be nullified if an agency were permitted to avoid formal adoption of a rule by merely incorporating such into a contract. While the rights of parties to a contract may be limited by the terms of the contract, it is inherently unjust for such terms to restrict the rights of parties not subject to the contract.

In the matter at hand, the rules contained in the RCOM govern the operations of the providers as well as the regional centers. Ultimately, the RCOM affects recipients of such services as well. Providers and recipients of developmental services (who were not parties to the contract) should not be deprived of their opportunity to comment on rules contained in the RCOM by virtue of the fact that the RCOM has been incorporated into a contract between DDS and the regional centers. It has been held that, "a

contract can control only the parties thereto or their successors in interest."^{100, 101}

Furthermore, it is generally understood that parties to a contract are bound by more than just its terms; they are bound by all law in existence at the time of contracting as well.¹⁰² The California Supreme Court has stated:

"all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated."¹⁰³

This principle has been further refined to include the proposition that "governmental regulations cannot be varied or evaded by a private contract."¹⁰⁴ Thus, a state agency entering into a contract is, nonetheless, subject to the APA requirements contained in both statutes and regulations. Clearly, given existing contract doctrine, it would be anomalous to hold that illegal "underground regulations" -- i.e., those which violate the APA -- may be insulated from the APA simply by including them in a contract with a regional center.

Moreover, the Legislature has expressly recognized the interrelationship between "regulations" and contract provisions. Welfare and Institutions Code section 4640 mandates that certain policies not only be incorporated into contracts between the DDS and the regional centers, but also be adopted as regulations.¹⁰⁵ This is a clear indication that inclusion of certain provisions in the contract does not relieve the agency from formally adopting those same provisions as regulations. As stated in 1987 OAL Determination No. 1, page 11:

" . . . 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 [Individual Program Plan Manual]) into a second manual of guidelines (the 650-page Regional Center Operations Manual) and then incorporating the [RCOM] into a contract." (Footnote omitted.)

Internal Management

DDS also argues that the challenged rules fall into the "internal management" exception. That argument also lacks merit.

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According to Government Code section 11342, subdivision (b), every general rule adopted by any agency to implement, interpret, or make specific the laws enforced by it is a "regulation" and must be adopted pursuant to the APA, "except one which relates only to the internal management of the state agency." (Emphasis added.) Grier v. Kizer, which provides a good summary of case law on internal management, states that this exception is "narrow."¹⁰⁶

It is clear that the DDS rules challenged here do not relate "only" to the internal management of DDS. These rules affect not only all regional centers, the non-profit corporations providing services to the developmentally disabled, but also the clients who receive such services. The challenged rules also affect services provided to the families of the developmentally disabled. Accordingly, the "internal management" exception does not apply.

Forms

DDS also raises the applicability of the statutory "forms exception." Government Code section 11342, subdivision (b), states in part:

"'Regulation' does not mean or include . . . any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." (Emphasis added.)

With respect to the scope of the "forms exception," we recently said the following:¹⁰⁷

"If a form or form instruction contains "regulations" within the meaning of Government Code section 11342, subdivision (b), those 'regulations' must be adopted pursuant to the APA. In other words, if a form contains uniform, substantive rules which were adopted in order to implement a statute, those rules must be promulgated in compliance with the APA. According to the California Court of Appeal for the First District, the ". . . statutory exemption relate[es] to operational forms." (Emphasis added.) [¹⁰⁸] There is no requirement that an agency adopt a form as a regulation when that form simply provides an operationally convenient place in which applicants for licenses can, for instance, write down information which existing provisions of law already require them to furnish to the licensing agency. By contrast, if an agency form goes beyond existing legal requirements, if that form contains uniform, substantive provisions which in

essence make new law, then, under Government Code section 11342, subdivision (b), a formal regulation is 'needed to implement the law under which the form is issued.'

Further, the requirement to complete a particular form in order to qualify for a certain benefit is not itself subject to the forms exception. For instance, if a particular benefit will not be provided unless and until the applicant fills out and submits a particular form, this form submission requirement is a rule applying generally to all members of an open class (i.e., all applicants).

Rates¹⁰⁹

DDS also argues that RCO 89-26 and RCO 88-31 establish "rates" and are therefore exempt from the APA pursuant to Government Code section 11343. We think not.

Government Code section 11343 states:

"Every state agency shall:

- (a) Transmit to [OAL] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:
 - (1) Establishes or fixes rates, prices, or tariffs.

We have consistently taken the stand that APA exemptions should be narrowly construed.¹¹⁰ Numerous cases support that position, including California Assn. of Nursing Homes Etc. Inc. v. Williams.¹¹¹ The California Court of Appeal in Williams addressed the issue of whether or not regulations adopted by the Department of Health Services fall within the "rates, prices or tariffs" exception to the APA. In response to a petition for rehearing, the court stated:

" . . . [S]ection 14104 . . . calls for the adoption of regulations establishing 'the methods to be used and the items to be included' in rate formulae. Section 14105 . . . calls for 'rules and regulations' establishing policies, which shall include 'rates for payment for services.' Under both sections the scope of the agency's regulations is much broader than the Administrative Procedure Act's narrow exemption of rates, prices or tariffs. Although the Medi-Cal agency's regulations deal with rates or establish rate formulae, they are not within the dispensation provided in section [11343], subdivision (a)(1)."¹¹²

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As noted in a published opinion of the California Attorney General,¹¹³ the reason the Williams court found the "rates, prices or tariffs" exception to be inapplicable to the regulations of the Department of Health Services was because the regulations were intended to go far beyond the mere establishment of rates.

In our view, the provisions of RCO 89-26 and the Schedule referred to in RCO 88-31 exceed the scope of the narrow exemption provided in Government Code section 11343, subdivision (a)(1).¹¹⁴

RCO 89-26 pertains to program proposals for the alternative residential model and negotiated rate facilities in order to determine rates. The RCO specifies what kind of information must be contained in the proposal as well as time frames for a rate setting. This RCO does not establish any rates.

While the Schedule of Maximum Allowances attached to RCO 88-31 does establish and fix maximum rates, it also contains rules not related to rate setting. For instance, the Schedule states:

"'Unlisted Services' . . . are payable only upon prior authorization of the Department

". . . No service rendered prior to the development and signed approval by the attending physician of the 'Case Evaluation and Initial Treatment Plan,' is payable."

The established rates contained in the Schedule attached to RCO 88-31 are exempt from APA requirements; those portions of the Schedule that are not related to rate setting, however, are not.

Our review discloses that no other exceptions would apply to the challenged rules. HAVING FOUND SPECIFIC SECTIONS OF THE RCOM, RCO 89-26, PORTIONS OF RCO 88-31, AND CSD 89-2 TO BE "REGULATIONS" AND NOT EXEMPT FROM THE REQUIREMENTS OF THE APA, WE CONCLUDE THAT SUCH RULES VIOLATE GOVERNMENT CODE SECTION 11347.5, SUBDIVISION (a).

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III. CONCLUSION

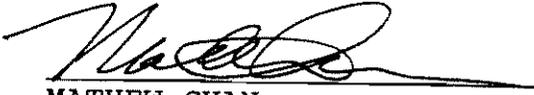
For the reasons set forth above, OAL finds that:

The RCOM is subject to the requirements of the APA; the RCOM contains numerous "regulations" as defined in Government Code section 11342, subdivision (b), which are in violation of Government Code section 11347.5, subdivision (a).

The challenged memorandums issued by DDS are subject to the requirements of the APA; RCO 89-26, portions of RCO 88-31, and CSD 89-2 contain "regulations" as defined in Government Code section 11342, subdivision (b), which are in violation of Government Code section 11347.5, subdivision (a); no conclusions are reached concerning the validity of specific provisions of bulletins not submitted to OAL with the request for determination.

DATE: October 3, 1991


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1. The Request for Determination was submitted by David Rosenberg, Attorney at Law, on behalf of the Association for Retarded Citizens, Alameda County, and the Association for Retarded Citizens, San Diego. 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.
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 rule-making 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 \$3.50 (\$4.50 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. Section 2238 of the RCOM states:

"The Association of Regional Center Agencies (ARCA) is an association composed of representatives from each of the 21 Regional Centers. Its purpose is to discuss issues of common concern, develop positions, share information, and provide an organized mechanism for communication with the California State Government."

17. 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.)

18. California Regulatory Notice Register 90, No. 39-Z, September 28, 1990, p. 1461.
19. A few commenters wanted OAL to expand the scope of materials to be reviewed in this determination. For instance, the Association for Retarded Citizens, San Francisco, submitted with its letter of October 26, 1990, a "Service Provider Agreement" and "Quality Assurance Standards" claiming that those materials "contained requirements for service providers that go beyond current regulations." In responding to determination requests, however, we review only those specific materials challenged by the Requester. Title 1, CCR, sections 122-128. The Association for Retarded Citizens, San Francisco (or any other commenter) may challenge any agency rule by filing a separate request for determination, which will in turn be processed by OAL in accordance with the Title 1 regulations governing determination proceedings.
20. All of the above-mentioned submitted materials were considered in rendering this determination.
21. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747.
22. ARCA argues that certain provisions contained in the RCOM could not be anything but "non-binding" since the adoption of those provisions as "regulations" would be in violation of the holding in Association for Retarded Citizens v. Dept. of Developmental Services (1985) 38 Cal.3d 384, 389-90, and be beyond the scope of DDS's authority. (ARCA Comment, p. 6.) Whether such provisions are legally binding is not determinative. If they are perceived by those parties affected as being binding, then, in effect, they are.
23. 1990 OAL Determination No. 11, p. 314 ((Division of Labor Standards Enforcement, July 31, 1990, Docket No. 89-018), CRNR 90, No. 32-Z, p. 1204).

24. According to Grier v. Kizer ((1990) 219 Cal.App.3d 422, 437, 268 Cal.Rptr. 244, 253, it is not necessary that an agency rule require any sort of affirmative conduct by an affected party before the rule may be deemed a "regulation."
25. (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24.
26. In Armistead v. State Personnel Board (1978) 22 C.3d 207, 149 Cal.Rptr. 1, the California Supreme Court interpreted the word "regulation" broadly. In that case, a state employee sought to withdraw his job resignation after submission but prior to its effective date. The resignation process was governed by a personnel board manual which contained regulatory material not adopted pursuant to the APA. In reaching the conclusion that the governing provision was invalid for failure to comply with the APA, the Court made it clear that one of the major goals of the APA was to prevent agencies from avoiding APA requirements through the use of regulations "denominated. . . as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards' or the like . . . contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins." (Id., 149 Cal.Rptr. at p. 4, emphasis added.) Read in conjunction with Government Code section 11347.5(a), Armistead further supports the view that the RCOM provisions need not be binding on the regional centers to be considered regulations.
27. Our conclusion is consistent with 1987 OAL Determination No. 1, note 25 ((Department of Developmental Services, January 21, 1987, Docket No. 86-007), CANR 87, No. 6-Z, February 6, 1987, p. B-35), in which we stated:

"We reject the notion that 'non-binding operating guidelines' are permissible under current California law."
28. 1990 OAL Determination No. 6, pp. 152-153 ((Department of Education, Child Developmental Division, March 20, 1990, Docket No. 89-012), CRNR 90, No. 13-Z, March 30, 1990, p. 496).
29. 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.
30. Government Code sections 11346, 11346.1, subdivision (a), 11342, subdivisions (b) and (c), and 11343, subdivision (a).

For detailed discussion of this point, see 1989 OAL Determination No. 4, pp. 120-144, 154.

31. Matthew Bender (1991).
32. Horn v. County of Ventura (1979) 24 Cal.3d 605, 612-614, 596 P.2d 1134, 156 Cal.Rptr. 718
33. See Pacific Legal Foundation v. California Coastal Comm. (1982) 33 Cal. 3d 156, 168, 188 Cal.Rptr. 104, 655 P.2d 306.
34. 111 Cal.App.3d 734, 739, 168 Cal.Rptr. 838.
35. Id., (criteria applied to one case only).
36. . . . 100 Cal.App.3d 128, 160 Cal.Rptr. 822.
37. See Gov. Code section 11346, 11347.5. . . .
38. Government Code section 11346 provides:

"It is the purpose of this article 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.)

39. (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804.
40. As City of San Marcos illustrates, a key factor to consider in determining whether or not an agency rule is quasi-legislative in nature is whether or not the rule falls within the statutory definition of "regulation" found in Government Code section 11342, subdivision (b). This is the approach taken not only in the leading California Supreme Court case, Armistead v. State Personnel Board (1978), but also in legislative committee reports. For instance, in 1955, the Senate Interim Committee on Administrative Regulations reviewed the degree to which agencies were complying with the APA. As part of this review, the Committee scrutinized agency publications for rules which should have been, but were not adopted pursuant to the APA. Noting that some agencies were contending that certain rules were not quasi-legislative in nature, the Committee articulated the following multi-part test in its 1955 report (Volume I, Appendix of the Journal of the Senate, Regular Session, 1955, pp. 9-10):

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"The determination of whether a particular rule of an agency is an exercise of a quasi-legislative nature is, in some instances, difficult of ascertainment, and the committee attempted throughout to carefully analyze rules contained in agency publications so as not to unjustly criticize the agency. Basically, the committee used as its test of a rule found in an internal organ of an agency the definition of a regulation contained in the [APA], which states:

'"Regulation" means 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, except one that relates only to the internal management of the state agency.'

"Using the above definition, the committee then applied the following tests of exclusion or inclusion:

"1. Did the rule only quote or paraphrase an existing section of law? If so, the committee considered it no further.

"2. Did the rule only quote or paraphrase an existing regulation set forth in the Administrative Code? If so, the committee considered it no further.

"3. Was the conduct prescribed or proscribed such that a member of the public would have a direct interest in its existence or non-existence, other than the interest in efficient and economical government? If such interest might exist, test 4 was applied.

"4. Was the rule such that it related only to the relationship of the employee to whom it was directed and the agency publishing such a rule, or would such rule be used by the employee in his dealings with the public and in effect prescribe or proscribe conduct of the public by following such rule? If the former, the committee passed up the rule, and if the latter, test 5 was applied.

"5. If the rule met tests 3 and 4 abovementioned, the committee then applied to it provisions of law which would exempt its adoption by public

procedures and publication in the Administrative Code.

"a. Does it related to internal management only? On determining this, the committee necessarily again applied tests 3 and 4, above, for if the public had an interest other than a general interest, and such rule would be used by employees in dealings with the public so as to prescribe or proscribe conduct, it could not relate solely to internal management.

"b. Did it establish rates, prices, or tariffs? If so, it was passed up.

"c. Did it relate to the use of public works where the effect of such order is indicated to the public by means of signs or signals? If so, it was passed up.

"d. Was it directed to a specifically-named person or to a group of persons, and not applicable generally throughout the State? If so, and the named person was not the employee receiving the communication, the committee concluded such rule was not an attempt to avoid publication by inclusion in an internal publication." (Emphasis added.)

One of the final recommendations of the Committee included the following (p. 64):

"3. Where it is questionable as to whether or not a particular rulemaking function of an agency is an exercise of quasi-legislative power, it is recommended that that agency be directed to follow the [APA] in the adoption of regulations."

41. (1976) 60 Cal.App.3d 405, 131 Cal.Rptr. 818.
42. Revised Response, pp. 6-7.
43. DDS cites as authority, Bendix Forest Products Corp v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465, 471.
44. Welfare and Institutions Code sections 4629, 4631, subdivision (b), 4640 and 4657 do not require that the contract between DDS and the regional centers include the specific provisions contained in the RCOM. Section 4629 states in part:

" . . . contracts between the state and the governing boards of regional centers shall include reasonable specific performance and reporting requirements relative to the responsibilities of regional centers defined in this division, and the timing for compliance with such requirements. The department shall specify procedures to be used by all regional centers which shall:

"(a) Define 'active' and 'inactive' cases.

"(b) Account for all funds received or expended by regional centers.

"(c) Define a unit of direct service performed by regional center personnel.

"(d) Allocate indirect, administrative, and overhead expenditures to a unit of direct service.

"(e) Calculate costs per unit of direct services.

"(f) Provide such other information as the department may require to analyze expenditures, conduct comparative costs and performance reviews, and implement the evaluation requirements in Chapter 8 (commencing with Section 4750) of this division."

Section 4631, subdivision (b), states:

"The department's contract with a regional center shall require strict accountability and reporting of all revenues and expenditures, and strict accountability and reporting as to the effectiveness of the regional center in carrying out its program and fiscal responsibilities as established herein."

Section 4640 states:

"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."

Section 4657 states:

"The State Department of Developmental Services shall, through the regional center contract, insure that the following information is collected by each regional center for each new case and is also collected at each review of all regional center clients in out-of-home placement.

"Information shall include:

"(a) The social security number of the parents of the client.

"(b) The birthday of the parents of the client.

"(c) The disability status of the parents of the client.

"(d) Whether the parents of the client are deceased or not."

45. Revised Response, p. 11.
46. DDS concedes that the adoption of RCO 89-26 and 88-30 were quasi-legislative acts.
47. Government Code section 11342, subdivision (a).
48. 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.
49. 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.
50. (1978) 87 Cal.App.3d Supp. 1, 151 Cal.Rptr. 522.
51. Id., 87 Cal.App.3d Supp. at pp. 11-12, 151 Cal.Rptr. at p. 528.

52. (1979) 89 Cal.App.3d 545, 152 Cal.Rptr. 506.
53. Id., 89 Cal.App. 3d at p. 550, 152 Cal.Rptr. at p. 509.
54. Finding that a private entity was itself subject to the APA (based on links to a state agency) would pose serious legal problems. A basic principle of administrative law is that the Legislature may, by statute, delegate legislative power to administrative agencies. Agencies may then exercise this quasi-legislative power, but must do so in accordance with conditions laid down by the Legislature. Neither the record of this proceeding, nor our independent research has disclosed any authority for the proposition that a state agency may properly subdelegate its quasi-legislative rulemaking power to a private entity.

As a practical matter, subjecting "agents" to the requirements of the APA makes little sense. Requiring all "agents" of the state to adopt rules under the APA would be unduly burdensome.

55. This does not mean that state agencies are free to avoid compliance with the APA by simply attributing the rule to a private entity. The basic question will always be whether or not the state agency issued, utilized, enforced, or attempted to enforce the uncodified rule. Government Code section 11347.5. For instance, in 1987 OAL Determination No. 10 ((Department of Health Services, August 6, 1987, Docket No. 86-016), summary published in CANR 87, No. 34-Z, August 21, 1987, p. 63) a state agency argued that certain challenged rules did not violate the APA because they had been issued by a private entity. We rejected this claim, and concluded that the state agency had issued the rules. This conclusion was based on the following considerations: (1) one of the challenged rules (an administrative bulletin) stated that the private contractor was publishing it at the request of the state agency; (2) the cover letter for the manual which the bulletin updated was printed on the letterhead of the state agency and stated that the manual had been prepared by the contractor in cooperation with the state agency; (3) introductory language in a challenged portion of the manual stated that the policy statements that followed were the responsibility of the state agency; and (4) the state agency itself twice mailed out copies of the rules in question in response to requests for copies of written guidelines applicable to the specific program. Thus, in this 1987 determination, we concluded that the state agency had issued and utilized the rules under review.
56. DDS, a member of the Contract Administration Committee, alleges that except for the Administrative Directives Division, it has a limited interest in the specific policies put forth in the RCOM.

57. Revised Response, p. 5.
58. The fact that DDS may have collaborated with ARCA in adopting the RCOM cannot excuse DDS from the formal rulemaking requirements of the APA. The California Court of Appeal, in the case of California Association of Nursing Homes, Etc. v. Williams (1970) 4 Cal.App.3d 948, 84 Cal.Rptr. 590, held that:

"Private negotiations with selected members or representatives of an affected industry are no substitute for public hearings. There is a public interest in having the law obeyed. Directed by law to hold public hearings, government officials may not resort to invitational gatherings with selected members of an affected business. The participating firms and associations, however immediately affected, cannot waive the public's right of participation." (Id., 4 Cal.App.3d at p. 812, 84 Cal.Rptr. at p. 599.)

While ARCA represents all 21 regional centers in California, it does not represent all parties affected by the rules contained in the RCOM. Certainly, the RCOM affects all "vendors" of developmental services, and ultimately the clients and their families as well.

59. Citing Association for Retarded Citizens v. Dept. of Developmental Services (1985) 38 Cal.3d 384, 389-90, DDS notes that it has no legal authority to affect some of the subject areas covered in the RCOM. (Revised Response, p. 5, note 2.) Basically, DDS argues that since it has no legal authority to adopt certain rules, those rules cannot be adopted as "regulations" under the APA, and therefore cannot be in violation of the APA. We disagree.

The question of whether a rule adopted by DDS is authorized and valid is separate from the question of whether that rule has been formally adopted under the APA. As stated in note 17??, our analysis under the "authority" standard is reserved until submission of regulations for our review under Government Code section 11349.1.

While DDS recognizes its lack of authority to adopt certain rules, the public affected by such rules may not be as astute. The formal adoption process outlined in the APA allows questions concerning the validity of the proposed regulations to be raised through public comment and OAL review. If it is determined that DDS lacks authority to adopt a certain provision or that the provision is in conflict with existing law, then OAL will disapprove that submitted regulation. Under those circumstances, there would be no doubt that DDS could not adopt that particular rule. Absent the requirement for the formal adoption of rules under the APA, members of the affected public--unaware

of pertinent legal issues--may believe they must comply with the informal rules issued by DDS.

60. In its October 22, 1990 letter, Association of Retarded Citizens - San Diego (Requester) asks OAL to note that "[DDS] not only approves the procedures and policies for the [RCOM] but makes and issues the revisions.
61. (1990) 219 Cal.App.3d 422, 434-435, 268 Cal.Rptr. 244, 251.
62. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
63. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
64. For instance, it has been judicially held that "rules significantly affecting the male prison population" are of general application. (Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736 188 Cal.Rptr. 130, 135; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.)
65. (1970) 9 Cal.App.3d 365, 375.
66. It appears that DDS recognizes that "enforceability" is not an expressly stated component of the APA definition of a "regulation." DDS nonetheless raises that issue by cleverly weaving it into the two-part analysis for determining whether a challenged rule is or is not a "regulation."
67. City of San Joaquin, supra, 9 Cal.App.3d at p. 375.
68. (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.
69. Id., 219 Cal.App. at p. 437, 268 Cal.Rptr. at p. 253.
70. The Grier Court agreed with the assessment of City of San Joaquin made by OAL in 1987 OAL Determination No. 10 ((Department of Health Services, August 6, 1987, Docket No. 86-016), summary published in CANR 87, No. 34-Z, August 21, 1987, p. 63). This determination had been issued in response to a request for determination filed by the Union of American Physicians and Dentists against the Department of Health Services ("DHS"). In reviewing this request, it became clear that City of San Joaquin was crucial to resolving the question of whether or not DHS had indeed issued an "underground regulation" concerning audits of Medi-Cal physicians in violation of Government Code section

11347.5. After careful review, OAL assessed the case as follows:

"DHS cites City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 88 Cal.Rptr. 12 as support for its argument that statistical auditing is valid and exempt from formal APA adoption requirements. In San Joaquin, the Court of Appeal held that a tax revenue pooling procedure, which was adopted 'merely as a statistical accounting technique' by the State Board of Equalization ('Board') to 'enable the Board to allocate, as expediently and economically as possible, to each city which joined the tax program, its fair share of sales taxes collected by the Board on that city's behalf,' 9 Cal.App.3d at page 375 (emphasis added), was not a 'regulation' within the meaning of the APA. (Emphasis added.)

"The 'statistical accounting technique' in San Joaquin provided as follows:

'Briefly, all revenues received by the Board from the collection of local sales taxes imposed throughout a county are placed in a county-wide pool and are allocated by the Board to the taxing jurisdictions of that county on a quarterly basis. As to sales taxes imposed on over-the-counter sales, the revenues are allocated to each taxing jurisdiction in direct proportion to the reported sales attributable to such jurisdiction. But, as to sales taxes derived from construction contracts, the taxes are returned to the cities and the county on the same ratio as such cities and county receive revenue from over-the-counter sales for the same quarterly periods. Thus, each city is not allocated sales taxes imposed in connection with construction contracts, on a transaction for transaction basis; it receives its prorated share of all such taxes collected by the Board under a formula which is geared to the revenue the city receives from over-the-counter sales.' [Emphasis added.]

"Subsequent cases have characterized the above San Joaquin holding as finding that the challenged pooling rule fell within the internal management exception. Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; City of San Marcos v. California Highway Commission, Department of Transportation (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804. However this San Joaquin holding is characterized, it is clear that it is no longer 'good law;' it is no longer authoritative. We base this conclusion on a review of the opinion in San Joaquin, of the briefs filed in that case, and on

subsequent history of San Joaquin. We reject the pooling procedure holding for these reasons:

"(1) This San Joaquin holding is inconsistent with the holding of the Court of Appeal in City of San Marcos v. California Highway Commission (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804, which involved state rules governing allocation of funds among local government entities. Finding that the Department of Transportation rules were invalid absent formal adoption, the San Marcos court found that it did not 'appear that those rules and practices which have evolved in connection with reviewing and making allocations among applicants for grade separation funds have been assembled in a repository accessible to the public.' More importantly, it does not appear that the affected local agencies have had an opportunity to participate in the formulation of the rules. 60 Cal.App.3d at page 409. [Emphasis added.]

"Citing San Joaquin, the San Marcos court stated that the 'better reasoned view is to regard the "internal management" exception narrowly so as to encompass accounting techniques and the like.' (Emphasis added.) The reality is, however, that San Joaquin read the internal management exception very broadly. Or, put another way, San Joaquin read the definition of 'regulation' very narrowly.

"(2) We need not linger over the question of which court (San Joaquin or San Marcos) had the correct view in, respectively, 1970 and 1976, because a higher court resolved the conflict in 1978. The California Supreme Court, in Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, clearly and authoritatively adopted the 'narrow' view of the scope of the internal management exception and the 'broad' view of the definition of 'regulation.' The San Joaquin holding so heavily relied upon by DHS cannot be reconciled with the subsequent ruling by the Supreme Court in Armistead, which proclaimed:

'A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of the proposed rules. [Par.] [R]ules that interpret and implement

other rules have no legal effect unless they have been promulgated in substantial compliance with the APA.' 22 Cal.3d at page 204. [Emphasis added.]

- "(3) Subsequent to San Joaquin, the California Legislature ratified Armistead's broad reading of 'regulation' by enacting Government Code section 11347.5.

- "(4) The San Joaquin court inappropriately focused on the substantive merit of the pooling procedure: the court states that the procedure was 'expedient and economical.' This is beside the point. We can assume arguendo that any given agency policy is absolutely unassailable from a policy perspective. Having presumably arrived at a sound policy, the agency is nonetheless required by law to initiate APA procedures-- if the policy falls within the broad definition of 'regulation' prescribed by the Legislature.

"Further, DHS seems to argue that any statistical accounting or auditing technique is exempt from APA requirements. This argument goes too far. What if a statewide bond issue were passed and the administering state agency informally issued guidelines allocating 99% of the funds to the smallest county in the state, 1% to Los Angeles County, and nothing to the remaining counties?

"We conclude that accounting or statistical techniques must be reviewed on a case by case basis to determine whether or not the technique at issue falls within the broadly defined term 'regulation.'

"We assume arguendo that selection of statistical sampling techniques is within the scope of DHS' delegated powers; however, the exercise of such powers must be in full compliance with the APA. We reject the argument that San Joaquin controls the outcome of the current dispute concerning the validity of the sampling technique."

- 71. DDS requests that OAL present a section by section analysis of the RCOM. The length of the RCOM and OAL's very limited resources preclude such an exhaustive analysis.

- 72. Revised Response, p. 10.

73. The DDS cites 64 Ops.Cal.Atty.Gen. 910 (1981) ("Opinion") as authority for the proposition that the informational sections of the RCOM could only be considered to implement, interpret, or make specific the law if the Department required regional centers to comply with them (i.e. if they were binding on the regional centers). The Opinion provides no such authority.

The question addressed in the Opinion was whether the DDS had the authority under the Budget Act of 1981 to control the provision of certain regional center services through the issuance of "guidelines." In reaching the conclusion that the Department lacked such authority, the Attorney General found that the Department guidelines did not need to take the form of official regulations, and that the regional centers did not need to "'implement' such guidelines, i.e., to treat them as formal regulations." (64 Ops.Cal.Atty.Gen. 910, 918 (1981)).

Furthermore, important differences exist between the issue addressed in the opinion and the matter at hand. First, the Attorney General found that the Budget Act required the Department to issue non-binding guidelines rather than binding requirements. No comparable mandate exists in this case. Second, the finding of the Opinion is limited to the expenditure of funds budgeted for the regional centers, or even more specifically, to the particular guidelines in question. In this case, the material in question has a broader impact on regional center operations. Finally, the Opinion, which pre-dates Government Code section 11347.5, is difficult to reconcile with the clear dictates of that statute.

74. 1990 OAL Determination No. 18, p. 569 ((Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001), CRNR 91, No. 2-Z, p. 82, 86-88).
75. 219 Cal.App.3d at 437, 268 Cal.Rptr. at 253.
76. DDS points out that the RCOM submitted with the Request for Determination is not the current version. For instance, those portions of section 3002 of the RCOM objected to by the Requester are not contained in the updated version of the RCOM provided by DDS. Juxtaposition of the two versions of the RCOM provided reveal that numerous sections were updated on 11/89 before the submission of the Request for Determination. Certain sections were also revised or re-revised on 04/90, after the submission of the Request. Several sections were also deleted from the current RCOM, including Appendix III, the Individual Programs Plan Manual.

77. As pointed out by the Requester, we have already determined that the "Vendorization Procedures Manual," constitute underground regulations. Accordingly, incorporation of the that manual into the RCOM is not proper.
78. Association for Retarded Citizens-California v. Department of Developmental Services (1985) 38 Cal.3d 384, 389, 211 Cal.Rptr. 758, 760. Also see, Welfare and Institutions Code section 4748 which requires DDS to adopt regulations for use by the regional centers to assure uniformity of the care and services to be provided.
79. Penal Code section 1001.20 defines "mentally retarded" in the same way that section 2100 defines "mental retardation." There is nothing to indicate, however, that the Penal Code definition should be applied when interpreting the meaning of "developmental disability."
80. Welfare and Institutions Code section 4512, subdivision (a), states:

"'Developmental disability' means 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." (Emphasis added.)

A similar but abbreviated version of the definition for "developmental disability" is contained in section 54000 of Title 17 of the CCR. Neither the quoted statute nor regulation section 54000, however, explain the meaning given to the terms "mental retardation," "cerebral palsy," "epilepsy," or "autism."

81. The notes to section 2100 state:

"When a person is diagnosed as mentally retarded, whose IQ does not fall at least two standard deviations below the normal, special justification must be shown in the client's record to justify that diagnosis."

". . .

"Most authorities agree that autism will appear before the age of three. If a person is diagnosed as

autistic, where this condition was not clearly apparent by the age of three, the record must clearly indicate justification for this diagnosis."

82. See generally, Welfare and Institutions Code sections 4782 through 4785, which pertain to parental contribution of costs.
83. Compare with Welfare and Institutions Code sections 4800, 4801, and 4825.
84. See generally, Welfare and Institutions Code sections 4648 and 4690.2; CCR, Title 17, sections 56776 through 56802.
85. Compare with CCR, Title 17, section 56605, subsection (f).
86. The "Appendix Index" of the RCOM provided by DDS indicates deletion of several appendices. Although deletion of appendices XIV and XV was not indicated, those appendices were not provided by DDS. We therefore review Appendices XIV and XV provided by the Requester. We also review the "current" version of Appendix XXI (A) provided by DDS.
87. Health and Safety Code section 416.5 provides that the following individuals can nominate the director as a guardian or conservator for any developmentally disabled person:
 - "(a) A parent, relative or friend.
 - "(b) The guardian or conservator of the person or estate, or person and estate, of the developmentally disabled person to act as his successor.
 - "(c) The developmentally disabled person." (Emphasis added.)
88. See Appendix XIV, p. 1, "2. Can a professional person such as a counselor, or social worker, be considered a 'friend'. . . ."
89. Appendix XV states:

"The Department is aware that the definition will have to withstand a court test, and that opinion is divided as to whether the expanded definition is appropriate.

"The Hospital Operations Division and the state hospitals are taking the position that 'dangerousness' is not limited to suicidal, homicidal, or self-abusive behavior. What is important is that it is not necessarily one, two, or three specific behaviors, per se, which constitute 'dangerousness'. Rather, it is the total effect of the collective behaviors. For

example, if an individual has impaired judgment such that he cannot perceive possible injurious situations to himself due to X, Y, and Z, the hospital considers him to be 'dangerous' to self.

"The following are examples of the variables, but are not considered definitive or exhaustive: inability to provide food, clothing and shelter; gets lost or has a severely limited ability to find his/her way from one place to another; is combative to others; because of behavior he/she could/would likely do physical harm to someone else.

"The procedure is for the hospital or other party to file a petition (Welfare and Institutions Code Section 6502) (Form MH-1754C) which describes the individual behaviors of the person which constitute the reasons for the petitioner's conclusion that these behaviors make the person a 'dangerous' individual."

90. The introduction states:

"This procedure may be invoked by a regional center only after the usual referral for admission procedures have been exhausted and all the solicited state hospitals/developmental centers (SHDC) have declined the admission, or an emergency situation warrants waiver of the usual procedures."

"In the event that a regional center and a SHDC have entered a written agreement in which they have agreed to specific services and procedures for emergency or routine services, that agreement or memorandum of understanding supersedes this procedure."

91. Several of the RCOs submitted with the Request for Determination were incomplete. RCO 89-8 contains only the odd numbered pages while RCO 89-26, RCO 89-3 and RCO 88-30 are missing the referred-to attachments or enclosures.

92. Revised Response, p. 15.

93. Welfare and Institutions Code section 4681.1, subdivision (c), states in part:

"By July 1, 1989 and each year thereafter, the department shall submit to the Office of Administrative Law regulations establishing quality service standards for facilities, procedures for administering the Alternative Residential Model, and ratesetting methodology. Full statewide implementation of the Alternative Residential Model shall not occur until the department has submitted these regulations."

DDS reads this provision to mean the Legislature intended that the ARM pilot project would operate without regulations. We disagree. Had the Legislature intended to provide an exemption to the APA, it would have expressly done so. It did not. The above-quoted language merely gives a deadline for the adoption of regulations.

94. ARCA Comment, p. 7.
95. Government Code section 11346.
96. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (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. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. There is very limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. 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 (no provision for non-statutory exceptions to APA require-

ments); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); 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 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In 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, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

97. Title 5, U.S.C. section 553(a)(2).
98. SB 824 (1947/DeLap) initially provided that public contracts were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did not exempt public contracts from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.
99. Federal law exempts "interpretative rules" from APA requirements. Title 5, USC, section 553(b) provides in part:

"Except when notice and hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;"

100. Stone v. Jones (1944) 66 Cal.App.2d 264, 270, 152 P.2d 19.
101. Basic contract formation principles lend support to this conclusion; for instance, a prerequisite to the formation of any contract is that the parties manifest to each other their mutual assent to the same bargain at the same time. (Civil Code sections 1550, 1565, & 1580; California State Auto Assn. Inter-Insurance Bureau v. Barrett Garages, Inc. (1967), 257 Cal.App.2d 71, 64 Cal.Rptr. 699 (It is essential to the existence of a contract that there be mutual consent); McClintock v. Robinson (1937), 18 Cal.App.2d 577, 64 P.2d 749 (one of the essential elements of contract is consent of the parties); Sackett v. Starr (1949), 95 Cal.App.2d 128, 212 P.2d 535 (there can be no contract unless the minds of parties have met and mutually agreed).) Neither the providers of developmental services nor their clients assented to the terms of the contract. Thus, the prerequisite for contract formation as to those parties was lacking.

102. Alpha Beta Food Markets v. Retail Clerks Union Local 770 (1955), 45 C.2d 764, 291 P.2d 433 (cert. den. 350 U.S. 996, 76 S. Ct. 547, 100 L.Ed. 861). See also City of Redwood City v. Dalton Construction (1990), 217 Cal.App.3d 690, 266 Cal.Rptr. 198; City of Torrance v. Worker's Comp. App. Bd. (1982), 32 Cal.3d 380, 185 Cal.Rptr. 645; Ritchey v. Villa Nueva Condominium Association (1978), 81 Cal.App.3d 695, 146 Cal.Rptr. 695; Grubb v. Ranger Insurance Company (1978), 77 Cal.App.3d 530, 143 Cal.Rptr. 558.
103. Alpha Beta Food Markets, supra, at 771.
104. Id. at 771.
105. 1987 OAL Determination No. 1, p. 12 ((Department of Developmental Services, January 21, 1987, Docket No. 86-007), CANR 87, No. 6-Z, February 6, 1987, p. B-35).
106. It has been argued that Americana Termite Co. v. Structural Pest Control Board (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693, supports the proposition that an agency's policy decisions fall within the "internal management" exception. As we discussed at some length in 1990 OAL Determination No. 18 ((Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001), CRNR 91, No. 2-Z, p. 82, 86-88), the dictum in Americana Termite is misleading and should not be relied upon.
107. 1990 OAL Determination No. 16, p. 496 ((Department of Personnel Administration, December 18, 1990, Docket No. 89-023), CRNR 91, No. 1-Z, p. 40).
108. Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 737-38, 188 Cal.Rptr. 130, 135-36.
109. The "rates, prices and tariffs" exception has no application to any of the specific RCOM sections analyzed.
110. 1986 OAL Determination No. 5, p. 10 (Board of Osteopathic Examiners, August 13, 1986, Docket No. 85-002), CANR 86, No. 35-Z, August 29, 1986, p. B-10.
111. (1970) 4 Cal.App.3d 800.
112. Id., 4 Cal.App.3d at p. 821, 85 Cal.Rptr. at p. 736.
113. Department of Developmental Services' Parental Fee Schedules, 66 Ops.Cal.Atty.Gen. 505 (1983).
114. We are aware of the holding in Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120 and find that case distinguishable from the circumstances before us. In Winzler, the issue was whether the Director of Industrial Relations could, without a public hearing, determine that

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field surveying was performed by the classification or type of workers covered by the prevailing wage rate law. In ruling that the coverage determination was exemption from the APA, the court noted that:

" . . . the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination. As the wage determination process is exempted from the prior hearing requirements of the APA, coverage determination, as an integral part of that process, is also exempted. . . ." (Id., at pp. 127-128; emphasis added.)

It is clear that the noted provisions of RCO 89-26 and the Schedule attached to RCO 88-31 were not required for establishing "rates."

115. We wish to acknowledge the substantial contribution of Legal Intern Janet Mueller and Unit Legal Assistant Melvin Fong and in the processing of this Request and in the preparation of this Determination.