STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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DEBRA BOWEN
SECRETARY OF STATE

2009 OAL DETERMINATION NO. 12
(OAL FILE NO. CTU2008-1218-01)

REQUESTED BY: **MICHAEL ST. MARTIN**

CONCERNING: **Special Order No. 130.01 Titled "The By Choice Incentive System" Issued by the Department of Mental Health**

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600[1] and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.[2] OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The challenged rule is Special Order No. 130.01, titled "The By Choice Incentive System" (Special Order), issued by the Department of Mental Health (Department). The Special Order outlines the policy for the "By Choice" incentive program for all state hospitals under the jurisdiction of the Department and contains the requirements related to the "By Choice" incentive system that each state hospital must implement. The challenged rule is attached hereto as Exhibit A.

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[1] Unless otherwise specified, all references are to the Government Code.

[2] As defined by title 1, section 250(a), an

> "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

DETERMINATION

OAL determines that Special Order No. 130.01, titled "The By Choice Incentive System," meets the definition of "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

The Department is a state agency responsible for the care and treatment of individuals with mental illness at the five state mental hospitals (Atascadero, Metropolitan, Napa, Coalinga and Patton State Hospitals). The state hospitals provide inpatient psychiatric care to individuals committed to the hospitals civilly or in connection with criminal proceedings.

On August 25, 2006, the Department issued Special Order No. 130.01, titled "The By Choice Incentive System." The Special Order states that it:

> ...outlines the policy for the "By Choice" incentive program for all Department of Mental Health State Hospitals. Each State Hospital shall incorporate this policy into their "By Choice" Administrative Directive without interpretation. The state hospital administrative directives shall contain the definitions and procedures that are used within this Special Order.

The Special Order defines the By Choice Incentive System as:

> ...an element of the individual's Wellness and Recovery Plan (WRP) and is imbedded within the hospital's therapeutic milieu. It is intended to support the recovery of individuals through the planned use of incentives and rewards. The BY CHOICE system uses points to reward routine positive behaviors that have been identified by the individuals and their Wellness and Recovery Teams as aspects of their recovery throughout their day. These points may be redeemed for desirable items or activities. In the BY CHOICE system, the individuals determine how they will allocate and earn their points.

The Special Order contains requirements the state hospitals must implement. For example:

- Individuals may earn a maximum of 100 points daily. The points are allocated by the individuals in consultation with their Wellness and Recovery Teams. Once earned, points shall never be deducted, cancelled, or in any way negated by staff.
- Individuals redeem their points for desirable items or activities in incentive stores established by the hospital for this purpose.
- Items and activities in the stores are selected and "priced" according to a recovery-focused, wellness economy.
- Evaluation data shall be aggregated and included in each hospital's Monthly Monitoring Report.

- The Chief of Psychology is responsible for the clinical appropriateness of the design, operation, and evaluation of the By Choice Incentive System as detailed in the By Choice Manual. Changes in the Manual can be made only by the statewide By Choice Committee.
- The By Choice Coordinator shall be responsible for maintaining the operation and consistent application of the By Choice System and for various other monitoring and coordinating duties.
- All unit staff and providers shall be trained in the correct implementation of the By Choice Incentive System.

On December 18, 2008, Michael St. Martin (Petitioner) submitted a petition to OAL. The Petitioner alleges that the Special Order meets the definition of a "regulation" in Government Code section 11342.600 and should have been adopted as a regulation pursuant to the APA. OAL accepted the petition for consideration on January 8, 2009.

The petition was published in the Notice Register on January 23, 2009, and the period during which public comments were accepted ended on February 23, 2009. OAL did not receive any public comments.

The Department did not submit a response to the petition.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

> (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 [Government Code] Section 11342.600, 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 [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a "regulation" subject to the APA. This analysis will determine (1) whether the challenged rule is a "regulation" within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A "regulation" is defined in section 11342.600 as:

> . . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

> A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).[3]

The first element used to identify a "regulation" as stated in *Tidewater* is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. The Special Order applies to state hospitals, hospital staff and the individuals committed to the care of the state hospitals. Each of these groups is a clearly defined class of persons.

The first element of "regulation" has, therefore, been met.

The second element used to identify a "regulation" as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. Welfare and Institutions Code section 4100 states:

> The department has jurisdiction over the following institutions:
> (a) Atascadero State Hospital.
> (b) Coalinga State Hospital.
> (c) Metropolitan State Hospital.
> (d) Napa State Hospital.
> (e) Patton State Hospital.

Further, Welfare and Institutions Code section 7200 deals specifically with mentally disordered individuals and provides:

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[3] Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

> There are in the state the following state hospitals for the care, treatment, and education of the mentally disordered:
> (a) Metropolitan State Hospital near the City of Norwalk, Los Angeles County.
> (b) Atascadero State Hospital near the City of Atascadero, San Luis Obispo County.
> (c) Napa State Hospital near the City of Napa, Napa County.
> (d) Patton State Hospital near the City of San Bernardino, San Bernardino County.
> (e) Coalinga State Hospital near the City of Coalinga, Fresno County.

State hospitals provide services to individuals committed to the Department pursuant to a variety of statutory provisions. For example:

- The Lanterman-Petris-Short Act (LPS)[4], at Welfare and Institutions Code section 5001, provides for the care for mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism.
- Individuals determined to be Sexually Violent Predators pursuant to Welfare and Institutions Code section 6604.
- Individuals found to be not guilty by reason of insanity pursuant to Penal Code section 1026.
- Individuals found to be mentally incompetent to stand trial pursuant to Penal Code section 1370.

To encompass this wide variety of individuals, the legislative grant to the Department of jurisdiction and authority over state hospitals is found in two separate sections, Welfare and Institutions Code sections 4101 and 7201. Welfare and Institutions Code section 4101 generally requires:

> Except as otherwise specifically provided elsewhere in this code, all of the institutions under the jurisdiction of the State Department of Mental Health shall be governed by uniform rule and regulation of the State Department of Mental Health and all of the provisions of this chapter shall apply to the conduct and management of such institutions.

Welfare and Institutions Code section 7201 requires:

> All of the institutions under the jurisdiction of the State Department of Mental Health shall be governed by the uniform rules and regulations of the State Department of Mental Health and all of the provisions of Part 2 (commencing with Section 4100) of Division 4 of this code on the administration of state institutions for the mentally disordered shall apply to the conduct and management of the state hospitals for the mentally disordered. ...

[4] The Lanterman-Petris-Short Act is found at Welfare and Institutions Code section 5000 et seq.

As stated in the Special Order, the purpose of the Special Order is to provide "...general guidelines for the consistent implementation and monitoring of the BY CHOICE system in each state hospital." It does this by establishing specific requirements with which every state hospital must comply. These requirements include the maximum number of points an individual may earn each day; the aggregation of evaluation data; the responsibilities of state hospital staff; etc. The imposition of these requirements by the Department establishes a "uniform rule and regulation" for the By Choice System in state hospitals as required by Welfare and Institutions Code sections 4101 and 7201 for the administration, conduct and management of the state hospitals. The Special Order, therefore, implements, interprets and makes specific Welfare and Institutions Code sections 4101 and 7201.

The second element of "regulation" has been met; therefore, the Special Order meets the definition of "regulation" in Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly*." (Emphasis added.)

The Department did not identify an express statutory exemption from the APA that would apply to the Special Order, nor did OAL find such an exemption.

CONCLUSION

In accordance with the above analysis, OAL determines that Special Order No. 130.01, titled "The By Choice Incentive System" meets the definition of "regulation" that should have been adopted pursuant to the APA.

Date: May 20, 2009

Susan Lapsley

SUSAN LAPSLEY
Director

Kathleen Eddy
Senior Counsel

Cc: Hon Chan

Exhibit A

CALIFORNIA DEPARTMENT OF MENTAL HEALTH

SPECIAL ORDER

Section 100-199: Clinical Services

Special Order Number: 130.01 Effective Date: August 25, 2006
Replaces: 130

Subject: THE *BY CHOICE* INCENTIVE SYSTEM

Special Order: This Special Order outlines the policy for the "By Choice" incentive program for all Department of Mental Health State Hospitals. Each State Hospital shall incorporate this policy into their "By Choice" Administrative Directive without interpretation. The state hospital administrative directives shall contain the definitions and procedures that are used within this Special Order.

In order to meet the safety and security concerns within a correctional environment, DMH's Vacaville Psychiatric Program and Salinas Valley Psychiatric Program shall implement the STEP/STAGE Program and shall outline within their respective administrative directives and/or program manuals the definitions and procedures related to the STEP/STAGE Program.

Authority: By order of the Deputy Director Long Term Care Services.

Purpose: This directive provides general guidelines for the consistent implementation and monitoring of the BY CHOICE system in each state hospital. Other details are provided in the BY CHOICE Manual.

Method:

I. Definition

The BY CHOICE incentive system is an element of the individual's Wellness and Recovery Plan (WRP) and is imbedded within the hospital's therapeutic milieu. It is intended to support the recovery of individuals through the planned use of incentives and rewards. The BY CHOICE system uses points to reward routine positive behaviors that have been identified by the individuals and their Wellness and Recovery Teams as aspects of their recovery throughout their day. These points may be redeemed for desirable items or activities. In the BY CHOICE system, the individuals determine how they will allocate and earn their points.

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II. Policy

A. During the course of each day, unit staff and Mall providers use the BY CHOICE system to positively reinforce adaptive and socially desirable behavior of the individuals and to motivate them to further their recovery.

B. BY CHOICE Manual. The BY CHOICE Manual provides staff with details of the incentive system. Unit and Mall staff shall follow the procedures described in the BY CHOICE Manual.

C. Points. Individuals may earn a maximum of 100 points daily. The points are allocated by the individuals in consultation with their Wellness and Recovery Teams. Points may be re-allocated by the individuals and their Wellness and Recovery Teams during scheduled reviews of their Wellness and Recovery Plans. Once earned, their points shall never be deducted, cancelled, or in any other way negated by staff. The points may be redeemed or saved by the individuals at their discretion.

D. BY CHOICE Economy. Individuals may purchase items and activities with the points they have earned.

1. Store. Individuals redeem their points for desirable items or activities in incentive stores established by the hospital for this purpose. The incentive stores are open at scheduled times. Each hospital will provide individuals reasonable access to the stores for redeeming their points.

2. Selection criteria. Items and activities in the stores are selected and "priced" according to a recovery-focused, wellness economy. Individuals shall not be denied access to items or privileges that they might reasonably expect to receive by virtue of being in the hospital. Each hospital shall ensure that the selection of redeemable items and activities are consistent with the individuals' rights as defined in policy.

E. Evaluation. The consistent and appropriate operation of the BY CHOICE System and its success at furthering the recovery of individuals shall be formally evaluated by direct observation and systematic outcome measurements. Evaluation data shall be aggregated and included in each hospital's Monthly Monitoring Report.

F. Responsibility.

1. The Chief of Psychology is responsible for the clinical appropriateness of the design, operation, and evaluation of the BY CHOICE Incentive System as detailed in the BY CHOICE Manual. Changes in the Manual can be made only by the statewide BY CHOICE Committee.

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2. Each hospital shall appoint at a supervisory level an appropriately skilled individual to be the full-time BY CHOICE Coordinator who is responsible for the overall operation of the BY CHOICE System. Each hospital shall also appoint a full-time Assistant BY CHOICE Coordinator.

3. The BY CHOICE Coordinator shall be responsible for:

   a. Maintaining the BY CHOICE System's operation and consistent application on the units/programs and in the Malls;
   b. Coordinating the hospital-wide training of staff on the BY CHOICE System;
   c. Monitoring the quality of the training provided to staff on the BY CHOICE System;
   d. Assisting in the integration of the BY CHOICE System into the hospital's therapeutic milieu and culture;
   e. Assisting the statewide BY CHOICE Committee to update the BY CHOICE Manual annually, or more frequently as needed;
   f. Coordinating data collection on fidelity and outcome evaluation; and
   g. Facilitating endeavors toward the proper operation of the incentives stores.

4. Enhancement Program Directors and Mall Coordinators are responsible for ensuring adequate resources and staff to administer the BY CHOICE System on units/programs and Malls, respectively.

5. Executive Directors and Hospital Administrators shall ensure adequate and consistent funding for the incentive stores, and coordinate budgetary oversight through the BY CHOICE Coordinator.

6. The Executive Directors shall ensure that data are collected, aggregated, analyzed and reported in the hospital's Monthly Monitoring Report.

G. Training: All unit staff and mall providers shall be trained in the correct implementation of the BY CHOICE Incentive System. All new employees who work as unit staff or mall providers shall receive similar training though the New Employee Orientation Program. Once trained, all unit staff and Mall providers will receive additional training, as needed, to maintain their competency in implementing the BY CHOICE System.

Signature on File
CYNTHIA A. RADAVSKY, Deputy Director
Long Term Care Services
Department of Mental Health

August 25, 2006
Date