

**State of California
Office of Administrative Law**

In re:

Department of Social Services

**Regulatory Action: Manual of
Policies and Procedures**

Adopt sections: 14-611, 14-915, 14-916

Amend section: 14-610

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2008-0415-02 S

SUMMARY OF REGULATORY ACTION

The State Department of Social Services (“Department”) proposed changes to the Manual of Policies and Procedures (“MPP”) that would have updated the requirements for training that child welfare workers and child welfare supervisors, juvenile probation officers and supervisors responsible for foster care placement must receive to properly perform their duties. Training that is simply recommended under the current rules would become mandatory under the new regulations. On April 15, 2008, the proposed regulations were submitted to the Office of Administrative Law (“OAL”) for review in accordance with the Administrative Procedure Act (“APA”) and on May 28, 2008, OAL disapproved the regulations. This Decision of Disapproval explains the reasons for OAL’s action.

DECISION

OAL disapproved the proposed regulations because the Department’s estimate of the fiscal impact shows both county and state costs of the kind that require approval of the Department of Finance, however the record does not show that such approval was secured; the Department’s reliance on California’s Title IV-B Program Improvement Plan for reference is not correct; the new regulatory provisions that apparently authorize the Department to withhold reimbursement from counties are not clear; and the rulemaking record does not meet the necessity standard in connection with these same provisions on withholding funds.

DISCUSSION

A) FISCAL IMPACT ESTIMATE REQUIRES APPROVAL

The file of every rulemaking action must include an estimate of the fiscal impact of the proposed regulations that has been prepared in accordance with instructions of the Department of Finance

[Government Code section 11346.5, subdivision (a)(6)]. These instructions are published in the State Administrative Manual, sections 6600 through 6680. Section 6660 provides, in part:

A state agency is not required in all instances to obtain the concurrence of DOF in its estimate of the fiscal effect of its proposed regulation on governmental entities. However, such concurrence is required for those estimates which contain any of the following elements, as depicted on STD. 399:

- | | |
|----------------------------------|-------------------|
| A.1–Reimbursable Local Costs | B.1–State Costs |
| A.2–Non-Reimbursable Local Costs | B.2–State Savings |
| A.3–Local Savings | |

The Department did prepare an estimate on the Department of Finance STD. 399 and included it under tab C of the rulemaking record. It shows that the proposed regulations will cause county expenditures of \$2.665 million dollars included in the FY 2007-08 appropriation; state expenditures of \$6.218 million included in the FY 2007-08 appropriation; and federal expenditures of \$11.421 million included in the FY 2007-08 appropriation. The county and state costs both fall within classifications described in A.2 and B.1 above, and for this reason the Department of Finance’s approval is required.

B) IMPROPER REFERENCE

Government Code section 11346.2, subdivision (a), paragraph (2) provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.

The provisions so identified are known as “reference.” Government Code section 11349, subdivision (e), explains:

“Reference” means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

Each of the four regulations submitted for OAL review includes as a reference citation the *Social Security Act, Title IV-B, Program Improvement Plan.*

Presumably this is California’s Title IV- B Child and Family Services Plan, Federal Fiscal Year 2005-2009, dated June 30, 2004, and revised September 1, 2004, which is included in the rulemaking record under tab G. While it is true that the regulations will help give effect to the state’s plan, and this plan was prepared and subjected to approval in accordance with law, the plan itself is not a provision of law that would make an appropriate reference citation. The Department may cite the underlying federal regulation that makes the plan necessary as reference for these regulations.

C) CLARITY – ADJUSTMENT OF CLAIMS

Proposed section 14-915.2 provides:

CDSS may make adjustments to the county's Titles IV-B and IV-E claims based on a county's failure to provide its child welfare workers and supervisors with training as required under these regulations.

Similarly, proposed section 14-916.2 provides:

CDSS may make adjustments to the county's Title IV-B and IV-E claims based on a county's failure to provide its juvenile probation officers and supervisors providing services to Title IV-E wards who do not receive the required training in the required allotted time.

The regulation is not clear because it does not provide an adequate basis for determining when the Department will make an adjustment, nor does it include any criteria to guide making the decision of how much to withhold. If the Department has such criteria in mind, they should be added to the regulation. If, on the other hand, the Department intends to proceed on a case by case basis, and is simply referring to a power it has as administrator of this program, then the rule should be clarified by providing additional information about how it will be applied.

Please also note that the language of proposed section 14-916.2 has a grammatical error that must be corrected if the clarified version of this regulation will still contain this sentence. The phrase, *who do not receive* is redundant because the sentence already includes the concept that adjustment may be "*based on a county's failure to provide . . .*" The placement of the phrase may also cause confusion, because it closely follows mention of the word *wards*, yet the training here is for probation officers and supervisors providing services to the wards; not for the wards.

D) NECESSITY NOT DEMONSTRATED

The rulemaking record does not provide substantial evidence of the necessity for new regulatory provisions that would authorize the Department to withhold reimbursement from counties. OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. The standard is defined in Government Code section 11349, subdivision (a):

"Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

In the course of rulemaking under the APA, this evidence is first presented in the initial statement of reasons ("ISR"). The notice alerting the public of the proposed action includes

information about the availability of the ISR for inspection so that interested persons may review and offer comments on the basis for the proposed action. The ISR prepared by the Department for section 14-915.2 and the essentially identical statement in support of section 14-916.2 include the following information:

Specific Purpose:

This section is being adopted to advise CWDs that failure to comply with these regulations may result in adjustments to their Titles IV-B and IV-E claims.

Factual Basis:

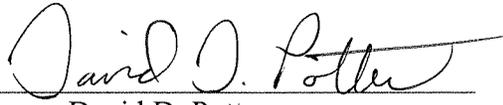
This section is necessary to comply with Welfare and Institutions Code Section 16206, with Title 45 CFR Section 1357.15(t) and with the Title IV-B Program Improvement Plan.

These statements are not sufficient and may even be misleading. Persons interested in the rulemaking are not obliged to ferret out the basis of the proposed regulation somewhere in these laws and the 88 page California plan. If this regulation is simply the reiteration of a rule from the identified laws, or something required by the state plan, a citation identifying the location of the provisions on adjustment of claims could easily have been provided by the Department. If the situation is more complex, and the identified laws and plan working together make a rule on adjustment of claims necessary, this must be explained more fully. In order to remedy this oversight, the Department may prepare a supplement to the statement of reasons that presents substantial evidence of the need for the claims adjustment regulation. As provided in Government Code section 11346.8 (d), this supplement must be made available for at least 15 days of public comment pursuant to Government Code section 11347.1.

CONCLUSION

For the foregoing reasons, OAL disapproved the proposed regulations.

June 4, 2008



David D. Potter
Senior Staff Counsel

FOR: SUSAN LAPSLEY
Director

Original: John Wagner
Copy: Sandra Ortega