

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
DEPARTMENT OF REHABILITATION)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
REGULATORY ACTION:)	(Gov. Code, sec. 11349.3)
Title 9, California Code of)	
Regulations)	OAL File No. 2008-1024-02S
)	
ADOPT SECTIONS 7212.1, 7212.2,)	
7212.3, AND 7212.4)	
AMEND SECTIONS 7210, 7211,)	
AND 7212)	
_____)	

SUMMARY OF REGULATORY ACTION

The Department of Rehabilitation (Department) by this regulatory action sought to amend title 9, California Code of Regulations, concerning the Business Enterprises Program for the Blind. Specifically, this regulatory action would have replaced existing regulations and adopted new regulations covering general provisions, definitions, eligibility requirements, applicant assessment, interview, referral, vendor training program, vendor-trainers, client-trainee responsibilities, and in-service and upward mobility training.

DECISION

On December 10, 2008, the Office of Administrative Law (OAL) disapproved the above referenced regulatory action for the following reasons: failure to make a change to the regulations available to the public as required by Government Code sections 11346.2 and 11346.8; failure to comply with the clarity and necessity standards of Government Code section 11349.1; and failure to include information in the initial statement of reasons and the final statement of reasons required by section 11346.2(b)(1) of the Government Code and sections 10(b)(2) and 20(c)(1) of title 1 of the California Code of Regulations.

DISCUSSION

The adoption of regulations by the Department must satisfy requirements established by the part of the California Administrative Procedure Act (APA) that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. THE PROPOSED REGULATIONS SUBMITTED TO OAL CONTAIN A CHANGE THAT WAS NOT MADE AVAILABLE TO THE PUBLIC

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the initial text made available to the public be made available for public comment before the changes are adopted. Subdivision (c) states:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 7211 of title 9 of the California Code of Regulations as proposed by this rulemaking and made available to the public during the 45 day comment period included a new subsection (a)(11) which provided a definition for the term “Combining or Consolidation of Vending Facilities.” The text of section 7211 of title 9 as submitted to OAL for filing with the Secretary of State has removed this definition. This definition is not independent of the other regulatory provisions in this rulemaking in that it is referred to in other definitions contained in subsections (a)(21) and (a)(38) of section 7211. This deletion of the definition in subsection (a)(11) of section 7211 was not shown in strikeout and made available to the public for comment.

For this reason, the deletion of the definition of “Combining or Consolidation of Vending Facilities” in subsection (a)(11) of section 7211 must be shown in strikeout and be made available for comment for at least 15 days pursuant to Government Code section 11346.8 (c) and

section 44 of title 1 of the California Code of Regulations. In the alternative, if the deletion of this proposed definition in subsection (a)(11) of section 7211 was merely an inadvertent error, it can simply be reinserted into the text for filing with the Secretary of State upon resubmission to OAL.

2. CLARITY

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The following provisions fail to comply with the “clarity” standard.

- a. Subsection (d) of new section 7212 of title 9 as proposed by this rulemaking provides in part:

...The applicant must score at least 66 percent on the DR 446, Pre-Entry Evaluation (Rev. 07/07) to be referred for the review and interview conducted pursuant to (g) and (h) herein, respectively, **unless the Training Instructor waives this requirement** (Emphasis added.)

No further description of any criteria or standards the Training Instructor is to follow in determining whether to grant such a waiver is provided in the regulations. A person directly affected by this regulation would not easily understand under what circumstances the Training Instructor might waive this requirement. Any applicable criteria or standards need to be added to the regulation and made available for comment for at least 15 days pursuant to Government Code section 11346.8 (c) and section 44 of title 1 of the California Code of Regulations. If there are no criteria or standards involved, the reason for this lack of direction needs to be explained in the statement of reasons.

- b. Subsection (a)(21) of new section 7211 of title 9 as proposed by this rulemaking provides in part:

...An individual vending facility number shall be issued for a vending facility, whether comprised of one site, or two or more sites that have been combined or consolidated, **as provided for in subsection (a)(11) herein.** (Emphasis added.)

Subsection (a)(11) of section 7211 of course no longer provides for combining or consolidating sites. See discussion under item 1 above.

- c. Subsection (a)(38) of new section 7211 of title 9 as proposed by this rulemaking provides in part:

“Satellite Site” means the secondary site or sites of two or more sites that have been combined or consolidated into a vending facility, **consistent with subsection (a)(11) herein.** (Emphasis added.)

Subsection (a)(11) of section 7211 of course no longer provides for combining or consolidating sites. See discussion under item 1 above.

- d. Subsection (a)(35) of new section 7211 of title 9 as proposed by this rulemaking provides in part:

“Permit” means any agreement between the BEP and the contracting agency, **as defined in subsection (a)(12) herein,** which authorizes.... (Emphasis added.)

There is no subsection (a)(12) of section 7211 of title 9 as proposed by this rulemaking in that the definition of “Contracting agency” was moved to subsection (a)(11) following the deletion of the definition described under item 1 above.

3. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of title 1 of the California Code of Regulations provides:

In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) a statement of the specific purpose of each adoption, amendment, or repeal;
and

(2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a

person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, "why" a regulation is needed and "how" this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3(b)(2) and (7).)

The initial statement of reasons provided with this regulatory action simply states for most of the regulations that the new provisions are needed to comply with various APA standards and to clarify what the regulatory provisions require. It fails to provide information explaining the need for each of the regulatory provisions themselves. Specifically, the initial statement of reasons fails to explain how the net income figure of \$3,200 in 7211(a)(2) was arrived at and the reasons for provisions in 7212(b), (c), (d), (e), (f), (g), (h) and (i), 7212.1(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j), 7212.2(a), (b), (c) and the first sentence of (d), 7212.3(a), the first sentence of (b), (c), (d), and (e), and 7212.4(a), second sentence in (b), (c)(13) and (g). This information should now be added to the rulemaking file and be made available to the public for 15 days pursuant to Government Code sections 11346.8(d) and 11347.1.

4. THE FINAL STATEMENT OF REASONS DOES NOT INCLUDE A DEMONSTRATION THAT IT WOULD BE CUMBERSOME, UNDULY EXPENSIVE, OR OTHERWISE IMPRACTICAL TO PUBLISH INCORPORATED DOCUMENTS IN THE CALIFORNIA CODE OF REGULATIONS

The regulations in the proposed rulemaking incorporate by reference a number of different forms. Subsection (c) of section 20 of title 1 of the California Code of Regulations provides in part:

(c) An agency may "incorporate by reference" only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected

public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained. (Emphasis added.)

The final statement of reasons included in this rulemaking file contained no such demonstration.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: December 12, 2008

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