

**State of California
Office of Administrative Law**

**In re:
Division of Juvenile Justice**

**Regulatory Action: Title 15
California Code of Regulations**

**Adopt sections: 4853, 4854, 4939.5,
4961.1, 4977.5, 4977.6,
4977.7, 4983.5**

**Amend sections: 4846, 4847, 4848,
4848.5, 4849, 4850,
4852, 4900, 4925, 4926,
4927, 4928, 4929, 4935,
4936, 4937, 4938, 4939,
4940, 4977, 4978, 4979,
4980, 4981, 4982, 4983**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2011-0817-04 S

SUMMARY OF REGULATORY ACTION

The Division of Juvenile Justice (Division) within the Department of Corrections and Rehabilitation, proposed to adopt sections 4853, 4854, 4939.5, 4961.1, 4977.5, 4977.6, 4977.7 and 4983.5 and amend sections 4846, 4847, 4848, 4848.5, 4849, 4850, 4852, 4900, 4925, 4926, 4927, 4928, 4929, 4935, 4936, 4937, 4938, 4939, 4940, 4977, 4978, 4979, 4980, 4981, 4982 and 4983 of title 15 of the California Code of Regulations pertaining to the parole revocation process for juvenile parolees, detention and revocation, hearings and appeals. On August 17, 2011, the Division submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On September 29, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

BACKGROUND

In *L.H. vs. Schwarzenegger*, Case No. 2:06-CV-02042-LKK0GGH, the United States District Court, Eastern District of California, issued a stipulated order of permanent injunctive relief in response to a lawsuit that alleged that juvenile parolees' rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Rehabilitation Act, and the Americans with Disabilities Act were violated. On

August 17, 2011 the Division submitted to OAL proposed regulations to implement this stipulated order. As noted above, OAL disapproved the proposed regulations.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons: failure to comply with the clarity and necessity standards of Government Code section 11349.1; a defective initial statement of reasons; failure to make a change available to the public; and failure to comply with the requirements for incorporation by reference.

DISCUSSION

The adoption of regulations by the Division must satisfy requirements established by the part of the 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.

All APA issues must be resolved before the regulations can be approved by OAL. OAL reserves the right to conduct a complete review for compliance with both the procedural and substantive requirements of the APA upon resubmittal of this regulatory action by the Division.

1. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

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 the 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 submitted with this proposed regulatory action contained for the most part only a general explanation of the need for the changes proposed by this rulemaking. The initial statement of reasons indicates that the specific purpose and factual basis for the adoptions and amendments in this rulemaking “...is to ensure parolees in the Division, regarding parole violation, detention, and revocation are given due process under *Morrissey v. Brewer*, 408 U.S. 481 (1972), the right to counsel under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and appropriate accommodations in compliance with the Americans with Disabilities Act (ADA) and the Rehabilitation Act.” Although a demonstration of necessity is not required for those regulatory provisions carried over from the existing regulation sections, the initial statement of reasons is required to include an explanation of the need for each new provision or change to the existing provisions proposed in the initial text made available to the public with the 45-day notice. In order to satisfy this requirement the Division will have to prepare a supplement to its Statement of Reasons that includes substantial evidence of the necessity, add it to the record and provide notice and an opportunity for public comment in accordance with Government Code section 11347.1.

2. CLARITY

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. Sections 4852(c), 4853(i), 4853(l), 4854(e), 4983(b)(3) and 4983.5(a) all discuss the additional time in custody that a parolee may incur through a parole violation. These sections indicate that the amount of time assessed to the parolee must be consistent with the Revocation Matrix, the Revocation Extension Matrix and hearing officer guidelines. The applicability of the Revocation Matrix or the Revocation Extension Matrix is dependent upon whether the parolee was in custody or not in custody when the violation occurred. An example from section 4852(c) is text that states, “A parolee may be returned for up to one (1) year for a parole violation consistent with the Revocation Matrix established by the Juvenile Parole Board.” The Revocation Matrix, the Revocation Extension Matrix and the hearing officer guidelines were not properly incorporated by reference and were therefore not noticed and made available for public comment. Therefore, a person facing additional time in custody would not easily understand from these sections how much additional time in custody they might receive for their alleged parole violation.
- b. Section 4852(d) and (e) both discuss Level I and Level II behavior in reference to parole violations. However, the only definition of what constitutes a Level I or Level II behavior is found in section 4982 that is located in a different division and chapter of the California Code of Regulations. Section 4852 is in Title 15, Division 4 “Division of Juvenile Justice,” Chapter 4 “Parole Services,” while section 4982 is found in Division 4.5 “Youthful Offender Parole Board,” Chapter 3 “Board Rules Relating to Parole.” “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.” (Emphasis added.) A person subject to these proposed regulations would not easily understand what is meant by these two levels of behavior or whether the definitions found in Division 4.5, Chapter 3 applied to the behavior identified in Division 4, Chapter 4.
- c. Section 4853(a) provides that, “Parole Revocation shall address Level III parole behavior which parole staff are required to report to the Juvenile Parole Board, including serious technical and/or law violations, and/or any Level I or Level II behavior which the Parole Agent and Unit Supervisor deem serious or reportable.” A person subject to these proposed regulations would not easily understand from this section what behavior might be deemed “serious or reportable.” In addition to the issues identified above regarding the location for the definition of Levels I, II or III behavior there is also no definition in

the regulations for what constitutes behavior that is “serious or reportable.” While there is a definition of a “technical” violation, it is found in section 4982 located in a different division and chapter of the California Code of Regulations. Section 4853 is in Title 15, Division 4 “Parole Services, Chapter 4 “Parole Services,” while section 4982 is found in Division 4.5 “Youthful Offender Parole Board,” Chapter 3 “Board Rules Related to Parole.” “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.” (Emphasis added.) A person subject to these regulations would not be able to easily understand what a “serious,” “reportable” or “technical” violation entails or whether the definition of “technical” found in another part of the California Code of Regulations applies.

- d. Section 4853(h) indicates that, “...supplemental charges must be raised at a reasonable time prior to the Revocation Hearing.” A person subject to this regulation would not easily understand what is meant by “a reasonable time.”
- e. Section 4854(i) uses two terms, “Serious In-Custody Misconduct” and “Willful Program Failure.” A parolee may be charged with an act of “Serious In-Custody Misconduct or “Willful Program Failure.” However, the only definition of what these terms mean are found in section 4900 located in a different chapter of the California Code of Regulations. Additionally, the definitions found in section 4900 only apply to that chapter pursuant to language in section 4900(b) that indicates the definitions are “For the purpose of the regulations contained in this chapter...” Section 4854 is in Title 15, Division 4, Chapter 4, while section 4900 is found in Division 4.5, Chapter 3. A parolee subject to being charged under section 4854 would not easily understand what act would constitute “Serious In-Custody Misconduct” or “Willful Program Failure.”
- f. Section 4900(b)(24) defines Notice of Rights as, “An advisement to a parolee of his/her procedural and due process rights in parole revocation proceedings pursuant to the L.H. Stipulated Permanent Injunction and State and federal constitutions.” A parolee would not easily understand what due process rights are contained in the L.H. Stipulated Permanent Injunction.
- g. Section 4935(e) states that one basis for an appeal is that “The decision of the Juvenile Parole Board was contrary to a Juvenile Parole Board Policy and the outcome of the hearing would have been substantially different had the Juvenile Parole Board policy been followed.” The Juvenile Parole Board policies were not properly noticed and made available for public comment, and incorporated by reference in this rulemaking; nor were the policies found as part of a statute or duly adopted regulation. Therefore, a parolee wishing to appeal a decision would not easily understand all of the potential “Juvenile Parole Board policies” that might be contrary to the decision.
- h. Section 4939(a)(3) indicates that if a new hearing is granted it “...shall be scheduled according to policy...” A parolee granted a new hearing would not be able to easily understand how his/her hearing will be scheduled since the term “policy” is very broad and undefined.

- i. Section 4961.1(a) states, “Disciplinary Decision Making System policy for youth as set forth in Sections 4630 through 4654 applies to parole violators where the sanctions imposed do not extend a parole violator’s confinement. This applies to Levels 1 through 3 of the Disciplinary Decision Making System that do not extend the Revocation Release Date.” However, there is no mention within sections 4630 through 4654 regarding Levels 1 through 3. The only levels discussed in these sections are Level A and Level B behaviors. Therefore, a person subject to this proposed regulation would not easily understand how this section will be applied.

Any changes made to the regulations to address the clarity concerns in paragraphs (a) - (i) above must be made available to the public pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

3. THE REGULATIONS SUBMITTED TO OAL FOR FILING WITH THE SECRETARY OF STATE CONTAIN A CHANGE THAT WAS NOT MADE AVAILABLE TO THE PUBLIC

Subdivision (a)(3) of Government Code section 11346.2 requires that changes to the existing California Code of Regulations be highlighted when made available to the public:

The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

The text of the regulations submitted to OAL with the notice of proposed rulemaking and purportedly made available to the public during the 45-day comment period did not show the strikeout of all of the current language in section 4937. Instead it merely illustrates the new language with underline. This change was also not shown during the two subsequent 15-day notice periods.

The strikeout of this language should now be made available for comment pursuant to section 44 of title 1 of the California Code of Regulations.

4. INCORRECT PROCEDURE

The proposed regulations contain numerous citations that identify materials or documents that are not included within the text of the regulations that may nevertheless determine the actual time assessment for various parole violations that will apply if these regulations are approved. OAL adopted section 20 of Title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Section 20 provides the requirements for a state agency that wishes to incorporate another document as part of a regulation by reference to that document. An incorporation by reference of an external document (or part of an external document) into a regulatory provision effectively makes the incorporated text a part of the regulatory provision, as though the incorporated text were printed in its entirety as part of the regulatory provision. (Cal. Code Regs., tit.1, section 20(a).) For this reason the incorporated document must be included in the rulemaking record for OAL review

and must have been made available to the public for comment. (Cal. Code Regs., tit. 1, section 20(b).) Subdivision (b) of section 20 provides in pertinent part:

Material proposed for “incorporation by reference” shall be **reviewed in accordance with procedures and standards for a regulation** published in the California Code of Regulations.... (Emphasis added.)

In order to be reviewed by OAL, a document incorporated by reference must be included along with the regulation text submitted to OAL with the rulemaking file.

Subdivision (c) of section 20 provides other requirements for a state agency that wishes to incorporate a document as part of a regulation by reference to that document. Subdivision (c) of section 20 provides:

An agency may “incorporate by reference” only if the following conditions are met:

...

(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.

(3) **The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance.** If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) **The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance.** Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.... (Emphasis added.)

a. Some of the regulatory language utilized by the Division suggests that the Division intends to incorporate materials that will not be published in the CCR as regulatory standards for the state of California. An example from the language used in section 4852(c) can be used to illustrate OAL’s concerns. [Similar language is employed throughout the regulations, and in each instance, presents the same issues.] The regulation provides:

A parolee may be returned to custody for up to one (1) year for a parole violation consistent with the Revocation Matrix established by the Juvenile Parole Board.

OAL's concern is with the language that indicates that the amount of time a parolee may be returned to custody is contained in a matrix that has not been reviewed by OAL, noticed and made available to the public, identified by date of publication and included in the rulemaking file. Even with all the information in the record, OAL does not know what information this matrix contains or what its instructions say. Moreover, it is impossible for anyone to know what the documents may say in the future as new versions are published by the Division. The Revocation Matrix, the Revocation Extension Matrix and hearing officer guidelines were not included in the rulemaking file, nor were they identified by title and date in the regulation text, nor were they identified in the notice and made available to the public for comment during the public availability period.

If the Matrix, the Revocation Extension Matrix and hearing officer guidelines contain regulatory content that is not specified in statute or other applicable law, these documents have not properly been incorporated by reference as required by section 20 of title 1 of the California Code of Regulations, and must be added to the rulemaking record for review by OAL and made available to the public for comment for 15 days pursuant to sections 11346.8 and 11347.1 of the Government Code.

b. Additionally, section 4900(b)(24) provides:

Notice of Rights. An advisement to a parolee of his/her procedural and due process rights in parole revocation proceedings pursuant to the L.H. Stipulated Permanent Injunction and State and federal constitutions.

The L.H. Stipulated Permanent Injunction was noticed and identified as a document relied upon for public comment during the public availability period. However, the L.H. Stipulated Permanent Injunction, and in particular, the procedural and due process rights in parole revocation proceedings, have not been properly incorporated by reference as required by section 20 of title 1 of the California Code of Regulations, and therefore, must be added to the rulemaking record for review by OAL and made available to the public for comment for 15 days pursuant to sections 11346.8 and 11347.1 of the Government Code.

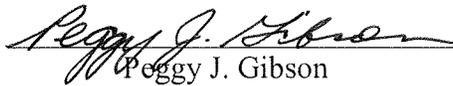
5. ERRORS IN THE TEXT

The proposed text includes errors. The text has typos, internal inconsistencies and incorrect display of changes with respect to the existing regulations. None of the errors present a significant substantive issue with regard to the notice that was provided to the public or impair the adequacy of the Division's rulemaking proceeding, but they must nevertheless be corrected prior to OAL approval and filing with the Secretary of State. All of these various errors have been discussed with the Division's staff.

CONCLUSION

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6805.

Date: October 6, 2011


Peggy J. Gibson
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