

**State of California
Office of Administrative Law**

**In re:
Superintendent of Public Instruction**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

**Regulatory Action: Title 5
California Code of Regulations**

Government Code Section 11349.3

**Adopt sections: 18224.6,
18227, 18227.1**

OAL File No. 2012-0601-01 S

**Amend sections: 18078, 18409,
18411, 18424, 18426**

Repeal sections:

SUMMARY OF REGULATORY ACTION

This regulatory action proposed to amend the general provisions for awarding of funding for Childcare and Development Programs. Current California law requires that child care providers who are exempt from licensure and not the child's grandparent, aunt, or uncle, to be TrustLine registered in order to be eligible to receive a child care subsidy payment. Existing CalWORKs Stage 2 and 3 regulations require this type of provider to apply for TrustLine registry or be TrustLine registered. These current proposed regulations address the issue of TrustLine registration for applicable license-exempt providers of subsidized child care and development services.

DECISION

On June 1, 2012, the State Superintendent of Public Instruction (SPI) submitted to the Office of Administrative Law (OAL) the proposed adoption and amendment of the aforementioned sections of title 5 of the California Code of Regulations. On July 16, 2012, OAL provided notice to SPI that OAL disapproved the proposed regulatory action for failure to comply with the California Administrative Procedure Act (APA). The reasons for disapproval are:

- A. The agency failed to follow required APA procedures.
- B. The regulations failed to comply with the *Clarity* standard of Government Code section 11349.1 and section 16 of title 2 of the California Code of Regulations; and,

- C. The regulations failed to comply with the *Reference* standard of Government Code section 11349.1 and section 14 of title 2 of the California Code of Regulations.

All issues must be resolved prior to OAL approval of any resubmission.

DISCUSSION

Any regulation adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 review (Gov. Code, secs. 11340.5 and 11346). OAL reviews all regulatory submissions for compliance with applicable APA procedural requirements 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 its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful opportunity to comment on rules and regulations before they become effective.

This disapproval decision contains examples of identified issues in the proposed rulemaking submitted by the SPI, but is not exhaustive. Many issues have been identified and discussed with SPI staff. 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 resubmission.

A. FAILURE TO FOLLOW REQUIRED PROCEDURES.

1. Form 399.

California Government Code section 11347.3(b)(5) requires that a rulemaking file contain the estimate, together with the supporting data and calculations, required by section 11346.5(a)(6). Section 11346.5(a)(6) identifies, in pertinent part, the estimate of the cost to any state agency and defines cost as additional cost, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations. The Department of Finance (DOF) adopted instructions pursuant to California Government Code section 11357 in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5(a)(6).

For purposes of reporting this estimate, and other information, the DOF has developed, and requires regulatory agencies to use, the STD. 399. (SAM section 6614.) SAM

section 6615 establishes when financial estimates contained in an STD. 399 require the concurrence of the DOF. Section 6615 states in pertinent 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. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

A.1-Reimbursable Local Costs	B.1-State Costs
A.2-Non-Reimbursable Local Costs	B.2-State Savings
A.3-Local Savings	B.4-Other
A.6-Other	

In this rulemaking file, the SPI has indicated in section B.4- "Other. The regulations do not impose any additional costs upon the state as they clarify current practice." The STD. 399, therefore, requires DOF concurrence. The rulemaking file does not contain DOF concurrence and, therefore, cannot be approved.

2. Documents Relied Upon.

Government Code section 11346.2(b)(3) requires identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation in the Initial Statement of Reasons. Government Code section 11347.3(b)(7) requires that all data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation *be included* in the rulemaking file.

The Initial Statement of Reasons for the proposed rulemaking identified two documents upon which the SPI relied in adopting this proposal; "the Initial Statement of Reasons (ISOR) and Final Statement of Reasons (FSR) ORD #0906-07 for the CDSS TrustLine regulations. . . ." Although the Initial Statement of Reasons indicated how those documents could be viewed (via web link), Government Code section 11347.3(b)(7) requires a copy to be in the rulemaking file.

B. CLARITY.

In adopting the APA, the Legislature found that many regulations were unclear and confusing to the persons who must comply with the regulations (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the "Clarity" standard. Section 11349(c) defines "Clarity" to mean "... written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them."

Section 16 of title 1 of the California Code of Regulations (“CCR”) declares in relevant part that:

In examining a regulation for compliance with the ‘clarity’ requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exist:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or ...
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons ‘directly affected;’ ...
- (b) Persons shall be presumed to be ‘directly affected’ if they:
 - (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this rulemaking, OAL determined that section 18224.6 did not satisfy the “Clarity” standard, as discussed below.

Section 18224.6 states in part:

- (a) A license-exempt provider shall not be eligible to receive reimbursement for child care and development services when an Alternative Payment program:
 - (1) is notified by the California Child Care Resource and Referral Network that the TrustLine registered provider’s:
 - (A) TrustLine case has been closed or denied; or
 - (B) TrustLine Registry has been revoked.
 - (2) Receives reliable and documented information that a license-exempt provider has:
 - (A) Active or contagious tuberculosis; or
 - (B) Been convicted of any crime involving violence against, or abuse or neglect of, children.
- (b) Upon receipt of any of the information in subdivision (a), the Alternative Payment program shall do the following:
 - (1) Terminate reimbursement to the provider for services provided as of the effective date of the TrustLine closure, denial, or revocation; or the date on which the Alternative Payment Program received reliable and documented information of active or contagious tuberculosis or of a conviction of a crime

against a child. The provider will be reimbursed for services provided through the effective day of the TrustLine closure, denial, or revocation, or the day of receipt of documentation of active or contagious tuberculosis, or a conviction of a crime against a child;

It is unclear in subdivision (b)(1) as to what the actual “effective date” is with respect to closure, denial, revocation, or if the provider will be paid for services even though they are denied TrustLine registration or are otherwise ineligible for reimbursement. Section 18224.6 must be redrafted to clearly state when reimbursement will be provided and not leave open to question whether reimbursement is available in situations where the provider would otherwise be ineligible.

C. REFERENCE.

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “Reference” standard. Government Code section 11349(e) provides:

“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.

Government Code section 11346.2(a)(2) requires that the agency include a reference following the express terms of each CCR section, listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by *that section* of the CCR.

Newly proposed section 18227 lists as references: “Sections 8202 and 8203, Education Code; Sections 1596.60-1596.68 and 1596.70-1596.799, Health and Safety Code.” Sections 1596.60-1596.68 actually contain nineteen Health and Safety Code provisions, some of which appear to be relevant to the issue of “eligible providers” and some that are merely extraneous to that particular issue. For instance, Health and Safety Code section 1596.615 states that all moneys collected by the department (which is defined as the Department of Social Services (DSS), not SPI) to implement the chapter shall be continuously appropriated to the department (DSS) without regard to fiscal year for expenditures. Although useful information, section 18227 proposed to be adopted by SPI does not specifically implement, interpret, or make specific Health and Safety Code section 1596.615. Therefore, Health and Safety Code section 1596.615 is not a proper reference citation for regulation section 18227 and should be removed.

Before this matter can be approved, each individual statutory code section provided as a reference citation for sections 18224.6, 18227 and 18227.1 must be analyzed to determine whether it is a proper reference citation. Does the proposed regulation actually implement, interpret, or make specific *that statute* that is referenced and does SPI have the authority to implement, interpret or make specific that particular statute?

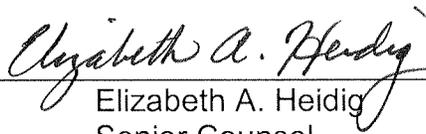
CONCLUSION

For the reasons set forth above, OAL has disapproved the proposed adoption of sections 18224.6, 18227 and 18227.1 and the amendment of sections 18078, 18409, 18411, 18424 and 18426 of title 5 of the California Code of Regulations.

In addition, please note that the Statement of Mailing of the 15 day text has an incorrect date on it. It indicates that the public comment period was from "May 5, 2021 through May 21, 2012, inclusive." This will also need to be corrected.

If you have any questions, please contact me at (916) 323-6800.

Date: July 20, 2012



Elizabeth A. Heidig
Senior Counsel

FOR: DEBRA M. CORNEZ
Director

Original: Tom Torlakson
Copy: Cynthia Olsen