

**State of California
Office of Administrative Law**

In re:
Department of Child Support Services

Regulatory Action:

**Title MPP, California Code of
Regulations**

Adopt sections:

Amend sections:

Repeal sections: 12-501, 12-501.1, 12-501.2, 12-505, 12-505.1, 12-505.2, 12-505.3, 12-505.4, 12-505.5, 12-505.6, 12-510, 12-510.1, 12-510.1.11, 12-510.1.11.111, 12-510.1.11.112, 12-510.1.12, 12-510.1.13, 12-510.2, 12-510.2.21, 12-510.2.21.211, 12-510.2.21.212, 12-510.3, 12-510.3.31, 12-510.4, 12-510.4.41, 12-510.4.42, 12-510.5, 12-510.5.51, 12-510.5.52, 12-515, 12-515.1, 12-515.1.11, 12-515.1.12, 12-515.2, 12-515.2.21, 12-515.2.22, 12-515.2.22.221, 12-515.2.22.222, 12-515.2.23, 12-515.2.24, 12-515.2.24.241, 12-515.2.24.242, 12-515.2.25, 12-515.2.26, 12-515.2.26.261, 12-515.2.26.262, 12-515.2.26.263, 12-515.3, 12-515.3.31, 12-515.3.32, 12-515.3.32.321, 12-515.3.32.322, 12-515.3.33, 12-

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0329-04

OAL Matter Type: Nonsubstantive (N)

515.3.33.331, 12-
515.3.33.332, 12-
515.3.34, 12-
515.3.34.341, 12-
515.3.34.342, 12-
515.3.35, 12-515.3.36,
12-515.3.36.361, 12-520,
12-520.1, 12-520.1.11,
12-520.1.12, 12-
520.1.12.121, 12-
520.1.12.122.

SUMMARY OF REGULATORY ACTION

On March 29, 2016, the Department of Child Support Services (Department) submitted this action to the Office of Administrative Law (OAL) to repeal Chapter 12-500 of the Manual of Policies and Procedures (MPP), which deals with the Franchise Tax Board child support collection program, as a change without regulatory effect.

On May 11, 2016, OAL provided notice to the Department that OAL disapproved the action. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced action because the Department failed to provide an explanatory statement that complies with the requirements in title 1 of the California Code of Regulations (CCR), section 100. The Department did not demonstrate that the repeal of the chapter meets the requirements for a change without regulatory effect.

DISCUSSION

The adoption, amendment or repeal of regulations is ordinarily accomplished by following the rulemaking procedural and substantive requirements of the Administrative Procedure Act (APA). In 1986, OAL adopted a regulation to create a procedure for allowing certain changes in regulations published in the CCR without going through the usual APA procedure. OAL's regulation, found in title 1, section 100 of the CCR, is based upon the rationale that changes to rules that have no regulatory effect do not involve rulemaking and the belief that following the usual APA rulemaking process for such changes imposed an unnecessary burden with no corresponding benefit.

Section 100, subdivision (a)(6) of title 1 of the CCR states, in part:

100. (a) ...Changes without regulatory effect include, but are not limited to:...

(6) making a regulatory provision consistent with a changed California statute if both of the following conditions are met:

(A) the regulatory provision is inconsistent with and superseded by the changed statute, and

(B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.

Section 100 further specifies in subdivision (b) that

100. (b) In submitting a change without regulatory effect to OAL for review the agency shall:

(1) submit seven copies of the regulations with an addition shown in underline or italics and a deletion shown in strike-out; and

(2) attach to each copy a completed Form 400, with at least one Form 400 bearing an original signature; and

(3) submit a written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

In this action, the Department proposes to repeal MPP Chapter 12-500 in its entirety. The chapter, entitled "Franchise Tax Board (FTB) Child Support Collection Program Regulations," was initially adopted by the Department of Social Services in 1998. It includes definitions, conditions for referrals of child support collection cases from the district attorney to the FTB, and general procedures for the management of child support collection cases.

The Department of Child Support Services was later created in 2000 as a department within the California Health and Human Services Agency. It was also given the authority to administer all services and perform all functions necessary to establish, collect, and distribute child support. (Fam. Code, sec. 17200.) The Department was further given the authority to adopt, amend, or repeal regulations. (Fam. Code, sec. 17312.)

In this file submitted to OAL, the Department's written explanation for each proposed repeal generally states that the regulation is "superseded by existing [statutory] provisions" and includes either a summary or a verbatim copy of the cited legislation. However, the legislation cited in the written explanation does not show that the Department has no discretion to keep or repeal the regulations. On the contrary, the cited legislation indicates that the Department was given such discretion.

Furthermore, the written justification does not explain why the proposed repeal of the regulations does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any CCR provision. (1 Cal. Code Regs, sec. 100, subd. (b)(3).)

1. Discretion to Adopt, Amend, or Repeal Regulations

The Department's written justification quotes various federal and state statutes, federal regulations, and even California regulations from title 22 of the CCR. However, a number of the provisions quoted indicate that the Department has discretion with respect to this particular subject matter. Below are a few examples, quoted in relevant parts:

- 1.1. Family Code section 17304, subdivision (b), states that the "local child support agency shall be responsible for the performance of child support enforcement activities required by law and regulation *in a manner prescribed by the department....*" (Emphasis added.)
- 1.2. Family Code section 17500, subdivision (c), states: "Except as provided in Section 17450, the local child support agency shall submit child support delinquencies to the department for purposes of supplementing the collection efforts of the local child support agencies. Submissions shall be *in the form and manner and at the time prescribed by the department....*" (Emphasis added.)

The above is not an exhaustive list of cited legislation that indicates that the Department has the discretion in adopting regulations to implement statutes dealing with the collection of child support. These statutory provisions provide the Department with the discretion to either repeal the current MPP Chapter 12-500 in its entirety or to amend it to tailor the regulatory language to the Department's chosen practices.

2. Failure to Explain Why the Proposed Repeals Do Not Have Regulatory Effect

As mentioned above, the Department's written explanation for each proposed repeal generally states that the regulation is "superseded by existing [statutory] provisions" and includes either a summary or a verbatim copy of the cited legislation. However, the written statement does not explain why the repeal of each provision does not have a regulatory effect. Below are some examples.

2.1. MPP § 12-501.2(h)(1)

The current MPP section 12-501.2, subdivision (h)(1), provides a definition for the term hardship. In its written explanation for the proposed repeal of this definition, the Department simply states: "Revenue Taxation Code (R&TC) section 19271 was repealed in 2009. Definition is superseded by existing provisions...." It then quotes various statutory provisions, including Family Code section 4071, subdivision (a), which discusses circumstances evidencing hardship.

However, Family Code section 4071 came into effect January 1, 1994. As mentioned above, MPP Chapter 12-500 was adopted in 1998. Thus, MPP section 12-501.2 could not be superseded by Family Code section 4071 because MPP section 12-501.2 was adopted subsequent to the effective date of Family Code section 4071. In other words, Family Code section 4071 is not a "changed statute" pursuant to title 1, section 100, subdivision (a)(6)(A), of the CCR.

Additionally, the description of circumstances evidencing hardship in Family Code section 4071 is made more specific by MPP section 12-501.2, subdivision (h)(1). The explanatory statement does not demonstrate that the term “hardship,” adopted in MMP section 12-501.2 in 1998, has been superseded by subsequent legislation.

2.2. MPP § 12-515.3.31

The existing MMP section 12-515.3.31 states that the “burden of producing evidence concerning a disputed balance shall be on the noncustodial parent.” In its written justification, the Department simply states: “Sections are superseded by existing provisions.” The statement goes on to quote Family Code sections, sections in title 45 of the Code of Federal Regulations (CFR), and sections in title 22 of the CCR.

However, none of the cited Family Code sections or the provisions of the CFR and CCR address any burden of proof. In other words, the written justification does not show that the regulation is superseded by statute. Thus, repealing MPP section 12-515.3.31 would materially alter the rights and responsibilities of the noncustodial parent because the provision that addresses the burden of proof would no longer be in existence. Again, the written justification does not show that the regulation has been superseded by statute.

2.3. MPP § 12-520.11

The current MPP section 12-520.11 states that the “reimbursement [of child support over collection] shall be issued within 15 working days of the day the district attorney determined the amount due the noncustodial parent.” Here too, the Department states in its written explanation that the “[s]ections are superseded by existing provisions” and quotes provisions from the Family Code, Government Code, title 45 of CFR, and title 22 of the CCR. It also summarizes a section of the Welfare and Institutions Code.

However, none of the referenced law provided in the written explanation address a time frame for reimbursement of child support over collection. In fact, the Department quotes subdivision (a)(8) of section 303.100 of title 45 of the CFR that provides the “State must have procedures for promptly refunding to noncustodial parents amounts which have been improperly withheld.” Further, the Department quotes section 303.102, subdivision (g) that states “[i]f the amount collected is in excess of the amounts required to be distributed..., the IV-D agency must repay the excess to the noncustodial parent whose State income tax refund was offset *within a reasonable period in accordance with State law.*” (Emphasis added.) These quoted provisions do not appear to supersede the regulation. Instead, MPP section 12-510.11 interprets the sections found in title 45 of the CFR by specifying that “within 15 working days” is a “reasonable period” for “promptly refunding” amounts improperly withheld. Thus, the Department has not demonstrated how the repeal of MPP section 12-520.11 would not materially alter the rights of the recipient of this reimbursement, in light of the fact the regulation establishes a time frame of 15 working days for reimbursement.

In short, simply stating that the regulation is “superseded by existing [statutory] provisions” with no further explanation or analysis does not satisfy the requirements of title 1, section 100 of the CCR. Although it is possible that the repeal of MPP Chapter 12-500 may be nonsubstantive, the Department failed to demonstrate how the repeal is without regulatory effect.

If the Department opts to resubmit the action to propose a repeal of the MPP Chapter 12-500 as a change without regulatory effect, the Department must provide a written explanation that demonstrates why the repeal of each regulatory section does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any CCR provision.

CONCLUSION

For the reasons set forth above, OAL disapproved this action because the Department did not adequately demonstrate that the repeal of MPP Chapter 12-500, in its entirety, qualifies as a “change without regulatory effect” under title 1, section 100, of the California Code of Regulations.

Date: May 18, 2016



Thanh Huynh
Senior Attorney

For: Debra M. Cornez
Director

Original: Alisha A. Griffin
Copy: Joseph Lott