

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CALIFORNIA ADVOCATES FOR)
NURSING HOME REFORM, et al., >

Plaintiffs and Appellants, >

vs. >

DIANA M. BONTA, in her official)
capacity as Director of the California)
Department of Health Services, et al.,)

Defendants and Respondents.)
_____ 1

NO. A097107

San Francisco Superior Court,
No. 315107

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

SAN FRANCISCO COUNTY

Hon. David A. Garcia

APPELLANTS' REPLY BRIEF

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INTRODUCTION

In Appellants' Opening Brief, plaintiffs demonstrated that the Department of Health Services administers its Medi-Cal Estate Recovery Program without regulations to govern most of the program's substantive and procedural details. In lieu of properly promulgated regulations, the Department relies on email, word of mouth, correspondence and training sessions to convey its policies to its employees. The bulk of the operative Medi-Cal Estate Recovery policies are conceived and finalized within the Department, without public notice, input, or explanation or justification. After they are adopted, the policies are not publicly available and frequently do not even exist in written form, all in violation of the California Administrative Procedures Act ("APA").

With the exception of defendants' policy of using liens to defeat hardship exemption applications, plaintiffs do not challenge the substance of any of defendants' policies in this lawsuit. Despite this, Respondents' Brief [hereafter "RB"] largely ignores defendants' non-compliance with the APA, and instead defends the substance of the underground policies which plaintiffs have used to illustrate defendants' lawless operation outside the

APA framework.’ As an added measure, defendants augment their straw man strategy by doggedly defending the Department’s right as an executive branch agency, to determine policy- a right that plaintiffs do not dispute.²

This attempt to change the subject of the appeal has led defendants to advance a number of awkward and irrelevant arguments. a, e.g. REI 23 (emphasis in original) (Erroneously arguing that plaintiffs are attacking the content of defendants’ policy excluding annuities from the definition of “other arrangements,” defendants state that the only relief available to plaintiffs “would be to *compel* the DHS to *enforce* claims against such instruments[,]” and then ask “Do Plaintiffs truly want a remand [to compel enforcement of claims against such instruments?]). See also, RB 26 (“it is hard to imagine that Plaintiffs truly want what they seek.... They cannot really want... to deny debtors the option of entering into agreements to postpone payment of their claims. Such a result would be in no one’s interest.“).

Defendants pay lip-service to the APA’s requirement for public

‘See, e.g. RB 7 (The Estate Recovery Program is “fair, progressive and held out as a model for other states.“).

² See, e.g. RB 21 (“DHS is in the best position to evaluate whether enforcing claims against instruments as an other arrangement is worthwhile and consistent with other agency priorities.“)

participation in agency rule-making, by suggesting that their creation of a public advisory group in which plaintiff CANHR participates, serves the purpose well enough. RB 7-8. But the requirements of the APA are not optional. Defendants are substantially out of compliance with the law, despite their clear, present, ministerial duty to obey it. a, Morris v. Harper (2001) 94 Cal.App.4th 52, 57. This Court should reject defendants' vague suggestions of future reform (RI3 8), and reverse the judgment, with directions requiring the Department immediately to adopt, in compliance with all relevant requirements of the APA, any and all rules of general application and procedure used by the estate recovery unit.

ARGUMENT

I. The Record Evidence Demonstrates that Defendants Currently Use Underground Regulations to Administer the Estate Recovery Program

Defendants contend that this lawsuit is based on “an erroneous assumption that [documents obtained through an earlier Public Records Act proceedings] reflect[] the program’s current practices and [a]re evidence of underground regulations.” RB 8-9. Defendants also argue that “Plaintiffs conceded the facts regarding the DHS’s current practices and policies” in the trial court. RB 9.

Neither of these contentions is correct. Plaintiffs demonstrated that

the older documents, whether or not they are still in use, reflect defendants' current operational policies, as testified to by the Department employees who administer the Estate Recovery program on a day-to-day basis (AOB 24-32, 37-39)³ and as determined by the federal Health Care Financing Administration ("HCFA"), during its 1999 review of the program. AOB 11-13, 33.⁴

³Defendants belatedly argue that the deposition testimony of Estate Recovery staff persons was unclear due to imprecise questioning. RB 18 n.4. However, defendants have waived this dubious objection by failing to make it in the trial court. People v. Williams (1997) 16 Cal.4th 153, 208.

⁴Defendants attempt to explain away HCFA's criticism of their administration of the Estate Recovery program by stating that the HCFA report "revealed no areas in which California was out of compliance with federal mandates. . . ." RB 7. But defendants' argument is beside the point. The requirements of the California APA are separate and apart from the substantive requirements of the federal Medicaid law. Compliance with the former has no bearing on obedience to the latter.

While defendants contend that they "promptly addressed the relatively minor concerns that [HCFA] raised[,]" (RB 7), Vivian Auble, the Acting Chief of the Third Party Liability Branch of the California Medi-Cal program (encompassing the Estate Recovery Unit), admitted in her declaration in support of defendants' motion for summary judgment that even after the Department attempted to clarify its policy on the use of liens, HCFA remained dissatisfied and "recently asked for further clarification of the DHS's position regarding the hardship exemption." AA 406-07,7126-27.

Indeed, defendants have never disclosed how they allegedly addressed HCFA's concern regarding the timing of lien offers during the hardship exemption determination process. AOB 12, AA 148. They simply conclusively assert that they have done so.

Citing generally to Plaintiffs' [Responsive] Separate Statement of Undisputed Material Facts in Opposition to Defendants' Motion for Summary Judgment or Adjudication (AA 577-58 1), defendants argue that plaintiffs "conceded the facts regarding the DHS's current practices and policies[,]" citing Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 17 1, an inapposite case which holds that a County employee was judicially estopped from denying that he had a disability in light of a stipulated worker's compensation award reciting that the employee had a permanent disability and was subject to certain work restrictions as a result. RB 9.

But nothing in plaintiffs' response to defendants' separate statement constitutes an admission that the Department no longer follows the underground policies described in the AOB. Most of defendants' "facts," have no bearing on the issues of underground regulations and compliance with the APA. Rather, they are brief descriptions of the content of various policies. AA 578-581. Defendants' argument that the "current practices and policies were undisputed in the lower court and they formed the basis upon which summary judgment was entered in DHS's favor" (RB 9) is incorrect. The trial court's written decision denying plaintiffs' motion, includes brief statements describing the content of current policies, finding that further regulations are unnecessary, without addressing the question of

whether those policies were adopted in compliance with the APA. AA 667-71

II. Defendants' Unlawful Practice of Using Underground Regulations to Administer the Estate Recovery Program is Not Entitled to Judicial Deference

Defendants argue that this Court should defer to their practice of ignoring the requirements of the APA in the administration of the Estate Recovery Program. RB 12 (citing Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal.3d 502). But there is no case which holds that judicial deference is owed to a state agency which flouts the law. The deference referred to in Western Oil, is to an agency's substantive policy decisions in its area of expertise.' Since this lawsuit does not challenge the Department's substantive policy choices, Western Oil is not germane.

Likewise, the presumption in Evidence Code 5 664, "that official duty has been performed [,] is a rebuttable presumption; its effect is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." Gee v. California State Personnel Bd. (1970) 5 Cal.App.3d 713, 718. Here, plaintiffs have met the burden of demonstrating that defendants have ignored the APA, thereby negating the

'See, RB 12 (this Court should defer to DHS's "policy choices," out of "respect for agency expertise.. . .").

effect of the presumption, assuming, for the sake of argument, that it is even applicable here.

III. The Undisputed Facts Demonstrate that Defendants Use Underground Regulations in their Estate Recovery Program

The parties agree that the two-prong test in Tidewater Marine Western, Inc. v. Bradshaw (1996)14 Cal.4th 557, is determinative of whether a policy or practice is a regulation within the requirements of the APA. AOB 14-15, RB 12-13. The first element of the Tidewater test is whether the rule applies generally “rather than in a specific case.” Id. at 57 1. Defendants argue that “a rule does not apply generally where it relates to practices for which there is a need for flexible and individual approaches.” RB 13. But Tidewater contains no such holding.⁶ Rather, it clearly states that in order to apply generally, a “rule need not... apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided.” Id. at 57 1.

Defendants repeatedly contend that Tave v. Cove (1994) 29 Cal.App.4th 1339, holds that a policy used in “some, but not all, audits, fails to constitute a rule of general application.” RI3 13. ⁷ But Tave does **not**

⁶ Indeed, the word “flexible,” does not appear in the Tidewater decision in any of its forms.

⁷Elsewhere in Respondents’ Brief, defendants argue that Tave holds that
(continued..)

concern a rule used in “some” audits, but rather, a methodology used in one audit. AOB 35-36. Defendants’ distorted reading of Taye is in conflict with the Tidewater definition of “general applicability.” In any event, a case is not authority for a proposition it has not considered or decided.

Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, 143. The Taye Court neither considered nor decided whether a policy used in some but not all audits qualifies as a regulation under the APA. Nor did it rule that matters requiring flexibility are exempt from APA requirements. This Court must reject defendants’ distorted reading of Tave and Tidewater.

Moreover, the Department’s policies plainly fall within the second element of a regulation as recognized in Tidewater: the policies implement, interpret or make specific the law enforced or administered by the agency or govern its procedure. 14 Cal. 4th 57 1. Defendants suggest that the underground policies identified by plaintiffs in the AOB are not regulations because they do not “interpret or make specific the law that the [Department] administers[,]” but relate to “internal management.. . .” RB 14.

(. . .continued)

the APA does not apply to policies “where there is a need for flexibility.” RB 26. Like Tidewater, Taye contains no such holding. The only mention of flexibility in Tave is in an excerpt from the agency accountant’s declaration explaining why he applied a particular audit approach to the one case at issue.

But defendants fail to identify a single policy which they believe to be covered by this exemption.

A. Underground Regulations Defining. the Scone of “Estate”

In Appellants’ Opening Brief, plaintiffs demonstrated that the Department maintains underground regulations regarding recovery and/or non-recovery against annuities, life insurance policies and life estates, among other things. AOB 23-26. Instead of responding to plaintiffs’ argument and evidence, defendants defend the merits of their policies and -fail to show why their policies are exempted from the APA. RB 16-17.

For example, defendants argue that their policy concerning recovery from certain life estates, but not others, is “perfectly proper,” because DHS has authority to enforce claims against revocable life estates. RB 16. But whether or not defendants’ policy is authorized by the substantive federal and state statutes is irrelevant.’ No matter what their content, defendants’

⁸ In the AOB, plaintiffs demonstrated that the Department currently follows a policy on life estates, the substance of which is set forth in a document known as “ERUP #004-96, Subject: Life Estates, dated April 19, 1999.” AOB 24-25. Cenia Rice, a Tax Compliance Representative with the Department of Health Services (AA 16 1:27-28), testified at her deposition on February 15,2001, that the content of ERUP #004-96, represents current Department policy. AA 168:13-170:2. Defendants do not challenge the accuracy of Ms. Rice’s statement regarding their policy on Life Estates in Respondents’ Brief. Thus, whether or not “ERUP #004-96,” is itself obsolete, is irrelevant, since the substance of the policy expressed therein is

(continued.. .)

policies on recovery from life estates are not in compliance with the APA.

There is no dispute that federal law authorizes the state to recover against “other arrangements.” 42 U.S.C. 5 1396p(b)(4). See AOB 23, RB 19. Unfortunately, rather than defining the particular “other arrangements,” which are the objects of Department policies, the state regulation simply tracks the general federal statutory language. 22 CaLCode Reg. §50960(b)(1). (AOB Appendix - 1). Defendants’ assertion that the Department’s “other arrangements?” policy is “authorized by federal law,” (RB 19) is not relevant to this appeal.

The Department formerly had a policy of including annuities as a type of “other arrangement.” AOB 23-24. The Department now has a current policy of excluding from recoverable “other arrangements,” annuities, life insurance policies, individual retirement accounts and pensions, that are conveyed to a beneficiary upon the death of a Medi-Cal recipient. RB 19. Although defendants claim that their change in policy

(...continued)
the Department’s current policy and is not contained in any APA regulation.

⁹ Defendants’ assertion that “there is no mystery” as to the Department’s policy on recovery from life estates (RB 17- 1 S), is actually contradicted by Pamela McBroom, the Department’s former Chief of the Estate Recovery Unit, who testified at her deposition that life estates was one of the areas in which the Estate Recovery policy needed clarification. AOB 12.

was made “formally,” (id.), the evidence cited by defendants does not show compliance with the APA. Respondents’ Brief states that “In early 2000... the DHS **adopted formal policies** ceasing the enforcement of claims against annuities.. . .” RB 8 (emphasis added). Yet, there is no dispute that defendants’ adoption of this formal policy was not in compliance with the APA.

Indeed, the Declaration of Vivian Auble states that “DHS determined simply to cease enforcing claims against annuities as an other arrangement.. . . The decision... was made by Stan Rosenstein... and it represents the formal policy of the DHS.” AA 410:23-27. Thus, Auble admits that DHS made its “formal policy,” in an informal manner -- by internal fiat.

The Auble declaration states that plaintiff “CANHR was notified of [the annuity] decisions at the time they were made. A copy of one such notification letter is attached as Exhibit K.” AA 4 10:28-411: 1. But the letter to CANHR is dated June 15, 2000, some three months after the Department’s internal decision was made in March 2000. AOB 24 (citing AA 298). Moreover, the letter clearly reserves the Department’s exclusive right to reinstate collection of annuities at any time, without following APA requirements. AA 2 12.

Defendants' related assertion that plaintiffs were notified of the change in the policy on recovery from annuities "in early 2000," (RB 20, citing AA 640, 643, excerpts from CANHR's publication entitled "Medi-Cal Estate Planning for Long Term Care:~Attorney 's Reference Guide - 2000"), is not only in error, but is also completely undermined by the record evidence cited by defendants. Rather than stating that the Department had ceased to collect from annuities, as defendants represent, the cited excerpt of the CANHR handbook explains that in January 2000, HCFA informed the Department that it could not continue to collect against annuities until after the federal agency revised its state Medicaid Manual and California amended its State Medi-Cal Plan. The manual also includes a letter from Stan Rosenstein to plaintiff McGinnis, representing the closed-door policy decision which he had conveyed internally on March 15, 2000, as a temporary suspension of collections against annuities. AA 643.

Defendants defend their current underground policy of non-collection against annuities as "a decision to forgo enforcing a regulation," which is "discretionary and presumed immune from judicial review." RB 20-21 citing Heckler v. Chaney (1985) 470 U.S. 821, 828. But Heckler is not helpful to defendants, since it is based on the interpretation of a specific

provision of the Federal APA which has no analog in state law.” In fact, contrary to the Federal APA which prohibits judicial review of discretionary agency action, California law explicitly authorizes judicial review of agency action for abuse of discretion. See Code of Civil Procedure 5 1094.5(b). In any event, Heckler concerns enforcement powers of the Food and Drug Administration. This case concerns neither quasi-police power nor the exercise of prosecutorial discretion.

The Department also suggests that its annuity policy is “a resolution not to enforce a regulation,” and therefore exempt from the APA. RB 21. However, this is a absurd, since there is no “regulation” which defines annuities as “other arrangements.” from which DHS can recover Medi-Cal expenditures.

Defendants’ argument that their policy not to collect against annuities does not “implement, interpret or make specific,” the estate recovery law is preposterous. RB 2 1. It could not be clearer that defendants’ policy, defining annuities as an “other arrangement,” subject to recovery one year, and exempt from recovery the next, “make[s] specific” the law on “other arrangements.”

“The provision is 5 U.S.C. § 701 (a)(2), which provides that there can be no judicial review of any “agency action [which] is committed to agency discretion by law.” 470 U.S. at 828.

Similarly, defendants' argument that the Department's annuity policy is not a regulation because it is "generally inapplicable," rather than "generally applicable," is absurd. Unquestionably, the Department's current decision not to recover from annuities generally applies to all estates subject to recovery, just as the prior policy to recover from annuities did.

Defendants' related argument that refraining from taking action is not a legislative act (relying on a legal dictionary definition of "legislation"), and therefore, presumably, not a quasi-legislative act, is equally shallow. The California APA contains no exception from its broad definition of "regulation," for policies stated in the negative. And as plaintiffs demonstrated in the AOB, the Department itself, maintains many such "negative" regulations. See AOB 40-42.' '

Defendants argue that while they may have been utilizing underground regulations when they formerly collected from annuities, they are no longer doing so, citing Robinson v. Washington (D.D.C. 1968), 302 F.Supp. 842, 844.¹² But Robinson is inapposite. There, plaintiffs

"Defendants appear to have abandoned their argument, made in the trial court and apparently endorsed by the superior court, that regulations are unnecessary to govern activities that do not currently occur. See AOB 40-42.

¹²Defendants refer to the Robinson decision as "United States District Court v. Washington" in their brief". RB 24.

challenged a local AFDC policy on two grounds: (1) that it was a de facto regulation which had not been properly promulgated and (2) that the substance of the policy was in conflict with the authorizing statute as interpreted by the United States Supreme Court in King v. Smith (1968) 392 U.S. 309.

The federal court of appeals agreed with plaintiffs on both points, but held that in light of defendant's voluntary withdrawal of the offending regulation as well the federal government's order to restore benefits to affected persons retroactive to the date of the King decision, there was no need for it to impose injunctive relief. Thus, in Robinson there was no question that the challenged policy would not be resurrected. Here, defendants repeatedly reserve their future right to collect from annuities, because such recovery is authorized under federal law. Moreover, unlike the challenged policy in Robinson defendants' annuities policy is one link in a long chain of policies maintained by defendants in violation of the APA.

B. Voluntary Liens and Interest

Defendants' portrayal of their use of liens in the Estate Recovery

program, as “commendable,” is irrelevant. Plaintiffs do not challenge the substance of the policy to use liens. except when they are improperly imposed to defeat a hardship exemption claim.

Defendants incorrectly assert that the complaint does not encompass the issue of the amount of interest charged when a lien is applied. RB 24 n.6 (citing Government Employees Ins. Co. v. Superior Court (2000) 79 Cal.App.4th 95, 98, n.4). But there. the Court correctly held that a complaint encompasses an issue, if it gives the defendants notice that plaintiffs are concerned with that issue. Here, the opening paragraphs of the complaint make clear that its gravamen is the Department’s use and enforcement of underground policies in the administration of its Estate Recovery program, in violation of the Administration Procedures Act, AA 2:3-19. The complaint itself does not catalog particular underground regulations. Rather, it lists the aspects of the Estate Recovery Program which defendants administer without properly promulgated regulations, including the use of liens. AA 6-7-119. Further, paragraph 23 clearly states that plaintiffs believe that “additional internal policies, procedures, guidelines, customs and practices” have been used and will continue to be used by the defendants. AA 7-8.

In the AOB, plaintiffs demonstrated that the Department has a

general policy of offering liens in certain situations. AOB 28-37.

Defendants do not refute plaintiffs' evidence but simply declare that it is not so. RB 25. And while entry into any particular contract is not a legislative act, the guidelines which the Department uses to determine who will be offered a lien contract and on what terms, are clearly legislative.

Defendants rely on Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622 and Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, to support the position that their lien policies are not subject to the APA. But in Roth, the Court held to the contrary, rejecting defendants' argument that the Department of Veterans' Affairs' practice and policy of imposing late fees was not one of "general application" and therefore did not violate the APA. The Court did not hold, as defendants claim (RB 25), that the APA was violated "because the contracts at issue, unlike the ones here, failed to authorize [the imposition of late charges.]"

Roth says:

The trial court, while finding that defendant began assessing a late charge in 1968 against all veteran purchasers who did not make timely installment payments, determined that the late charge provision is not a rule, regulation, order or standard of general application as defined in Government Code section 11371 [b], and thus does not have to be adopted in the manner provided by the Administrative Procedure Act. Defendant supports this determination on the basis that the late charge does not have application to all citizens in the state. **This is, we believe, an overly broad reading of the words "of**

Defendants next turn to Tave v. Cove, again distorting it beyond recognition, in arguing that their policies regarding imposition of liens and collection of interest “do not apply generally and pertain to settling claims where there is a need for flexibility.” RB 26. The Tave decision is self-explanatory. The Court based its holding that the audit method in question was not a policy of general applicable on the declaration of the auditor who stated:

The audit procedures used to conduct the audit of Pride Home Care Medical were designed to fit the **particular conditions that were encountered upon the arrival at the audit site.**

[I] . . . While all audits are performed along generally accepted audit principles, these principles are not intended to be steadfast rules from which deviation is prohibited. In the twelve years that I have been employed as an auditor for the California State Controller’s Office, I have been involved in numerous audits varying in subject and complexity. In these endeavors, I have found that the flexibility to adopt auditing principles to **unique situations**, including treatment of inventory, is imperative in the successful completion of an audit.”

On this basis, the Court ruled that “the method was not a “regulation,” and no error attended its employment.” 29 Cal.App.4th at 1345 (emphasis added). See also, supra at 7-8.

Defendants’ arguments as to why the practice of imposing liens to

defeat hardship waivers is not subject to the APA proves the contrary.”

First, defendants’ assertion that “the existing regulations provide ample authority for DHS to evaluate liens when considering hardship requests,” is in error. The department does not derive its “authority,” from its regulations but from the authorizing statute. Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal. 4th 287, 299-300.

Second, since federal and state statutes make the grant of exemption mandatory under certain circumstances, the use of liens to defeat such exemptions is contrary to the statutory mandate. Regulations which authorize policies contrary to the authorizing statute are void. Thus, even if the practice of using liens to defeat hardship exemptions were authorized by defendants’ current regulations, the policy would still be unlawful.

Next, again citing Tave v. Cove, defendants suggest that their imposition of a lien to defeat the hardship exemption in the Wilson case was a one-time event. RB 29. But the Department’s offer of a lien to defeat the hardship exemption application was not a unique occurrence, tailored specifically to the requirements of the Wilson case, but an ongoing

¹³Defendants’ claim that plaintiffs have abandoned the issue of underground regulations used in [he administration of the hardship exemption (RB 10 n.3),is incorrect. See AOB 3 1-36.

practice which is reflected in the Wilson decision.” See AOB 12 (HCFA Report directs state to process hardship request **before** offering lien); AOB 30-3 1 (the Wilson decision denying a hardship exemption when beneficiary refuses to enter into a lien agreement); AOB 3 1-32 (email from Robert O’Neill verifying that the practice of offering liens to defeat hardship exemptions is generally applicable); AOB 32 (the department’s response to the HCFA letter, failing to state that it will correct the policy of using liens to defeat hardship, failing to deny that the policy exists); AOB 33-34 (the department’s lack of candor regarding the frequency of its practice to impose liens to defeat hardship exemptions, and the Attorney General’s

⁴ Defendants similar argument, that since the imposition of a lien to defeat hardship “only arises in a quasi-judicial setting.” it is not a regulatory policy, but an “[interpretation] 1 that arises[s] in the course of case-specific adjudications. . . .” (RB 29, citing 1’idewater Marine. 14 Cal.4th at 571), is equally infirm. The email from Robert O’Neill of the Department’s Office of Administrative Hearings, to Vivian Auble, dated December 19, 2000, demonstrates that the practice is one of general application by the division of DHS which makes the initial hardship determination. It states:

In some cases the willingness of DHS to accept a lien has a great bearing on whether we grant a waiver or not. USUALLY an agreement to accept a lien defeats the appellant’s argument that they have a hardship. especially if the lien doesn’t have payments. . . .

AA 306 (emphasis in original). Clearly. O’Neill was discussing policy in general as opposed to a rule which arose and was applied in a particular adjudication only.

admission regarding the policy at the summary judgment hearing).¹⁵

C. Disability Verificat @

Defendants admit that the! have a policy on disability determination: persons who have been deemed disabled for purposes of the Supplemental Security Income (“SSI”), program, or who have been determined by DSS to meet the SSI disability standard. ;ire automatically considered disabled for purposes of exemption from estate recovery. Others must go through a disability determination process conducted by the Department of Social Services (“DDS”) for the Department of Health Services. RB 30-3 1.

Plainly, defendants do no1 deny that the absence of a written disability determination policy. that information on the process is not publicly available, and that there is no \-a!- for an affected person to know what type of disability verification the Department requires ahead of time. AOB 36-37. Defendants further concede that their current policy and prior policy (permitting doctor verifications): \;cre adopted and repealed internally, outside the scope of the APA.

Nevertheless, defendants argue that they do jo- need to promulgate

¹⁵ All the evidence must be vic\ed ‘-ill the light most favorable to the nonmoving party below...and [the Appcllatc Court must] assume[] that [their] version of all disputed fi~cl~ is the correct one.” Birschstein v. New United Motor Manufacturing, Inc. (200 I) 92 Cal.App.iFth 994, 999.

disability determination regulations because the substance of the disability test is in the federal statute which, in turn, is interpreted by “extensive federal regulations.” Thus, defendants argue, “If an individual wants to know whether they [sic] are exempt [as disabled], they need only look to these detailed federal regulations.” RI3 30.

Defendants’ elaborate argument is beside the point. The APA has no exception for state regulations which mirror federal regulations. More importantly, defendants’ disability determination **procedure** is not published in the federal regulations and is not publicly available in any form. There is no question that it is a regulation, because it is a “standard of general application” used by the Department “to govern its procedure.” Government Code § 11342.600, a, Kincaid Rehabilitation Center, Inc. v. Premo (1999) 69 Cal.App.4th 215, 217 (internal punctuation and citations omitted) (“If a policy or procedure falls within the definition of a “regulation” within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule.”) See also, AOB 41-42.

The promulgation of the disability verification procedure as a regulation, in conformance with the APA, will further the APA’s purpose of

providing “notice of the law’s requirements so that [affected persons] can conform their conduct accordingly.” * Ticker Marine, 14 Cal.411-7 at 569. The continued secrecy of the Department’s certification process is indefensible on any ground and totally incompatible with the letter and spirit of the APA.

D. In Home Health Supportive Services Payments

Defendants admit that in early 2000, they “adopted formal policies... stopping the recovery of costs for In-Home Supportive Services.” RB 8. There is no dispute that this policy was not adopted in conformance with the APA. AOB 38-40.

E. The Department Does Not Dispute that Statements of Negative Policy, Procedural Policies and Unwritten Underground Regulations Are All Subject to the APA

Plaintiffs argued in the trial court and in Appellants’ Opening Brief, that statements of negative policy, procedural policies and unwritten underground regulations, are all subject to the requirements of the APA. AOB 40-45. Defendants apparently do not disagree, since they have not refuted any of these points in Response Brief.

CONCLUSION

The judgment should be reversed with directions to enter judgment for plaintiffs, directing issuance of a writ of mandate, requiring the Department to adopt, in compliance with the procedural requirements of the APA, any and all rules of general application and procedure used by the estate recovery unit and to allow plaintiff to present their claim for injunctive relief seeking restitution.

Dated: June 10, 2002

Respect fully submitted,

Ainitai Schwartz
Attorney for Plaintiffs and Appellants

Certificate of Counsel as to Word Count

I, Amitai Schwartz, certify, that the Appellants' Reply Brief consists of 5,460 words, exclusive of tables .

Dated: June 10, 2002

Amitai Schwartz
Attorney for Appellants

PROOF OF SERVICE

Re: California Advocates for Nursing Home Reform and Patricia McGinnis v. Diana Bonta. et al., Case No. A097107

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the attached

APPELLANTS' REPLY BRIEF

by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and with postage fully prepaid thereon was deposited in the United States Mail at Emeryville, California on June 10, 2002.

Bill Lockyer
Attorney General
James Humes
Deputy Attorney General
455 Golden Gate Avenue, Suite I 1000
San Francisco, CA 94102

I also caused to be served by hand five (5) copies of the Clerk of the California Supreme Court.

I also served one (1) copy by mail on the Superior Court addressed as follows:

Hon. David A. Garcia
Judge of the San Francisco Superior Court
400 McAllister St.
San Francisco, CA 94102

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on June 10, 2002 at Emeryville, California.

Amitai Schwartz