



MEMO

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DATE: May 13, 2009

RE: Implementation of Chapter 20 of the Third Extraordinary Session of 2009 (AB 5xxx)

Chapter 20 of the Third Extraordinary Session of 2009 (AB 5xxx) which was an urgency measure and went into immediate effect amended the following three sections of the MHSOAC:

- (1) Welfare and Institutions Code Section 5845;
- (2) Welfare and Institutions Code Section 5846; and
- (3) Welfare and Institutions Code Section 5847.

This memo will review each of these amendments and discuss the possible legal interpretations and practical implementation. To assist in a better understanding of the interpretation process below is a very brief description of the principals of interpretation called, "statutory construction."

I. PRINCIPALS OF STATUTORY CONSTRUCTION

The first step in constructing or interpreting a statute is to look at the language of the statute to see if the language is plain on its face. If it is, then the plain meaning of the language is followed. Part of this plain meaning interpretation includes looking at the statutory scheme (i.e. other sections and subsection of the statute) to determine if the interpretation is consistent with the overall statute. Even though this sounds simple there are thousands of court cases trying to interpret language that one party or the other believes is plain on its face.

If the language is ambiguous, then pursuant to Code of Civil Procedure Section 1859, one may look at the legislative intent. Section 1859 states that "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible..." In addition, California courts have consistently ruled that the legislative intent can be looked at to confirm the interpretation of the plain meaning of the statute.

II. AMENDMENTS TO WELFARE AND INSTITUTIONS CODE SECTION 5845

W&I section 5845 was amended to add the following bold and italicized language:

(d) In carrying out its duties and responsibilities, the commission may do all of the following:

...

(2) Within the limit of funds allocated for these purposes, pursuant to the laws and regulations governing state civil service, employ staff, including any clerical, legal, and technical assistance as may appear necessary. *The commission shall administer its operations separate and apart from the State Department of Mental Health.*

...

(5) *Enter into contracts.*

(6) *Obtain data and information from the State Department of Mental Health, or other state or local entities that receive Mental Health Services Act funds, for the commission to utilize in its oversight, review, and evaluation capacity regarding projects and programs supported with Mental Health Services Act funds.*

(7) *Participate in the joint state-county decisionmaking process, as contained in Section 4061, for training, technical assistance, and regulatory resources to meet the mission and goals of the state's mental health system.*

Each of the above changes will be discussed below.

A. Options for Legal Interpretation of W&I 5845(d)(4) and the "separate and apart from DMH" Language

There are two basic legal interpretations of the phrase "shall administer its operations separate and apart." Each option is discussed below.

Legal Interpretation Option 1: The plain meaning of the phrase seems to indicate that the MHSOAC, in the administration of its operations, is separate from DMH and within that framework is autonomous.

In determining the scope of this autonomy there must first be a determination of the meaning of "operations." Generally speaking "operations" means the day-to-day activities needed to perform required or authorized tasks of an agency or organization. This includes everything from hiring staff to purchasing equipment to providing IT support, etc.

This determination is not a legal issue but is a policy and program issue which must consider not only the practical and fiscal aspects of the autonomy but the political ramifications as well. In defining “operation” the MHSOAC has a great deal of flexibility and options in negotiating with DMH.

Legal Interpretation Option 2: MHSOAC is separate and apart from DMH only as to the operations of employing staff.

A much narrower interpretation of the sentence added to Section 5845 can be made by looking at Section 5845 as a whole. The Legislature added the “separate and apart” sentence at the end of subdivision (d)(2) and thus it modifies the authority set forth in (d)(2). Subdivision (d)(2) deals only with the authority to employ staff pursuant to laws and regulations governing state civil service. Support for this interpretation is the fact that the Legislature also added a new subdivision (d)(5) to give the MHSOAC authority to enter into contracts. However, because of how the contract process works for the State of California it can be argued that the Legislature was merely clarifying that the “separate and apart” included the authority to enter into contracts.

This Option 2 is a weak interpretation of the “separate and apart” language because of the official and unofficial documentation of legislative intent which is discussed below.

Legislative History/Intent: Because Assembly Bill 5xxx was a budget trailer bill there is very little documented official legislative intent history; however the few documents that do exist clearly show that the intent was to increase the oversight and authority of the MHSOAC.

The Concurrence in Senate Amendments analysis states that the Legislative intent behind AB 5xxx in making the changes to the MHSA was to “assist in the implementation and effectiveness” of the MHSA. The Third Reading analysis states that the changes “clarified and furthered the intent” of the MHSA. This analysis also states that the amendments were proposed based on the June 2008 audit conducted by Department of Finance and the Office of Statewide Audits and Evaluations (OSAE report). According to the Third Reading analysis the OSAE report articulated the need for the DMH to streamline its processes and to increase the oversight of the MHSOAC.

Implementation of either option: The implementation of either option is problematic because MHSOAC does not currently have authority to administer funds for any of its operations. Under Welfare and Institutions Code Section 5892(d) DMH administers the MHS Fund including the administration costs.

In order to implement the change in functions one of two things must occur:

(1) W&I Section 5892 is amended to provide MHSOAC with authority to administer its own administration funds:

or

(2) MHSOAC and DMH reach an agreement on how to deal with the funds issue.

B. Options for Implementing the “separate and apart from DMH” Language of W&I Code Section 5845(d)(4)

As mentioned above currently DMH is the sole entity having statutory authority to administer MHS funds which includes the five percent (5%) for administration. Accordingly, there are only the two basic options listed above for MHSOAC to implement the “separate and apart” language.

OPTION 1: INTRA-AGENCY AGREEMENT WITH DMH

Under this option there are 2 sub-options:

Option 1A: Under this option MHSOAC would enter into an intra-agency agreement with DMH to formalize and make consistent some of the current practices and expand current decision making authority of MHSOAC. This intra-agency agreement would define the roles and responsibilities of MHSOAC and DMH in regards to administrative activities in light of MHSOAC authority to administer its operations “separate and apart” from DMH. The details would have to be negotiated but this option generally formalizes the current practices.

Pro: This option would have little or no fiscal impact and would not disrupt daily operations. This gives MHSOAC authority to approve activities and to administer its operations directly. Given that DMH has sole authority to administer funds this option would not require legislation or change in legal status of MHSOAC.

Con: This option does not address the issue of timeliness as it relates to DMH administered activities.

Action Needed: MHSOAC and DMH would need to enter into an intra-agency agreement which would delineate the scope of services provided by DMH and the procedures and processes to effectuate implementation of new the statutory authority of MHSOAC to operate separate and apart from DMH.

Option 1B: Under this option MHSOAC would enter into an intra-agency agreement with DMH by which DMH, on behalf of MHSOAC, would enter into an interagency agreement with another State department whereas the other State department would provide the administrative services currently provided by DMH. [NOTE: The current interagency agreement with DOJ is an example of how this works.] The details would have to be negotiated but this interagency agreement would define what administrative activities would be done internally and what activities would be contracted out.

Pro: This interagency agreement would ensure that MHSOAC has complete authority to approve all activities and that the contracted State department would execute all action requests. This contract would outline required timelines and responsibilities and hopefully increase the overall speed and efficiency of administrative functions. This option address the issue of timeliness related to DMH administered activities. Given that DMH has sole authority to administer funds this option would not require legislation or change in legal status of MHSOAC.

Con: This option would have a fiscal impact to support the interagency agreement and may require additional resources. DMH continues to have ultimate signatory authority.

Action Needed: MHSOAC would need to enter into an interagency agreement with another State department which would delineate the scope of services provided by the contractor.

OPTION 2: LEGISLATIVE OR OTHER LEGAL CHANGE

Under this option the MHSOAC would move forward with legislative action to amend the MHSA or with other procedure to change the legal status of the MHSOAC. This option would allow the MHSOAC to have the greatest flexibility and decide to: (1) enter into an interagency agreement with another department to provide the administrative functions; or (2) provide the administrative functions internally.

Pro: This option would provide the greatest flexibility to the MHSOAC and it would make the MHSOAC fully separate and apart from DMH.

Con: In doing preliminary investigation on this option MHSOAC staff spoke with several entities that have gone through similar process. The information received is that this is not simple nor something that can happen overnight. This option would also have a substantial fiscal impact depending on whether MHSOAC chose to enter into an interagency agreement or to provide the administrative functions internally. If all administrative functions were done internally the overall workload of the MHSOAC would dramatically increase and additional resources would be required.

Action Needed: The MHSOAC would have to be amended or other legal action taken to change the legal status of the MHSOAC. Detailed research would be required to determine the procedures for the change of legal status.

C. W&I 5845(d)(5) and the “enter into contracts” Language

Subdivision (d)(5) states that the MHSOAC may enter into contracts. There seems to be no ambiguity as to this phrase: the plain meaning of the new authority is that MHSOAC may enter into and thereby execute contracts on its own authority without having to go through DMH.

This statutory authority may be sufficient to take whatever administrative steps necessary to execute contract. There is still a practical implementation problem because MHSOAC does not have authority to administer its funds; however, it does have a separate program budget within the overall DMH budget and that may be sufficient.

Action Needed: No action needed to implement this provision.

D. W&I 5845(d)(6) and the “obtain data and information” Language

Subdivision (d)(6) states that the MHSOAC may obtain data and information from the State Department of Mental Health, or other state or local entities that receive Mental Health Services Act funds, to utilize in its oversight, review, and evaluation capacity regarding projects and programs supported with Mental Health Services Act funds.

This statutory language provides clear authority for MHSOAC to obtain requested data and information from DMH or other state and local entities that receive MHSA funds. This new authority recognizes that access to such data and information is critical for MHSOAC to be effective in its oversight and accountability role. Currently MHSOAC has relied on DMH and other entities to voluntarily provide requested information. This statutory authority should help the timeliness of obtaining the necessary information.

Action Needed: No action needed to implement this provision.

E. W&I 5845(d)(7) and the “participate in the joint state-county decisionmaking process” Language

Subdivision (d)(7) provides that the MHSOAC may participate in the joint state-county decisionmaking process, as contained in Section 4061, for training, technical assistance, and regulatory resources to meet the mission and goals of the state’s mental health system.

Effective training and technical assistance is necessary to create the skill set required to carry out the mandate of the MHSA. The MHSOAC in its oversight and accountability role is extremely concerned about the provision of effective training and technical assistance. However, as a practical matter, the MHSOAC has to this point been unable to mobilize sufficient or adequate training and technical assistance to support the implementation of the MHSA, despite persistent work with a variety of partners.

Action Needed: No action needed to implement this provision.

III. AMENDMENT TO WELFARE AND INSTITUTIONS CODE SECTION 5846

W&I Section 5846 was amended to add the following italicized language:

(b) The commission shall place a county expenditure plan for consideration on a meeting agenda no later than 60 days after receipt.

(c) The commission shall issue guidelines for expenditures pursuant to Part 3.2 (commencing with Section 5830), for innovative programs, and Part 3.6 (commencing with Section 5840), for prevention and early intervention, no later than 180 days before the fiscal year for which the funds will apply.

A. W&I 5846(b) and the “60 days after receipt” Language

The new subdivision (b) seems self explanatory; however, there may be some issues with the practical implementation of this language. For example, the MHSOAC has no control over how quickly the counties make needed changes to their plans as recommended by the review team. Currently the 60-day time limit is being met.

Action Needed: No action needed to implement this provision.

B. W&I 5846(c) and the “guidelines” Language

Subdivision (c) grants authority to the MHSOAC to issue guidelines for expenditures for Innovative and PEI no later than 180 days before the fiscal year for which the funds will apply.

This subdivision is ambiguous because of the use of the word, “guidelines.” Generally this word means a guide or an indication of a future course of action. The ambiguity is created because the word, “guideline” has also been used to mean the formal written instructions from DMH that provide direction to counties. Prior to AB 5xxx being enacted DMH had issued “guidelines” to the counties for funding for the following components: Community Services and Supports; Capital Facilities; Technology; Workforce Education and Training; Prevention and Early Intervention; and Innovation.

Using principals of statutory construction, it is important to look at the statutory scheme (i.e. other sections or subdivisions of the statute) and the legislative intent. In this case, the Legislature in AB 5xxx used the word, “guidelines” in two different sections within the same statutory scheme: Section 5846 and Section 5847. Section 5846 was amended to require MHSOAC to issue guidelines for Prevention and Early Intervention and Innovation and Section 5847 was amended to require DMH not to issue guidelines for the Integrated Plans for Prevention, Innovation and System of Care Services before January 1, 2012. The term must be interpreted consistently in these two sections. Accordingly, it seems that the Legislature gave the MHSOAC the authority to issue the formal written instructions to counties.

A practical issue associated with the implementation of this authority is that DMH has already issued guidelines regarding PEI and Innovation. However, if the MHSOAC desires it has the authority to issue updates or amendments to the previously DMH issued guidelines to reflect what is learned through best practices and quality evaluations.

Action Needed: No action needed to implement this provision.

IV. AMENDMENT TO WELFARE AND INSTITUTIONS CODE SECTION 5847

W&I section 5847 is amended to add the following italicized language:

(a) It is the intent of the Legislature to streamline the approval processes of the State Department of Mental Health and the Mental Health Services Oversight and Accountability Commission of programs developed pursuant to Sections 5891 and 5892.

(b)

...

(7) Establishment and maintenance of a prudent reserve to ensure the county program will continue to be able to serve children, adults and seniors that it is currently serving pursuant to Part 3 (commencing with Section 5800), the Adult and Older Adult Mental Health System of Care Act, Part 3.6 (commencing with Section 5840), Prevention and Early Intervention Programs, and Part 4 (commencing with Section 5850) of this division, the Children's Mental Health Services Act, during years in which revenues for the Mental Health Services Fund are below recent averages adjusted by changes in the state population and the California Consumer Price Index.

(c) The State Department of Mental Health shall not issue guidelines for the Integrated Plans for Prevention, Innovation and System of Care Services before January 1, 2012.

...

(f) Each year the State Department of Mental Health, in consultation with the California Mental Health Directors Association, the Mental Health Services Oversight and Accountability Commission, and the Mental Health Planning Council, shall inform counties of the amounts of funds available for services to children pursuant to Part 4 (commencing with Section 5850) of this division, and to adults and seniors pursuant to Part 3 (commencing with Section 5800) of this division. Each county mental health program shall prepare expenditure plans pursuant to Part 3 (commencing with Section 5800), and Part 4 (commencing with Section 5850) of this division, and updates to the

plans developed pursuant to this section. Each expenditure update shall indicate the number of children, adults and seniors to be served pursuant to Part 3 (commencing with Section 5800), and Part 4 (commencing with Section 5850) of this division, and the cost per person. The expenditure update shall include utilization of unspent funds allocated in the previous year and the proposed expenditure for the same purpose.

(g) (1) The department shall evaluate each proposed expenditure plan and determine the extent to which each county has the capacity to serve the proposed number of children, adults and seniors pursuant to Part 3 (commencing with Section 5800), and Part 4 (commencing with Section 5850) of this division; the extent to which there is an unmet need to serve that number of children, adults and seniors; and determine the amount of available funds; and provide each county with an allocation from the funds available. The department shall give greater weight for a county or a population which has been significantly underserved for several years. *The department shall approve, deny, or request information on a county expenditure plan or update no later than 60 days upon receipt.*

(2) *The department shall only evaluate those programs in a county expenditure plan or update that have not previously been approved or that have previously identified problems which have been conveyed to the county. The department shall distribute the funds for renewal of the previously approved programs contained in the county expenditure plan or update prior to approval of the county expenditure plan or update.*

Only the changes to subdivisions (a) and (f) apply to MHSOAC accordingly only these changes are discussed in this memo.

A. W&I 5847(a) and the “streamline the approval processes of programs developed pursuant to Sections 5891 and 5892” Language

Following the recommendations of the OSEA report DMH and MHSOAC developed and implemented a streamlined approval process of the programs.

Action Needed: No action needed to implement this provision.

B. W&I 5847(f) and the “in consultation with” Language

Subdivision (f) added the requirement for DMH to consult with CMHDA, MHSOAC, and MHPC” to inform counties each year of the amounts of funds available for services to children pursuant to Part 4 (commencing with Section 5850) and to adults and seniors pursuant to Part 3 (commencing with Section 5800).

Action Needed: No action needed to implement this provision because this language codifies current practice.