

Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 5, No. 2 (2004)

HIGHLIGHTS

Poverty/Nutrition:

DSS proposes regulations to implement quarterly/
prospective budgeting, instead of monthly reporting,
for the CalWORKs and Food Stamp programs

Health/Safety:

MRMIB proposes regulations to streamline enrollment
of AIM infants in the Healthy Families Program

Education:

The Department of Education proposes
uniform complaint procedures in response to
the settlement of *Williams v. State of California*

Juvenile Justice:

CYA proposes regulations to ensure that wards have
reasonable opportunities to exercise religious freedom



KEY

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from July 1, 2004, through December 17, 2004; actions on those packages through December 17, 2004; and updates on previously-reported regulatory packages through December 17, 2004.

Prior issues of the *Children's Regulatory Law Reporter* may contain extensive background information on topics discussed in this issue.

The following abbreviations are used in the *Children's Regulatory Law Reporter* to indicate the following California agencies (discussed in detail on pages 36-38), publications, or documents:

AB:	Assembly Bill
CCR:	California Code of Regulations
CDE:	California Department of Education
CSFA:	California School Finance Authority
CYA:	California Youth Authority
DCSS:	Department of Child Support Services
DDS:	Department of Developmental Services
DHS:	Department of Health Services
DMH:	Department of Mental Health
DSS:	Department of Social Services
MPP:	Manual of Policies and Procedures
MRMIB:	Managed Risk Medical Insurance Board
OAL:	Office of Administrative Law
Parole Board:	Youth Offender Parole Board
SB:	Senate Bill

CHILDREN'S REGULATORY LAW REPORTER

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PREFACE

Each year, the California Legislature enacts important new laws affecting children. Those laws have broad mandates, and they often delegate critical details to the rulemaking or administrative process of our state's various agencies. The *Children's Regulatory Law Reporter* focuses on that rulemaking activity—an often ignored but very critical area of law. For each regulatory proposal discussed, the *Children's Reporter* includes both an explanation of the proposed action and an analysis of its impact on children. Any advocate knows that the devil is in the details, and a single phrase in a rule can mean that either ten thousand or a hundred thousand children receive public investment when needed. The *Children's Reporter* is targeted to policymakers, child advocates, community organizations, and others who need to keep informed of the agency actions that directly impact the lives of California's children.

The *Children's Regulatory Law Reporter* is published by the Children's Advocacy Institute (CAI), which is part of the Center for Public Interest Law (CPIL) at the University of San Diego School of Law. Staffed by experienced attorneys and advocates, and assisted by USD law students, CAI works to improve the status and well-being of children in our society by representing their interests and their right to a safe, healthy childhood.

CAI represents children—and only children—in the California Legislature, in the courts, before administrative agencies, and through public education programs. CAI strives to educate policymakers about the needs of children, including their economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and injury. CAI's mission is to ensure that children's interests are effectively represented whenever and wherever government makes policy and budget decisions that affect them.

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INTRODUCTION

Arnold Schwarzenegger was sworn in as California's 38th Governor on November 17, 2003, after winning the recall election ousting former Governor Gray Davis. The day Governor Schwarzenegger took office, he issued an executive order suspending all proposed state regulations for 180 days pending a thorough review. He also called for each agency in the state to conduct a 90-day review of all regulations adopted, amended, or repealed in the last five years "to determine if they are necessary, clear, consistent and are not unnecessarily burdensome or cause undue harm to California's economy." All findings of these reviews were to be submitted to the Governor's Legal Affairs Secretary. (*See* Office of the Governor, Press Release dated November 17, 2003.)

As described inside the back cover of this publication, the Administrative Procedure Act (APA), Government Code section 11340 *et seq.*, sets forth the process that most state agencies (including the agencies covered in the *Children's Regulatory Law Reporter*) must undertake to adopt regulations, which are binding and have the force of law. The rulemaking process includes a submission to the Office of Administrative Law (OAL), an independent state agency authorized to review agency regulations for compliance with the procedural requirements of the APA, as well as for six specific criteria: authority, clarity, consistency, necessity, reference, and non-duplication. Also, the APA requires an agency to make findings for each proposed regulatory change regarding any significant adverse economic impact on business; potential cost impact on private persons or businesses; small business impact; assessment of job creation or elimination; and effect on housing costs.

To many advocates, Governor Schwarzenegger's order suspending pending regulations for six months seemed redundant, gratuitously insulting to state officials, and unnecessarily pro-business, as such an order would give many companies a reprieve on proposed consumer and environmental rule changes—arbitrarily and apart from any hearing on the merits. The order impacted children by discouraging agencies from engaging in any rulemaking until the suspension was lifted. Rulemaking activity by the agencies covered in this publication continues to lag compared to the time period before the Governor took office and ordered the suspension. Thus, this issue of the *Children's Regulatory Law Reporter* contains fewer new rulemaking proposals than previous issues.

CHILD POVERTY

New Rulemaking Packages Quarterly Reporting for the CalWORKs Program

Assembly Bill (AB) 444 (Chapter 1022, Statutes of 2002), AB 692 (Chapter 1024, Statutes of 2002), and AB 1402 (Chapter 398, Statutes of 2003) provide authority to DSS to implement a Quarterly Reporting/Prospective Budgeting (QR/PB) reporting system for the CalWORKs Program by emergency regulation. Specifically, AB 444 added sections 11265.1, 11265.2, 11265.3, and 18910 to the Welfare and Institutions Code to mandate implementation of quarterly reporting in both the CalWORKs and Food Stamp programs. Prior to this legislation, recipients were required to report income, household composition, and eligibility circumstances on a monthly report; counties then calculated recipient income on a retrospective basis using actual income from the prior two months to determine a current month's CalWORKs cash grant amount. The proposed regulations allow counties to utilize the monthly reporting/retrospective budgeting method until they are able to fully implement the quarterly reporting/prospective budgeting system.

The proposed regulations require the following changes to the CalWORKs Program:

- ◆ recipients are to submit income/eligibility reports quarterly;
- ◆ recipients are to report limited information during each quarter, including address changes and work hour changes that may affect benefit levels;
- ◆ eligibility and benefits are to be based on a Quarterly Eligibility Report; and
- ◆ benefits are to be "frozen" during the three month quarter, except under specific and limited circumstances, including (1) a voluntary recipient mid-quarter report resulting in an increase in cash aid; (2) a mandatory recipient mid-quarter report resulting in a decrease in or discontinuance of cash aid; or (3) a county-initiated action resulting in a decrease in or discontinuance of cash aid (e.g., welfare-to-work sanction, Intentional Program Violation sanction, child support penalty or sanction, sanction for failure to verify citizenship/alienage status or failure to furnish a social security number, and others listed in the Manual of Policies and Procedures (MPP) section 82-832.2).

Effective July 1, 2004, DSS amended—on an emergency basis—sections 22-071, 22-072, 22-305, 40-103, 40-105, 40-107, 40-119, 40-125, 40-131, 40-173, 40-181, 40-

183, 40-188, 40-190, 41-405, 42-209, 42-213, 42-221, 42-302, 42-406, 42-407, 42-716, 42-721, 42-751, 42-769, 44-101, 44-102, 44-111, 44-113, 44-115, 44-133, 44-205, 44-207, 44-211, 44-304, 44-305, 44-313, 44-314, 44-315, 44-316, 44-318, 44-325, 44-327, 44-340, 44-350, 44-352, 44-400, 44-401, 44-402, 47-220, 47-320, 48-001, 80-301, 80-310, 82-612, 82-812, 82-820, 82-832, 89-110, 89-130, and 89-201, and adopted section 40-036 of the MPP to implement the statutory changes discussed above.

On July 9, 2004, DSS published notice of its intent to permanently adopt the regulations. DSS held a public hearing on August 25, 2004, in Sacramento. On December 17, 2004, DSS readopted the changes on an emergency basis. At this writing, the amendments await review and approval by OAL.

IMPACT ON CHILDREN: The Department's switch to quarterly reporting is intended to reduce administrative costs over the long term, and reduce errors in Food Stamp administration that have resulted in federal penalties against California. The monthly reporting system is admittedly costly, burdensome for recipients and workers, and prone to errors. In fact, California's monthly reporting system was cited by the U.S. Department of Agriculture as a cause of its excessive Food Stamp error rate, which led to imposition of a \$175 million penalty for years 2001 and 2002 (see Nutrition section below for further discussion of California's Food Stamp Program).

According to the Assembly Appropriations Committee analysis for AB 1402, the switch to quarterly reporting/prospective budgeting for CalWORKs and the Food Stamp Program was supposed to create minor absorbable workload costs to both DSS and county welfare departments, and potential future reductions in federal Food Stamp penalties to the extent that the transition lowers the Food Stamp error rate. However, DSS estimated the following costs in its rulemaking package: (1) \$3.3 million in the state-funded portion of CalWORKs grants and \$2.9 million in CalWORKs state administration included in the fiscal year 2003-04 budget; (2) costs of \$749,000 in county share of funding for CalWORKs grants; and (3) an increased cost to the federal government of \$25.9 million for CalWORKs grants and \$25.2 million for CalWORKs administration, also included in the fiscal year 2003-04 budget. DSS did not estimate any future year savings from the proposed changes.

One reason for these fairly significant costs could be the state's use of mandatory, mid-quarter reporting requirements, resulting in re-determinations of eligibility every 1.5 months (compared to existing monthly re-determinations). In other words, if the state wanted long-term cost savings, it should have passed legislation that effectively froze the level of cash grants during the quarter, so that no administrative costs would be spent during a three-month

period. The end result is the state's failure to institute true reform and cost savings, for fear that the state might overpay a few individuals whose income levels change by some degree. Few families with children receiving cash grants will obtain sudden wealth within a two-month period. The preoccupation with preventing a one-month payment for children just above the poverty line occurs in the context of fifteen years of grant diminution. In 1989, the maximum safety net grant for the benchmark family comprised of one parent and two children was \$1,022 in 2004 dollars. It is currently about \$650—35% less. Counties have substantial authority to obtain repayment of excessive grant amounts and have dedicated units in district attorney offices addressing welfare fraud. The mid-quarter procedures undermine the efficiency enhancement of a quarterly system, add administrative costs more consequential than monies saved, and raise gratuitous barriers for child safety net protection.

The following is an example of how the state struggles with this issue. According to the Senate Appropriations Committee's analysis of AB 1402, the switch from monthly to quarterly reporting was delayed because the state was unable to secure a federal waiver to permit implementation of AB 444 (Chapter 1022, Statutes of 2002). Specifically, AB 444 provided for reports during quarters when a family's income exceeded an income eligibility threshold or when a family voluntarily chose to report a drop in income so benefits could be adjusted to reflect the loss of previously available income. In these situations, AB 444 provided that income be averaged for the entire quarter, including any past months of the quarter before the change occurred. This method of averaging conflicted with federal Food Stamp regulations, so the U.S. Department of Agriculture denied a waiver for AB 444.

The Legislature corrected this problem through passage of AB 1402 (Chapter 398, Statutes of 2003), which eliminated consideration of any past months when benefits are adjusted within a quarter due to reporting of changed circumstances. The purpose behind the switch from monthly to quarterly reporting was to decrease the administrative burdens in the existing reporting system. However, the language in the final version of the bill required mandatory, mid-quarter reporting requirements. Anti-poverty advocates and the County Welfare Directors Association opposed the use of mid-quarter reporting, stating it was unnecessarily complicated, leading the Legislature to require that by April 2005 DSS report to specific legislative committees on the impact (including cost, errors, and overpayments) of the mandatory mid-quarter reporting on program efficiency and integrity. The hope is that information about the impact of mid-quarter reporting will guide policymakers to re-evaluate the quarterly reporting system, do away with mandatory mid-quarter reporting, and institute true cost-saving measures. To the extent the state realizes cost savings from streamlining the administration of

CalWORKs, and those savings are then invested in assisting families with children who are in need, this regulation could benefit children.

The goals of welfare programs changed during the late 1990s due to welfare reform. Cash assistance programs now place a larger emphasis on getting families employed and reducing the number of families receiving welfare benefits generally. Welfare reform has met some seeming success. For instance, reports indicate the number of welfare cases nationally dropped from a peak of 5 million in the early 1990's to 2.2 million in 2000, and studies conducted during this period showed between half and three-quarters of former welfare recipients were employed shortly after they left welfare programs. However, most former recipients are in low paying jobs with few or no benefits, and many are still in need of some public assistance to make ends meet. A recent U.S. Department of Health and Human Services report, based upon 1998 data, found that over half of poor families with children faced two or more hardships (e.g., hunger, trouble paying rent or utility bills, and housing problems such as leaking roofs and exposed wires) during the same period of time. More significantly, 1.6 million poor households (containing about 4 million children) experienced hunger, seriously overcrowded housing, or having their phone or utilities shut off. Current data suggests these situations have not improved over the last six years, since there are 1.5 million more poor Americans and housing and utility costs have steadily risen.

According to a recent report by the Center on Budget and Policy Priorities, the trend since 2000 (economic downturn, job losses among single mothers, and rising poverty) would seem to indicate greater need for welfare assistance, but the opposite is true: caseloads have continued to come down nationally in 2002 and 2003. What is happening to these families that are not working (or are working but not making enough money to provide basic necessities for their children) and not receiving any welfare assistance? Of great concern is the well-being of children in these families. In 2003, 1.757 million California children lived in families with incomes below the federal poverty line. Strong evidence shows that growing up in poverty can limit a child's physical and cognitive development.

Public assistance programs do make a difference. When combined, programs such as Social Security, unemployment insurance, nutrition and housing assistance, and tax credits for working families lifted 28 million Americans above the poverty line in 2002, cutting the size of the poor population in half. In these times of increasing cuts to domestic programs and ballooning deficits, it is extremely important that child advocates not allow the safety net that supports these families to degrade further. But that only accounts for half of the problem. The welfare reform vision of families rising out of poverty, becoming self-sufficient, and providing a better life for their children has

largely not been met for the remaining poor population. Therefore, it is equally important that child advocates continue to advance measures to expand the safety net and force policy makers to make hard choices about the standard of living we expect for our nation's children.

Update on Previous Rulemaking Packages **Job Retention Services for Former CalWORKs Recipients**

On March 5, 2004, DSS published notice of its intent to amend—on a permanent basis—section 42-717 of the MPP to provide that job retention services may be provided to former CalWORKs recipients both before and after they have exhausted their sixty-month time limit for CalWORKs cash aid, and counties may determine the duration, type, and reimbursement rate for services. Specifically, transitional services may be provided for a former recipient for a period of up to twelve months; this period must begin as soon as the former recipient is both employed and off aid, and this period must begin within a year of the time that the former recipient left aid. These amendments also clarify that participation in community service is not a prerequisite for receipt of job retention services, unless the county adopts such a requirement. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 6.)

Update: On August 9, 2004, OAL approved DSS' permanent amendments.

Learning Disabilities Regulations

AB 1542 (Ducheny) (Chapter 270, Statutes of 1997) implemented welfare reform legislation enacted under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the PRA), and established the CalWORKs Welfare-to-Work program, the intent of which was to provide employment, education, and training services to assist families on aid to achieve self-sufficiency. On July 4, 2003, DSS published notice of its intent to adopt amendments to sections 42-700, 42-701, and 42-722 of the MPP to implement protocols regarding the screening and evaluation of CalWORKs welfare-to-work participants for learning disabilities and the provision of needed reasonable accommodations to assist participants in assigned welfare-to-work activities.

On January 22, 2004, DSS released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 7 and Vol. 4, No. 2 (2003) at 4.)

Update: On April 1, 2004, DSS released a second modified version of this rulemaking proposal. As well as making other changes, this version added the following provisions:

- ◆ A county's offer for screening and evaluation for learning disabilities must be made both verbally and in writing.
- ◆ The areas that will be tested at evaluation are natural talents and abilities, ability to follow verbal and written information, achievement, and job and career interests.
- ◆ Limited-English proficient CalWORKs welfare-to-work participants have the right to request a referral to a learning disabilities evaluation when there is no screening tool in their primary language.
- ◆ Participants referred to health-related evaluations prior to a learning disabilities screening and/or evaluation shall not be required to sign a waiver until the health-related issues are identified and addressed and the participant subsequently declines the screen and/or evaluation.
- ◆ If the individual initially agrees to an evaluation but fails to attend the evaluation without good cause, he/she will be deemed to have declined the evaluation and the assessment process will resume without benefit of the evaluation.

On August 16, 2004, OAL approved DSS' permanent amendments.

Child Support: Review and Adjustment of Child Support Orders

On May 5, 2003, the Department of Child Support Services (DCSS) adopted new sections 115500, 115510, and 115520, Title 22 of the California Code of Regulations (CCR), and repealed sections 12-223.2 through 12-223.22 of the MPP—on an emergency basis—regarding the review and adjustment of child support orders. Among other things, the emergency regulations require that each local child support agency provide written notice, at least once every three years, of the right to request a review to seek an upward or downward adjustment of a child support order, or an adjustment to include a provision for medical support; local child support agencies shall review cases to determine if a change in circumstances exists which could alter the amount of child support ordered by the court under the specified guidelines when certain conditions are met; and that any changes in circumstances which would result in a change in the child support order, either upward or downward, by at least 20% or \$50, whichever is less, shall be considered cause to file a motion for modification or order to show cause to adjust the child support order.

On November 3, 2003, DCSS readopted these provisions on an emergency basis. On May 18, 2004, DCSS released a modified version of its regulatory proposal for an additional fifteen-day public comment period. (For

background information on this rulemaking package, *see Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 8 and Vol. 4, No. 2 (2003) at 4.)

Update: On September 13, 2004, OAL approved DSS' permanent amendments.

NUTRITION

New Rulemaking Packages **Quarterly Reporting in the** **Food Stamp Program**

Assembly Bill (AB) 444 (Chapter 1022, Statutes of 2002) and AB 1402 (Chapter 398, Statutes of 2003) added and amended Welfare and Institutions Code sections 11265.1, 11265.2, 11265.3, and 18910 to provide authority to DSS to implement a Quarterly Reporting/Prospective Budgeting (QR/PB) reporting system for the Food Stamp Program that is compatible with the same reporting system in the CalWORKs program, and to seek federal waivers where necessary to comply with that directive. Federal waivers were received from the Food and Nutrition Service on April 1, 2003. Several federal regulations were waived to provide compliance with quarterly reporting as mandated by AB 444 and AB 1402. For instance, the waiver approval allows a county welfare department to continue Food Stamp benefits for sixty days when the household's CalWORKs case is being transferred out of county. Prior to this waiver, the Food Stamp case was required to be discontinued immediately upon an address change to a different county of residence.

Prior to this legislation, recipients were required to report income and eligibility on a monthly basis, and counties were required to process these report forms and re-determine benefit levels each month. The proposed regulations allow counties to utilize the monthly reporting/retrospective budgeting method until they are able to fully implement the quarterly reporting/prospective budgeting system. The quarterly reporting/prospective budgeting applies to all CalWORKs cases and households receiving food stamps with the exception of existing non-monthly reporting households in the Food Stamp Program, who will continue to follow existing reporting rules and are not mandated to submit quarterly reports.

The proposed regulations require the following changes to the Food Stamp Program:

- ◆ recipients are to submit income/eligibility reports quarterly;
- ◆ recipients must report address changes and hours of work for ABAWD (Able-Bodied Adult Without Dependents) during the quarter;

- ◆ eligibility and benefits for the prospective quarter are to be based upon a Quarterly Eligibility Report form filled out by the recipient; and

- ◆ benefits are to be "frozen" during the three-month quarter, except under specific circumstances, including (1) a voluntary recipient mid-quarter report resulting in increased benefits; (2) a mandatory recipient mid-quarter report resulting in a decrease in or discontinuance of benefits (refer to MPP sections 63-509(b) and (c)); (3) an individual or household request for discontinuance from the program; or (4) a county-initiated action resulting in a decrease in or discontinuance of benefits, *e.g.*, imposition of sanctions and approval of benefits for an existing household member who has moved to another household (refer to MPP section 63-509(h)(3)).

Effective July 1, 2004, DSS amended—on an emergency basis—sections 63-034, 63-102, 63-103, 63-300, 63-301, 63-410, 63-501, 63-503, 63-504, 63-505, 63-801, and 63-804, and adopted sections 63-508 and 63-509 of the MPP to implement the statutory changes discussed above. On July 9, 2004, DSS published notice of its intent to permanently adopt the regulations. DSS held a public hearing on August 25, 2004, in Sacramento. On December 17, 2004, DSS readopted the changes on an emergency basis. At this writing, the amendments await review and approval by OAL.

IMPACT ON CHILDREN: The proposed regulations attempt to relieve the administrative burden to the Food Stamp Program by cutting the number of reports generally required of recipients from twelve to four per year. DSS estimated the following Food Stamp Program costs and savings in its rulemaking package: (1) \$8.5 million in expenditures in state spending for the Food Stamp Program in fiscal year 2003–04, and savings of \$10.4 million in fiscal year 2004–05; (2) expenditures of \$2.3 million in county spending for the Food Stamp Program in fiscal year 2003–04, and savings of \$4.8 million in fiscal year 2004–05; and (3) expenditures of \$10.5 million for the federal government in fiscal year 2003–04, and savings of \$16.1 million in fiscal year 2004–05.

As the discussion of quarterly reporting for CalWORKs above indicates, the switch to quarterly/prospective budgeting for CalWORKs and the Food Stamp Program was intended to decrease federal Food Stamp penalties to the extent that the transition lowers the Food Stamp error rate. In June 2003, the federal government fined California \$62.5 million for making too many mistakes in handling and dispensing federal Food Stamps during 2002. This sanction is in addition to the record \$114 million fine the state received for the same problems in 2001. According to the U.S. Agriculture Department, California's error rate is 14.8%, almost double the national average. Mistakes in

arithmetic and complicated and burdensome eligibility rules resulted in overpayments of \$172 million in 2002, and underpayments of \$79.5 million. The most dire consequence of underpayment is the number of poor households (estimated at between 66,000 and 165,000) that do not receive the Food Stamp benefits they are entitled to and go hungry instead. The federal government offered to settle the \$62.5 million penalty if California agrees to invest half of the latest penalty to improve the process.

Hunger can have a serious impact on the health and mental well-being of children, and hunger incidence is high among children suffering “extreme poverty” (below 50% of the federal poverty level (FPL)). Recent studies of child hunger concluded that among school-aged children (average 10 years of age), 50% experienced moderate hunger and 16% experienced severe hunger. For fiscal year 2005, the maximum Food Stamp allotment for a family of four is \$499 per month, which works out to be less than \$17 per day to provide three meals for four people.

Only 49% of eligible people are participating in the Food Stamp Program, according to the U.S. Department of Agriculture. Red tape and bureaucracy limit participation among eligible Californians—particularly working families, who represent 70% of eligible households—from receiving federally-funded benefits. A recent UCLA survey found that 80% of California adults who are income-eligible for Food Stamps and who are experiencing the actual pains of hunger are not receiving Food Stamps.

The most recent data from the U.S. Department of Agriculture show the percentage of Americans who are “food insecure” (meaning at some point during the year these households were uncertain of having, or unable to acquire, enough food for all household members due to insufficient resources) increased for the fourth straight year in 2003; nearly 36 million people were food insecure during the year. This equals one-eighth of the total U.S. population and roughly approximates the combined populations of Florida and New York. These studies show that current federal and state efforts to feed children in low-income households need to be improved in order to have a positive impact on children. California’s indices of child hunger are substantial and are of special concern given the unreported increase in the proportion of children living in homes below 50% of the FPL. For more information, see the Children’s Advocacy Institute’s *California Children’s Budget 2004–05* (San Diego, CA; June 2004) at Chapter 3 (available at www.cachildlaw.org).

Easing the burdens on the system, as this regulatory proposal does, may assist in those efforts. While there is no indication that recipients would unnecessarily lose benefits under the new reporting system, they interpose mid-quarter requirements that undermine the effects of quarterly filing and red tape reduction, as discussed above pertaining to similar CalWORKs safety net qualification. It is unclear

why the state finds the possible receipt of modest food coupons for children living near the poverty line should trigger expensive and time-consuming mid-quarter reporting, all to prevent the receipt of under \$200 in benefits for a child, particularly in the context of an administration historically guilty of unjustified benefit denials.

Update on Previous Rulemaking Packages **Transitional Food Stamps and** **Face-to-Face Interview Exemptions**

AB 1752 (Budget Committee) (Chapter 225, Statutes of 2003) requires the state to provide a transitional Food Stamp benefit program. In accordance with amended Welfare and Institutions Code section 18901.6, county welfare departments are required to provide five months of transitional Food Stamp benefits to households terminating their participation in the CalWORKs program without requiring them to reestablish Food Stamp eligibility. Within one month of this legislative change, former Governor Gray Davis signed AB 231 (Steinberg) (Chapter 743, Statutes of 2003), which requires the state to screen Food Stamp households for the need to conduct face-to-face interviews upon application and recertification in the program. As amended in Welfare and Institutions Code section 18901.10, county welfare departments must now grant applicable exemptions when appropriate, thus decreasing the use of the face-to-face interview.

Effective April 19, 2004, DSS amended—on an emergency basis—sections 63-300, 63-500, and 63-504 of the MPP to implement the statutory changes discussed above. On April 2, 2004, DSS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 9.)

Update: On August 17, 2004, DSS readopted these changes on an emergency basis. On November 4, 2004, DSS released a modified version of this regulatory proposal for an additional fifteen-day public comment period. As well as making other changes, this version added the following provisions:

- ◆ A person eligible for an exemption under section 63-300 of the MPP may request a face-to-face interview to establish initial eligibility or to comply with recertification requirements.
- ◆ Nothing in section 63-300 shall limit a county’s ability to require an applicant or recipient to make a personal appearance at a county welfare department office if the applicant or recipient no longer qualifies for an exemption or for other good cause.
- ◆ Households are not required to report changes in their circumstances during the transitional period.

◆ If a person leaves the household and is approved for benefits in another Food Stamp household, that person's allotment would be removed from the household and the transitional Food Stamp benefit amount would be adjusted.

◆ If transitional Food Stamp benefits are ending for any reason other than the expiration of the five-month benefit period, the county welfare department shall give the household timely notice of such action prior to the termination of transitional benefits.

At this writing, the permanent amendments await review and approval by OAL.

CalWORKs/Food Stamps Intercept Program

The 1984 federal Deficit Reduction Act set general criteria for determining which debts must be referred under federal tax offset through federal wages, salary, and retirement payments. DSS implemented the federal law in 1992 by collecting Food Stamp over-issuances (both intentional and erroneous) at the IRS under special authority of the Food Stamp Act. Not until 1996, with passage of the federal Debt Collection Improvement Act, did the federal government mandate state participation in the Treasury Offset Program.

On August 1, 2003, DSS published notice of its intent to permanently adopt amendments to sections 20-400, 20-401, 20-402, 20-403, 20-404, 20-405, 20-406, and 20-409 of MPP to implement recent changes to this federal law and California's implementation of the Welfare Intercept System (WIS) Enhancement Project, which allows counties to establish, increase, decrease, or delete accounts as appropriate throughout the year, instead of on an annual basis. Existing regulations required counties to submit delinquent accounts by May 1 of each year for intercept the following tax season. After these changes, WIS will be updated weekly with information provided by counties, the Franchise Tax Board, and the IRS. DSS states that moving to a continuous system will allow counties to keep account information more current and accurate. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 11 and Vol. 4, No. 2 (2003) at 11.)

Update: On August 18, 2004, OAL approved DSS' permanent adoption of these changes.

Anticipating Income and Changes in the Food Stamp Program

Effective November 1, 2003, DSS amended—on an emergency basis—sections 63-503, 63-504, and 63-505 of the MPP to implement recent federal regulations by the U.S. Department of Agriculture as follows: (1) the current regulation that households report a change of more than \$25 in monthly gross income is increased to more than \$50

in unearned income and to more than \$100 in earned income; and (2) a technical amendment addressing procedures for the handling of certain recurring income in a retrospective budgeting system. Final federal rules were issued on April 29, 2003, requiring all states to implement these changes by November 1, 2003. On October 31, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. On March 1, 2004, DSS readopted these amendments on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 11 and Vol. 4, No. 2 (2003) at 12.)

Update: On July 8, 2004, OAL approved DSS' permanent adoption of these sections.

HEALTH / SAFETY

New Rulemaking Packages **Incorporating AIM Infants Enrolling** **Into the Healthy Families Program**

The Access for Infants and Mothers (AIM) Program, established in 1991 pursuant to Insurance Code sections 12695 *et seq.*, provides health insurance to low and moderate income pregnant women and infants born during the covered pregnancy. The AIM program, established under the Managed Risk Medical Insurance Board (MRMIB), is funded from four sources: the Cigarette and Tobacco Products Surtax Fund (Proposition 99); the state's general fund; federal funds from Title XXI of the Social Security Act; and subscriber contributions. The AIM program covers pregnant women with family incomes above 200%, but not more than 300%, of the FPL. Women with family incomes under 200% of the FPL qualify for no-cost Medi-Cal services for their pregnancy, which is funded with state and federal monies. Many infants born into the AIM Program are also eligible for the Healthy Families Program (HFP), which covers infants in families from 200% through 250% of the FPL.

The State Children's Health Insurance Program (SCHIP), established in 1997 pursuant to Title XXI to the Social Security Act, provides health services to uninsured, low-income children. The program is targeted to serve children whose family income, although low, is too high to qualify for Medi-Cal. In 1997, California passed AB 1126 (Chapter 623, Statutes of 1997), which allowed it to both expand its Medi-Cal program and establish HFP, a new standalone children's health insurance program. DHS administers the Medi-Cal expansion through its own regulations, and MRMIB administers the HFP.

Assembly Bill (AB) 1762 (Chapter 230, Statutes of 2003) made the following changes to existing law: (1) an infant born to an AIM subscriber who is enrolled in the AIM Program on or after July 1, 2004, shall be automatically enrolled in HFP; (2) the infant's coverage will be effective from the date of birth; (3) the enrollment shall cover the first twelve months of the infant's life, and at the end of the twelve months, income information shall be provided as a condition of continued eligibility under HFP annual eligibility review process; and (4) the infant shall be disenrolled if the income is either under or over the AIM income eligibility standard. Prior to AB 1762, infants born to AIM subscribers were eligible for coverage under AIM for two years assuming payment of premiums. Infants born before July 1, 2004, will remain eligible for AIM for two years, while those born on or after July 1, 2004, will be eligible for the HFP as set forth above. MRMIB contends that these changes will allow the state to draw down more federal funding, improve coordination between the AIM and HFP programs, and enhance customer services in these programs.

On July 1, 2004, MRMIB adopted—on an emergency basis—section 2699.6608, amended sections 2699.6500, 2699.6600, 2699.6606, 2699.6607, 2699.6611, 2699.6613, 2699.6617, 2699.6619, 2699.6625, 2699.6631, 2699.6705, 2699.6717, 2699.6725, 2699.6801, 2699.6809, and 2699.6813 of Chapter 5.8, Title 10 of the CCR, and amended sections 2699.100, 2699.200, 2699.201, 2699.205, 2699.209, 2699.400, and 2699.401 of Chapter 5.6, Title 10 of the CCR. The amendments to the regulations for AIM and HFP will accomplish the following changes, among other things:

- ◆ The subscriber contribution rate will decrease to 1.5% of adjusted household income for subscribers who enroll on or after July 1, 2004, since their infants will no longer be covered under the AIM Program and the infant's family will be paying monthly premiums for the infant under the HFP. For subscribers enrolled before July 1, 2004, the contribution will remain at 2% of the adjusted household income.
- ◆ The registration process for infants born to AIM subscribers who are enrolled on or after July 1, 2004, will change substantially; existing regulations describing the registration process for infants born to subscribers who are enrolled prior to July 1, 2004, will remain the same.
- ◆ The definition of what constitutes acceptable income documentation to determine AIM eligibility will change. For instance, "spouse of a pregnant woman" is being added to the definition of family member to insure eligibility is determined as required by law. These changes to the AIM Program will make income documentation requirements consistent in the AIM, HFP, and Medi-Cal programs, which is necessary for

automatic enrollment of infants into the HFP. Copies of the revised application and instruction page are included in the rulemaking package.

- ◆ A new section will explain the registration and enrollment process that must be followed after an AIM infant is born (on or after July 1, 2004). The AIM subscriber must notify the HFP by the end of the eleventh month following the infant's date of birth in order to make the infant automatically eligible for the HFP, retroactive to his/her date of birth.
- ◆ A new section will differentiate between infants pre-enrolled in the HFP program (coverage begins no earlier than 10 days after birth) and infants born to AIM subscribers and automatically enrolled into the HFP (coverage begins on the date of birth).
- ◆ Changes will clarify that an AIM infant's automatic enrollment into the HFP will cover only the first twelve months of the infant's life. At the end of the twelve months, as a condition of continued eligibility, the applicant must provide income information like any other family in the HFP. The infant will be disenrolled if the documentation shows that the adjusted annual household income exceeds 300% of the FPL or is under the income floor for HFP (200% of the FPL).
- ◆ In order to be consistent with current HFP policies, the revisions will clarify that AIM infants with siblings in the HFP will be automatically transferred to their siblings' HFP plan after month two, unless a child requires continuity of care for health reasons, or a parent makes a specified request.
- ◆ Changes will establish an initial health plan rate under the HFP for AIM infants covering the birth month and through the end of the second month of life. After this two-month period, the health plan will be paid rates in accordance with age and geographic region risk categories as set forth in existing HFP regulations. If the infant is in immediate need of health services during the period covered by the initial plan rate, the infant may be enrolled by the plan or health care provider without prior payment of premiums.
- ◆ Other definition and technical changes to AIM and HFP regulations are necessary to ensure compatibility. On July 30, 2004, MRMIB published notice of its intent to adopt the changes on a permanent basis. MRMIB held a public hearing on September 15, 2004. At this writing, the amendments await review and approval by OAL.

IMPACT ON CHILDREN: Child advocates raised concerns about early drafts of these regulations. For exam-

ple, in a previous version of the regulations, if the AIM mother did not notify her AIM plan of the baby's birth before the end of the month following the birth month, the baby would not be covered for any medical care received or needed during the first two months of the infant's life (not by AIM and not by HFP) and the mother would be billed for all care the baby received in the hospital or elsewhere during that time, which could be substantial. Under that version of the regulation, although the family could apply for HFP coverage for the infant at a later time, there would not be retroactive coverage, even if the infant was enrolled. Also, in January 2004, Governor Schwarzenegger included a cap on the number of children allowed into HFP in his 2004-05 budget proposal. This would have resulted in waiting list status for infants born to mothers covered by the AIM program who were not properly enrolled in HFP. Advocates warned that the intent of the legislation would be violated, since the purpose was to pull down more federal funding to cover infants who are already eligible for coverage, not to restrict coverage to eligible infants.

MRMIB was successful in alleviating some of the concerns of advocates. Final regulatory language allows coverage retroactivity to the infant's date of birth if enrolled in HFP after the infant's second month of life (and before the infant turns one year old), where all premiums for those months are paid. In addition, approximately 30 days before the estimated delivery date, the AIM mother will receive a letter explaining how the mother can fill out and return several forms (including selection of a primary care provider and dental plan for the newborn) after the baby is born, along with the premium payment. The mother's AIM plan or her provider can also provide this information to HFP on behalf of the infant. Further, if medical care is provided by a hospital or out of network provider during the birth or shortly after, these expenses will be covered by HFP once the AIM mother or AIM provider notifies HFP of the need for services, sends the required information (name, date of birth, and sex of the infant), and pays all premiums due. As is the case for all health coverage under HFP, an infant will be disenrolled if premiums are not paid.

As part of the rulemaking package, MRMIB estimates state costs of approximately \$2 million in the 2004-05 budget year (these costs are shared by HFP and the Department of Health Services' California Children's Services (CCS) Program, which covers some of the costs of high-cost infants in HFP, but not in AIM), then a net savings in budget year 2005-06 of \$13.8 million. Based upon the state's drawing down of additional federal SCHIP funding by covering infants through HFP, rather than AIM, it is estimated the state will receive an additional \$11.8 million in federal funds in budget year 2004-05, and \$17.2 million in budget year 2005-06.

Federal funding is currently available only for AIM infants in families between 200% and 250% of the FPL and

only for the infant's first year of life (meaning the state was subsidizing the cost of the second year of coverage for the infant in the AIM Program without drawing down federal funding). For AIM infants automatically enrolled in HFP effective the date of birth, federal SCHIP funding will be available for nearly all of these infants. For families between 250% and 300% of the FPL, federal funding will be available for up to two years, based on annual re-qualification, as a result of a federal waiver approved on June 10, 2004. For AIM families who remain within the HFP income threshold, up to 250% of the FPL, federal funding will continue through age 18, again based upon annual re-determination.

The most recent statistics from the UCLA Center for Health Policy Research show the number of uninsured California children dropped to 1.1 million in 2003, from 1.5 million in 2001, in large part due to increased enrollment in public health programs, including Medi-Cal, HFP, and other local health care initiatives. The data show that while enrollment in public health programs has increased 5.2%, these gains were partially offset by decreases of 4.3% in employment-based dependent health coverage. Unfortunately, more than half of all uninsured children in 2003 were eligible for enrollment in either Medi-Cal (about 207,000 children), Healthy Families (another 224,000 children), or county-based insurance programs (44,000 children in 2003 growing to 116,000 by the end of 2004). The most recent budget figures show the state saved \$38.8 million in the fiscal year that ended June 2004 because enrollment in the Healthy Families Program was down, a trend MRMIB attributes to a 15% staff reduction, which has resulted in backlogs of up to four months for families appealing denial of their applications. Further, reports of lost or misplaced applications and supporting documentation are common since the switch in January 2004 to a new contractor to process applications.

As a result of California's failure to fully implement and use federal SCHIP monies, California has returned approximately \$1.7 billion to the federal government since the inception of the program in 1998. MRMIB reported in October 2004 that an additional \$120 million of federal fiscal year 2002 SCHIP funds are set to be returned. Under the federal law, states have three years to use federal SCHIP funds appropriated for a given year. If they do not spend the money within that time, the federal government redistributes some portion of the unused money to states that exhausted their initial funding. Although Congress proposed legislation that would have allowed states to keep and use a portion of expired funds in future years, the bill failed to pass in the last session, and was opposed by the Bush Administration. States must spend any returned monies to provide health care to children. California, thus far, has not been effective in spending this money on children's health care, despite great need for this coverage.

A rather simple concept—seeing a doctor to treat an illness or for a preventive care check-up—has been turned into a logistical challenge for the families of these children. For years, advocates have questioned the logic of having multiple state agencies implementing so many different health care programs, each with separate administrative barriers and costs, instead of expanding eligibility within an existing health care program, *e.g.*, Medi-Cal. “Californians for Healthy Kids,” a campaign to insure every child in California, sponsored by the 100% Campaign (a collaboration of several child advocacy groups), and supported by business leaders, parents, health care providers, faith leaders, labor representatives, and children’s advocates, has recently been announced. The first major hurdle for policy-makers and advocates will be to streamline existing health care systems to make coverage simple and available to all families with children. This campaign seeks to accomplish what many advocates argued would be most effective for achieving coverage for children since the inception of the federal SCHIP program and funding.

MRMIB’s current rulemaking, which strives to streamline its AIM program to function more efficiently with both Healthy Families and Medi-Cal, exemplifies why child advocates have been and continue to be critical of this program, and others like it, that result in a fragmented, confusing, and expensive “system” of health care. Notwithstanding this criticism of the state’s fragmented health care system, AIM and HFP do provide coverage to many pregnant women (including prenatal care for uninsured moderate-income women), young infants, and children, who would otherwise be lacking under the state’s current regulatory scheme. With the downturn in our economy and increasing numbers of unemployed, it is imperative that some forms of public assistance, like the AIM and Healthy Families programs, exist when the number of unemployed and uninsured rise. For more information, *see* the Children’s Advocacy Institute’s *California Children’s Budget 2004–05* (San Diego, CA; June 2004) at 4-67 (available at www.caichildlaw.org).

Medi-Cal Estate Recovery Program Definitions

On July 27, 2004, DHS amended—on an emergency basis—sections 50960 and 59061, Title 22 of the CCR, to accomplish the following: (1) add annuities to the definition of “estate” as an asset from which DHS may seek recovery for Medi-Cal expenditures; (2) add the definition of “annuity” to the regulations and specify that only annuities purchased on or after September 1, 2004, are affected by this regulation; (3) specify how DHS’ claim for reimbursement for Medi-Cal expenditures shall be recovered from an annuity as part of a deceased beneficiary’s estate; and (4) make other technical changes to properly implement estate recovery mandates under state and federal law, including a recent settlement agreement and permanent injunction in the case of *California Advocates for Nursing Home Reform, et al. v. Bonta, et al.* (2003) 106 Cal.App.4th 498.

Under existing federal and state law, DHS is required to seek reimbursement from the estates of deceased Medi-Cal beneficiaries for certain Medi-Cal services paid on or after the individual’s 55th birthday, unless specific limitations apply. An estate is defined under previous regulations as those assets owned by the beneficiary at the time of death and include assets distributed through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. DHS files claims through its estate recovery program for nursing facility services, home and community-based services, hospital and prescription drug charges, health care premiums, and all services provided after a beneficiary turns 55 years of age. DHS’ claim is limited to the total value of assets in the estate of the deceased, or the total amount of Medi-Cal services paid, whichever is less. Contrary to the opinion of the federal Centers for Medicare and Medicaid Services, some California attorneys, estate and financial planners, and insurance agents have been telling elderly Medi-Cal beneficiaries that the use of annuities will protect that money from future estate recovery by DHS. Through this regulatory action, DHS seeks to clarify that it can pursue annuities for estate recovery.

On August 13, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. DHS held a public hearing on September 29, 2004, with the public comment period ending October 1, 2004. At this writing, the amendments await review and approval by OAL.

IMPACT ON CHILDREN: DHS estimates that the state will save \$62.5 million in fiscal year 2004–05 from the clarification of its collection rights through estate recovery. This will equate to a similar savings for the federal government for fiscal year 2004–05 from not having to put forward federal matching funds in the amount of approximately \$62.5 million. To the extent that annuities, and income produced from those annuities, were intended by the deceased to help support a spouse or children, this could impact the amount a spouse and/or child can recover after the death of an older family member. From DHS’ estimate of savings, it appears that close to \$62.5 million in 2004–05 would have been protected from the state’s recovery and potentially been used to help support family members. Although the regulations provide for an estate hearing for any heir who will suffer undue hardship resulting from the estate recovery action, generally after September 1, 2004, children and family members of Medi-Cal beneficiaries will no longer be able to access monies placed in annuities if recovered by DHS for reimbursement.

Medi-Cal Enrollment Process and Criteria

In an effort to curb perceived Medi-Cal fraud and abuse, the Legislature passed AB 1107 (Chapter 146, Statutes of 1999) and AB 1098 (Chapter 322, Statutes of 2000), adding several provisions to the Welfare and Institutions Code, including sections 14043 through 14043.75. These legisla-

tive changes brought California into compliance with federal Medicaid laws regarding detection and prosecution of fraud and abuse by giving DHS broad discretion to establish additional requirements for applicants, and requiring all providers to re-enroll and provide additional proof regarding their place of business. The Department has found “providers who cannot demonstrate they are operating an established place of business are more likely to commit Medi-Cal fraud.” Therefore, providers are now required to show they are operating an established place of business and must follow standard business practices, like carrying several types of insurance. DHS may deny approval to participate in the Medi-Cal program to providers who fail to meet the new standards set forth in this regulation.

On October 7, 2004, DHS added and/or amended—on an emergency basis—sections 51000.1, 51000.1.1, 51000.3, 51000.4, 51000.6, 51000.7, 51000.16, 51051, 51000.10.1, 51000.15.1, 51000.20.9, 51000.30 (and various forms incorporated by reference in this section), 51000.31, 51000.40, 51000.45, 51000.50, 51000.51, 51000.52, 51000.53, 51000.55, 51000.60, and 51451, Title 22 of the CCR, to implement SB 857 (Chapter 601, Statutes of 2003), which amended Welfare and Institutions Code sections 14043 through 14043.75 to strengthen application and enrollment processes for providers. Specific provisions of DHS’ proposed rulemaking include the following (not an exhaustive list):

- ◆ These regulations further clarify provider participation standards in the Medi-Cal program that require an applicant to demonstrate an established place of business in order to properly bill the state for services provided in that location. If provider information does not meet these standards, DHS can deny participation in the Medi-Cal program.
- ◆ These regulations require DHS to (1) approve, (2) find incomplete, (3) require background checks, or (4) deny an application package within 180 days from submission. If DHS fails to take one of the above actions within the 180-day time frame, it must extend provisional provider status to the applicant/provider on the 181st day after submission. These regulations enable DHS to enroll an applicant as a provisional provider for a period of up to twelve months. If DHS finds the application package is incomplete, it must identify in a notice to the provider what materials are needed to complete the application.
- ◆ Regulations specifying that if the original application was incomplete and all requested information is re-submitted by the provider within 35 days of the Department’s notice, DHS must, within 60 days of the re-submission, notify the applicant of one of the following: (1) that he/she is granted provisional provider status for twelve months; (2) that the application is denied

and reasons therefore; or (3) that there is a need to conduct background checks, pre-enrollment inspections, or unannounced visits. If the provider fails to re-submit documentation requested by DHS for an incomplete application within 35 days, the application package will be denied.

- ◆ In order to monitor newly-enrolled providers, these regulations enable DHS to enroll an applicant as a “preferred provisional provider” for a period of eighteen months. In order to be considered for preferred provisional status, a provider must meet certain requirements as follows: (1) hold a current state Medical Board license; (2) be a current faculty member of an accredited teaching or children’s hospital; (3) have full, current, unrevoked, and unsuspended privileges at an accredited general acute care hospital; and (4) not have any adverse entries in a specified databank, and the provider must specifically request preferred status of the Department at the time of application. DHS must notify an applicant who requests preferred provisional status within 90 days of whether the provider does or does not meet the criteria.
- ◆ According to these regulations, DHS may terminate a provider’s enrollment as a provisional provider or preferred provisional provider if any fraud, waste, or abuse of the Medi-Cal program is detected by DHS.
- ◆ These regulations adopt a definition for “rendering practitioner” and institute a new application form for the same. Only certified nurse midwives, nurse practitioners, physician assistants, or licensed midwives can apply for this status. DHS further specifies what information must be provided with such an application, and what requirements such a practitioner must meet in order to be enrolled.
- ◆ These regulations establish requirements for applicants applying for enrollment or continued enrollment as a provider group.
- ◆ These regulations change the Medi-Cal provider disclosure form to increase the disclosure period from five to ten years for any felony or misdemeanor conviction involving fraud or abuse in any government program, liability in any civil proceeding involving fraud or abuse in any government program, or settlement in lieu of conviction involving fraud or abuse in any government program.
- ◆ These regulations specify that when a provider number is issued, only the designated provider at the specified location may utilize the number.
- ◆ These regulations contain a list of situations in which a provider number will be deactivated by DHS.

While DHS claims there is no fiscal impact on either the state or federal government to implement these regulations, there will likely be a fiscal impact on providers who may need to spend additional money in order to comply with these requirements. DHS claims it is impossible to estimate the average cost that will result from implementation of these regulations due to multiple factors including the large range of provider types (e.g., durable medical equipment providers, laboratories, physicians), providers who work in, own, or lease a wide variety of physical settings (e.g., retail stores open to the public, "closed door" pharmacies, medical offices), and providers who have different scopes of professional practices with varying risk factors (e.g., podiatrists, surgeons, speech therapists, nurse midwives, etc.). DHS estimates that for a small business place for a provider with no employees and no adverse claims, comprehensive liability could be less than \$1,000 per year, but for other providers, "it could be significantly more."

On October 22, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. DHS held a public hearing on December 8, 2004, with the public comment period ending December 10, 2004. At this writing, the amendments await review and approval by OAL.

IMPACT ON CHILDREN: Current figures show that only 26,000 of the state's 90,000 licensed physicians are approved to participate in the Medi-Cal program. Accordingly, impoverished children who are eligible under Medi-Cal are unable to reliably find a doctor who will treat them. In March 2004, the *Orange County Register* reported that forty percent more physicians would be available to treat Medi-Cal beneficiaries if the state eliminated a backlog of 10,500 applications from physicians seeking to participate. State officials claimed the process takes an average of 111 days, but some physicians reported that the application process can extend beyond a year. An unknown number of the 27,700 applications that DHS has termed "closed" were rejected because they contained errors and remain in "bureaucratic limbo," the *Register* reported. To become certified for Medi-Cal, some physicians allegedly submitted as many as five applications, and if the applications contained any errors, they were returned for re-submission *de novo*.

Apparently in response to this criticism, current law now imposes the above time requirements for DHS when reviewing applications. Unfortunately, the regulations continue to allow DHS up to six months to review an application. The process admittedly took only a few months previously. Further, if DHS can show a need for further investigation or documentation, the six months may be extended. It is unclear whether the revised regulations will resolve DHS' backlog of applications, and place more needed Medi-Cal providers throughout the state to ameliorate current supply deficiencies for children.

The theory behind the above regulations implementing the "established place of business" laws is that if a provider is not operating a legitimate health care business at a defined location, he/she is more likely to be fraudulently billing. Those who are able to expend money to come into compliance with these regulations are more established practitioners and are less likely to engage in marginal practice or fraud. However, these regulations will negatively impact providers who run honest businesses treating low-income children. For example, many rural providers might not carry a comprehensive general liability policy at their place of business and are not otherwise required to do so under the law. Physicians who practice are not required to carry such insurance as a matter of law in general. The regulations will likely affect providers to rural and poor children disproportionately because they frequently work at community clinics and in poor areas where institutional employers do not provide liability coverage (unlike urban hospitals or managed care facilities). DHS states that the cost of liability insurance could be less than \$1,000 per year for a provider with no employees (an amount of uncertain accuracy), but the agency fails to indicate whether it measured the impact on doctors who have or may leave the system, or who will otherwise stop treating children covered by Medi-Cal due to the new requirements.

Malpractice insurance is a good protection from a consumer standpoint. In California, pursuant to Business and Professions Code section 2216.2, only providers who perform surgery outside of a general acute care hospital (e.g., cosmetic surgeons) are required to carry malpractice insurance. However, if the increased cost of purchasing this insurance in order to treat Medi-Cal patients results in additional physicians leaving the system, children already suffering from physician undersupply will be further disadvantaged. Some child advocates support a state fund from license renewal assessment of all medical professionals to provide malpractice coverage for pediatric physicians serving impoverished children; socializing that coverage allows protection to malpractice victims without supply diminution.

DHS has not produced applicable data on the average cost to pediatric physicians practicing in rural, suburban, or urban areas to purchase required insurance and what impact that will have on their continued ability to treat Medi-Cal children. DHS does not disclose the rate or prevalence of fraud by Medi-Cal providers, nor does it show that money lost to existing fraud and abuse is high enough to warrant imposing these additional burdens and costs on providers who run legitimate businesses. In fact, a state audit of DHS released in early 2004 found that DHS officials significantly overstated the \$1 billion saved in the prior five years from efforts to reduce Medi-Cal fraud, raising questions about how resources aimed at the problem have been used. The examination of the \$29 billion Medi-Cal program led the state auditor to call into question the

efficacy of over 250 positions added to DHS since 1999, finding that some of the staff hired to conduct investigations may have been doing other jobs. It is clear that increased staffing and money have not produced intended results, and may have even worsened the problem—since the anti-fraud measures instituted by DHS may be hindering needed physician supply.

According to federal Medicaid law, patients covered by Medicaid are entitled to the same quality of care and access to care as are individuals covered by other insurance, including private health care insurance and Medicare. California is responsible for complying with this federal mandate by adequately setting provider rates for Medi-Cal services. Many recent studies have found Medi-Cal provider rates to be low in California—particularly for services to children. These rates have not been adjusted consistent with medical cost or consumer price inflation for more than a decade, and many practitioners complain that Medi-Cal patients in general and Medi-Cal-covered children in particular, impose out-of-pocket costs. Accordingly, an increasing number of practitioners refuse to handle Medi-Cal patients. In many cases, California compensation is substantially less than national average fee-for-service rates. Increasing administrative burdens for these providers, on top of their low rates, will only lead to less access to care for California children.

Of special concern are rates paid to pediatric specialists—those physicians needed to treat a child's significant illness or injury after diagnosis. These critical medical providers include allergy/immunology, critical care, emergency care, perinatal pediatrics, urology and dialysis, hospital care, office visits, psychiatry, and even child preventive services (EPSDT). Most rates applicable to these practitioners are now less than 50% of the amount paid for the identical treatment for an elderly Medicare patient. For example, recent American Academy of Pediatrics data show that a doctor treating an elderly patient under Medicare would receive \$203.15 for an initial inpatient consultation of high complexity, while the same doctor treating a child under Medi-Cal would receive \$82.25 for the same service. This disparity is common between pediatric specialty Medi-Cal rates and their Medicare counterparts.

Notwithstanding this and other evidence, rather than increasing rates to be more equivalent with Medicare or other lawfully-mandated levels (requiring the approximate doubling of rates for pediatric specialists), the 2003–04 budget cut Medi-Cal provider rates by 5%. In response to these cuts, the California Medical Association, the American Academy of Pediatrics, and several other provider and beneficiary organizations joined forces to sue the state. In a published opinion dated December 23, 2003 (*Clayworth v. Bonta*, 295 F. Supp. 2d 1110 (E.D. Cal. 2003)), the federal District Court issued a preliminary injunction barring the DHS director from implementing the

5% rate reduction to fee-for-service Medi-Cal rates. The court held that the plaintiff Medi-Cal recipients have a private right of action under the Civil Rights Act to enforce the provisions of 42 U.S.C. section 1396a(a)(30)(A), the equal access provision. Further, the court held that plaintiffs had established both the likelihood of irreparable injury if the rate reduction were to go into effect and the likelihood of success on the merits of their claims. All of these issues have been appealed by the DHS Director to the Ninth Circuit Court of Appeals and a decision is expected in 2005.

State law requires that Medi-Cal fee-for-service rates be adopted pursuant to a regulatory process and requires that DHS annually review Medi-Cal rates for physician and dental services, taking into account annual Consumer Price Index cost increases, reimbursement levels under Medicare and other third party payors, prevailing customary charges, and other factors. (*See* Welfare and Institutions Code sections 14075, 14079, 14105; 42 C.F.R. section 447.45; 42 U.S.C. section 1396a(a)(32).) Plaintiffs further alleged in the above case that prior to enacting the 2003–04 budget bill, including the addition of section 14105.19 of the Welfare and Institutions Code (reducing Medi-Cal program service rates by 5%, with a few exceptions), no studies or other analyses were conducted by the Legislature or DHS to determine whether the Medi-Cal rates resulting from the 5% reduction would be consistent with efficiency, economy, and quality of care, or with the costs of providing the services affected, or what impact the rate reduction would have on beneficiaries' access to health care services as compared to the general population. In fact, section 14105.19(a) explicitly states that the 5% reduction in rates was due to "the significant state budget deficit projected for the 2003–04 fiscal year." Even the Legislative Analysts' report on the proposed 15% rate reduction initially introduced found that California's reimbursement rates, when adjusted for cost-of-living, were among the ten lowest in the country, that the proposed rate reduction would negatively affect beneficiaries' access to providers, and that DHS has "no rational basis for its rate system."

In Governor Schwarzenegger's 2004–05 budget released in January 2004, he proposed an additional 10% provider rate reduction, even though the 5% rate reduction from the prior year had been successfully challenged in court. In Schwarzenegger's May Revision, however, he withdrew the proposed Medi-Cal provider rate reductions. California is already spending less per person under Medicaid than many other states. Consider that California's per capita personal health care expenditures under Medicaid in 1998 were \$2,866, compared to the national average of \$5,032. Also consider that in 2000, low-income children and parents made up 73% of Medi-Cal enrollees, yet accounted for only 27% of the spending (a majority of Medi-Cal spending goes to treating elderly,

blind, and disabled enrollees). It does not make sense to continue to reduce pediatric provider rates, with the result of decreasing children's access to Medi-Cal, in an effort to cut costs in the Medi-Cal program, since this sector of the population has a small effect on overall program spending.

For a more detailed discussion of the problems facing the Medi-Cal system and provider rates, see the Children's Advocacy Institute's *California Children's Budget 2004-05* (San Diego, CA; June 2004) at 4-39 through 4-45, and the previous issue of the Children's Advocacy Institute's *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 16-17, both available at www.cachildlaw.org.

Nurse-to-Patient Ratios in General Acute Care Hospitals

Licensed nurse-to-patient ratios represent the maximum number of patients that can be assigned to one licensed nurse at any one time. On September 26, 2003, OAL approved DHS regulations to implement the statutory mandate of Health and Safety Code section 1276.4, passed in 1999, which required DHS to develop minimum, specific, numerical licensed nurse-to-patient ratios by licensed nurse classification and by hospital unit for all general acute care hospitals. Health and Safety Code section 1276.4 also requires DHS to review the regulations five years after adoption and report back to the Legislature regarding any proposed changes. This report is due on August 26, 2008.

Specific ratios were determined by DHS and became operational on January 1, 2004. The regulations also provided for a phased-in enrichment of the ratios at two specified dates: (1) ratios for medical/surgical and mixed units change from 1:6 to 1:5 on January 1, 2005; and (2) ratios for telemetry (cardiac monitoring) and specialty care units change from 1:5 to 1:4, and the ratio for step-down units (a care level between intensive and regular medical/surgical) from 1:4 to 1:3, on January 1, 2008. Under the initial regulations, "assigned" means the licensed nurse has responsibility for the provision of care to a particular patient within his/her scope of practice. There can be no averaging of the number of patients and the total number of licensed nurses on the unit during any one shift, nor over any period of time. Only licensed nurses providing direct patient care are included in the ratios.

Although there are no specific federal statutes or regulations that address minimum nurse staffing levels, section 482.23(b), Title 42 of the Code of Federal Regulations, provides the following guidance for hospitals certified to participate in Medicare: "the nursing service must have adequate numbers of licensed registered nurses, licensed practical (vocational) nurses and other personnel to provide nursing care to all patients as needed."

On November 12, 2004, DHS amended—on an emergency basis—section 70217, Title 22 of the CCR, to delay

implementation of specified nurse-to-patient ratios, from 1:6 to 1:5, scheduled to take effect on January 1, 2005. DHS determined that it is necessary to maintain the current ratio, which became effective January 1, 2004 for medical, surgical, medical/surgical, and mixed units, until January 1, 2008. These regulations affect personnel (including registered nurses, licensed vocational nurses, and licensed psychiatric technicians) employed at licensed general acute care hospitals. According to DHS, during the first ten months of the existing ratios, hospitals cited the ratios as a cause for the closure of two hospitals and the closure or reduction in capacity of several hospital emergency rooms and other patient care units. DHS included copies of letters from several hospitals documenting closure and/or reduction in capacity in its rule-making package as proof of the need to implement these emergency regulations.

These regulations also made the following changes to clarify the application of the nurse-to-patient ratios:

- ◆ Licensed nurses shall be included in the calculation of the nurse-to-patient ratio only when the licensed nurse has a patient care assignment, is present on the unit, and is not on a meal break or other statutorily-mandated work break.
- ◆ Because of the unique characteristics of emergency departments at general acute care hospitals, these regulations adjust the documentation requirements for emergency rooms when there is "an unforeseeable increase in the number or acuity of patients" and the emergency department reaches "saturation" (as defined in new sub section 70217(s)). Hospitals must demonstrate that prompt efforts were made to maintain required staffing levels (but not that those staffing levels were actually met).
- ◆ For emergency departments, hospitals must document, in addition to other section requirements, the licensed nurses on duty, and patient identifiers with the time of the patient's arrival and departure, on a day-to-day, shift-by-shift basis; however, actual specific licensed nurse assignments correlated to patient identifiers are not required to be documented.
- ◆ These regulations re-establish that they do not affect the existing Patient Classification System, which provides a method for tracking staffing requirements by unit, by patient, and by shift. Under the Patient Classification System, nursing staff levels will still be required to increase in response to patient acuity, e.g., the severity of the illness, the need for specialized equipment and technology, and the complexity of clinical judgment needed to design, implement, and evaluate patient care plans.

On December 3, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. DHS will hold a public hearing on January 18, 2005, in the Sacramento Convention Center, with the public comment period ending January 21, 2005.

IMPACT ON CHILDREN: Since Governor Schwarzenegger's decision in November 2004 to delay the implementation of the new nurse staffing ratios, there has been a vigorous debate over the effect these emergency regulations will have on patient care, and debate over the procedural legality of the Governor's usurpation of the regulatory/legislative process on behalf of powerful HMO and hospital business interests. The California Nurses Association (CNA) has been outspoken in its opposition to the Governor's cancellation of previously promised and adopted ratios, and has filed a lawsuit to stop the implementation of these emergency regulations. CNA argues the new staffing regulations will not financially harm hospitals and nursing homes, and that more nurses are coming to California. The CNA president was quoted as saying the executive order "has set a dangerous precedent" that would allow the Governor to "vacate any health and safety regulations corporations do not like through emergency decrees without legislative or public support."

In support of the Governor's edict, hospital associations argue that delay of the ratio change is necessary, and hospital interests have financed highly visible public ads thanking the Governor for his "courageous" stand against inflexible nurse ratios. Hospitals contend that the new nursing ratios will financially harm them, cause closures, and lead to fewer beds. DHS admits that it does not have data to support or refute the claims of hospitals and emergency rooms regarding problems caused or exacerbated by nurse-to-patient ratios. DHS will begin to study the effects of current ratios as required by law, and report the findings to the Legislature in early 2007.

According to a *Los Angeles Times* investigation of recent state inspection reports, more than half of the hospitals inspected for alleged violations of state nurse-to-patient staffing ratios do not comply with the existing rules/ratios. Most violations of the ratios occurred in emergency departments, medical surgical wards, and telemetry units. In July 2004, the chief nursing officer at Los Angeles Children's Hospital told *USA Today* that children frequently were not admitted due to a lack of nurses, and the nursing shortage was called a "public health crisis." Young children, lacking the ability to articulate medical needs, are especially in need of attentive nurses in hospitals and clinics. Stakeholders agree that California is in great need of qualified nurses, and state colleges and universities should be training well beyond current capacity.

According to a 2001 U.S. General Accounting Office report, California ranks 49th to 50th in the nation in the

number of registered nurses per capita with 544 per 100,000 population, compared with the national average of 782 per 100,000 population. In passing the legislation that created the need for ratios, the Legislature recognized that the quality of patient care was related to the number of licensed nurses at the bedside, and intended to ensure a minimum, adequate number of nurses. To now deviate from the intent of the legislation raises the issue of *ultra vires* cancellation by a Governor whose executive branch is empowered to carry out legislative intent, not unilaterally reverse it.

Notices of General Public Interest

DHS issued the following notices of general public interest:

- ◆ to adopt protocols for disease management of arthritis, including implementation of policies to ensure appropriate use of medication for arthritis in fee-for-service Medi-Cal (published August 27, 2004) (written comments due 30 days from the publication date of the notice);
- ◆ to announce a public meeting and agenda for the Drug Use Review Board meeting on September 21, 2004 (published August 27, 2004);
- ◆ intent to submit a state plan amendment to reduce (for a total general fund savings of \$52.1 million in 2004–05) the reimbursement rate paid to pharmacy providers for specified dispensing of drugs on or after September 1, 2004 in accordance with Senate Bill (SB) 1103 (Chapter 228, Statutes of 2004) (August 20, 2004);
- ◆ intent to submit a state plan amendment to provide a cost of living adjustment in reimbursement rates paid to long term care freestanding skilled nursing facilities effective August 1, 2004 (July 30, 2004);
- ◆ intent to submit a state plan amendment regarding the state's use of federal Preventive Health and Health Services Block Grant funding for fiscal year 2004–05, and to announce a public meeting to receive comment on proposed funding on August 30, 2004 (July 16, 2004); and
- ◆ to adopt new Medi-Cal reimbursement levels (for a net general fund savings of \$4 million in 2004–05) for antihemophilic blood factor products for services provided on or after June 1, 2004 (July 9, 2004).

Some of the above notices invited public comment and made available the regulatory language being changed and/or adopted by the notice. However, the notices do not fulfill the requirements of the Administrative Procedure Act regarding formal rulemaking, will not be approved by

the Office of Administrative Law, and do not require DHS to respond to any comments received.

IMPACT ON CHILDREN: Some of the changes made in these notices will affect reimbursement rates through the Medi-Cal program. Plaintiffs in the *Clayworth v. Bonta* lawsuit, referenced above, alleged in their complaint for injunctive and declaratory relief that DHS violated state law because it failed to adopt the Medi-Cal fee-for-service rates pursuant to the regulatory process. (See Welfare and Institutions Code sections 14075, 14079, and 14105.) Specifically, section 14079 requires that DHS annually review and revise reimbursement rates to ensure reasonable access by Medi-Cal beneficiaries to physician and dental services, consider Consumer Price Index increases, consider reimbursement levels under Medicare and other third-party payors, and consider prevailing customary charges and other factors required by statute.

In the *Clayworth v. Bonta* lawsuit, the plaintiffs also alleged that DHS violated federal regulations that require public notice of the reduction of rates and an opportunity for public comment. (See 42 C.F.R. section 447.205.) DHS thereafter issued a notice of general public interest (like the ones listed above) regarding the 5% reduction in rates in November 2003, after the *Clayworth v. Bonta* complaint was filed.

The plaintiffs further alleged that DHS' 5% reduction is invalid because, according to federal law, any state plan amendments must be submitted to the Secretary of the U.S. Department of Health and Human Services for approval; thus, a state cannot implement its state plan, or any amendments to the plan, before approval from the Secretary is granted. Procedurally, DHS cannot implement rate reductions without going through the proper and formal rulemaking procedures in the state. Specifically, California's approved state plan requires DHS, when setting rates, to (1) develop an evidentiary base or rate study resulting in the determination of a proposed rate; (2) present the proposed rate at a public hearing to gather public input; (3) determine the final rate based on the evidentiary base including the pertinent public input; and (4) establish the payment rate through the adoption of regulations specifying such rates.

The purpose of these code sections is to protect beneficiaries of Medi-Cal services (who are disproportionately children) by disallowing arbitrary decisionmaking by the agency and creating an avenue for public input and comment. Unfortunately, for many years budgetary considerations have dictated the rates paid to providers, a distinct disadvantage for child beneficiaries who cannot gain access in some instances to necessary health care. It could be argued that several of the above-referenced notices of general public interest should have been implemented through the formal rulemaking process. However, the

question remains whether DHS' use of this general notice procedure fulfills the federal and state requirements listed above. Until a court or OAL rules on this issue, it appears that DHS will continue to utilize this process when changing reimbursement rates within the Medi-Cal program.

Update on Previous Rulemaking Packages **Drug Medi-Cal Rates for Fiscal Year 2002–03**

On April 22, 2004, DHS amended—on an emergency basis—section 51516.1, Title 22 of the CCR, to update Medi-Cal reimbursement rates for substance abuse services for fiscal year 2002–03. Welfare and Institutions Code sections 14021.5, 14021.6, and 14105, and Health and Safety Code section 11785.42 require the Department of Alcohol and Drug Programs (ADP), in consultation with DHS, to establish rates for Drug Medi-Cal services, including perinatal residential treatment services for pregnant women and women in the postpartum period, Naltrexone (drug and alcohol addiction) treatment, and day care habilitative (rehabilitative/ambulatory intensive outpatient) services; establish a dosing fee for use of two specific narcotic replacement drugs (Methadone and Levoalphacetyl-methadol (LAAM)); and to establish a uniform statewide monthly reimbursement rate for narcotic treatment programs.

DHS is adopting these regulations, rather than ADP, because DHS is the single state agency authorized by federal law to administer the Medicaid program in California (Medi-Cal). DHS/ADP have been paying these increased rates for services provided on or after July 1, 2002. Based upon decreased payment levels for services provided under this regulatory package, there is a combined state-federal (50/50) fiscal savings (from 2002–03) of over \$3.2 million.

On May 7, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 12.)

Update: On September 29, 2004, OAL approved DHS' permanent adoption of these changes.

Established Place of Business

In an effort to curb perceived Medi-Cal fraud and abuse, the Legislature passed AB 1107 (Chapter 146, Statutes of 1999) and AB 1098 (Chapter 322, Statutes of 2000), adding several provisions to the Welfare and Institutions Code, including sections 14043 through 14043.75. These bills brought California into compliance with federal Medicaid laws regarding detection and prosecution of fraud and abuse by giving DHS broad discretion to establish additional requirements for applicants, and requiring all providers to re-enroll and provide additional proof regarding their place of business. DHS has found "providers who cannot demonstrate they are operating an established place of business are more likely to commit Medi-Cal fraud."

Therefore, providers will now be required to show they are operating an “established place of business” and must follow standard business practices, like carrying several types of insurance. DHS may deny approval to providers who fail to meet the new standards set forth in this regulation.

On February 3, 2003, DHS amended, on an emergency basis, sections 51000.4, 51000.30, 51000.45, 51000.50, 51000.55, 51200, 51200.01, and 51451, Title 22 of the CCR, to reflect changes made in AB 1107 and AB 1098. On February 21, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. On August 5, 2003, and again on February 2, 2004, DHS readopted these amendments on an emergency basis. Following the February 2004 reoption, DHS was required to transmit a certificate of compliance to OAL by June 2, 2004, or the emergency language would be repealed by operation of law on the following day. DHS failed to transmit the certificate to OAL by June 2, and the emergency changes were repealed. However, on June 8, 2004, DHS readopted these changes—for a third time on an emergency basis. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 15) and Vol. 4, No. 2 (2003) at 18.)

Update: DHS failed to transmit a certificate of compliance to OAL by October 6, 2004, so the emergency language was repealed by operation of law on the following day. However, some of the regulatory sections relevant to this action are also part of a new DHS emergency rulemaking action (see “Medi-Cal Enrollment Process and Criteria,” described above).

Authorization of Prosthetic and Orthotic Appliances

Federal law requires state Medicaid plans to include procedures intended to safeguard the system from unnecessary use of care and services. On July 17, 2003, DHS amended—on an emergency basis—sections 51315 and 51515, Title 22 of the CCR, to impose a prior authorization requirement on prosthetic and orthotic appliances and to impose a restriction on which providers may prescribe specified appliances to Medi-Cal beneficiaries. By tracking the billing practices of providers, DHS determined that billing thresholds under Medi-Cal have been implemented in such a way to allow numerous appliances to be provided and paid for under Medi-Cal when they were not necessary. These regulations are necessary to ensure adequate utilization review while ensuring appropriate access to prosthetic and orthotic appliances and to prevent over-billing for unnecessary appliances. On August 8, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. On January 14, 2004, DHS readopted the changes on an emergency basis, including the repeal of section 51515. (For background information on this rulemaking package, see *Children’s Regulatory Law*

Reporter, Vol. 5, No. 1 (2004) at 16 and Vol. 4, No. 2 (2003) at 23.)

Update: On August 12, 2004, OAL approved the permanent adoption of these changes.

Acute Inpatient Intensive Rehabilitation/Manual of Criteria

Federal law requires state Medicaid plans to include procedures intended to safeguard the system from unnecessary utilization of care and services. Prior authorization of services may be imposed by DHS. However, Welfare and Institutions Code section 14133.9 establishes requirements that must be met by the Department if prior authorization is used. For example, for major categories of treatment, like acute inpatient intensive rehabilitation, DHS must publicize and continually develop a list of objective criteria to indicate when authorization will be granted. The Department is currently expanding and updating its Manual of Criteria for Medi-Cal Authorization, which is incorporated by reference into Title 22 of the CCR, due to the outcome of a lawsuit, *Fresno Community Hospital and Medical Center v. State of California, et al.*, Fresno County Superior Court Case No. 555694-9 (1996).

On August 22, 2003, DHS published notice of its intent to permanently adopt changes to section 51003, Title 22 of the CCR, to change the date of the proposed revision of the Manual of Criteria to May 28, 2003, and to expand and adopt criteria for inclusion in the Manual for acute inpatient intensive rehabilitation. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 16 and Vol. 4, No. 2 (2003) at 23.)

Update: On September 29, 2004, OAL approved DHS’ amendments.

SPECIAL NEEDS

New Rulemaking Packages

Vouchered Respite

On August 27, 2004, the Department of Developmental Services (DDS) amended—on an emergency basis—sections 50604, 50605, 54310, 54320, 54326, 54332, and 54355 and Appendix A, Title 17 of the CCR, regarding the Respite Program, which provides intermittent or regularly scheduled, temporary, non-medical care and/or supervision in a person’s home or in a licensed residential facility. Respite services are typically obtained from a respite vendor by use of vouchers and/or alternative respite options. Vouchers are a means by which

a family may choose its own service provider directly through a payment, coupon, or other type of authorization.

Under the Home and Community-Based Services Waiver, DDS receives federal funding for services provided to qualified consumers. DDS' regulatory amendments would enable the Department to add vouchered respite services to the Waiver, thus increasing the amount of federal funding accessed by the state. DDS estimates that these regulatory changes will bring in an additional \$7.1 million in federal financial participation for the first nine months of 2004–05, and at least \$9.5 million annually thereafter.

In order to make such a Waiver amendment, however, DDS must revise many of its current regulations to bring them in line with federal requirements. For example, the regulatory changes require the qualifications of vouchered respite providers to be comparable to other respite providers; enable DDS to ensure financial accountability for funds expended for home and community-based services; clarify details about the types of records that vendors must maintain pursuant to federal requirements; and extend the record retention period from three years to five years.

On September 10, 2004, DDS published notice of its intent to adopt these changes on a permanent basis. DDS held a public hearing on this rulemaking proposal on October 25, 2004 in Sacramento. At this writing, the changes await review and approval by OAL.

IMPACT ON CHILDREN: Respite services are critical for families with developmentally disabled children, as they enable parents and others to have brief breaks from their caregiving responsibilities. Respite services can be instrumental in helping a family keep a disabled child in the home, where the child is typically most comfortable and secure.

California spent \$77 million in fiscal year 2001–02 for vouchered respite; this proposal would enable the state to qualify for federal reimbursement of approximately 10% of those expenses. To the extent that these regulatory changes enable California to continue to provide respite services to families with disabled children, this proposal is beneficial to children.

Habilitation Transfer

Effective July 1, 2004, DDS is responsible for administration of the Habilitation Services Program (HSP), which was formerly administered by the Department of Rehabilitation; this transfer of responsibility was required by the 2003–04 Budget Act. The HSP addresses the vocation needs of persons with developmental disabilities through a broad range of services directed toward developing the individual's maximum potential for mainstreaming

into generic vocational rehabilitation programs. HSP provides sheltered workshop services through Work Activity Programs and supported employment services. HSP services are available only to persons 18 years of age or older with developmental disabilities who are also Regional Center clients.

On July 22, 2004, DDS amended—on an emergency basis—sections 54302, 54310, 54320, and 54370, and adopted new sections 54351, 58800, 58801, 58810, 58811, 58812, 58820, 58821, 58822, 58830, 58831, 58832, 58833, 58834, 58840, 58841, 58842, 58850, 58851, 58860, 58861, 58862, 58863, 58864, 58870, 58871, 58872, 58873, 58874, 58875, 58876, 58877, 58878, 58879, 58880, 58881, and 58882, Title 17 of the CCR, to enable DDS to assume all functions and responsibilities with respect to the administration of the HSP.

On October 29, 2004, DDS published notice of its intent to adopt these regulatory changes on a permanent basis. DDS held a public hearing on this rulemaking proposal on December 16, 2004 in Sacramento.

On November 29, 2004, DDS adopted—on an emergency basis—sections 54351, 58800, 58810, 58811, and 58812, and amended sections 54302, 54310, 54320, and 54370, Title 17 of the CCR, to further implement the transfer of HSP functions to DDS.

At this writing, these changes await submission to OAL for review and approval.

IMPACT ON CHILDREN: The Schwarzenegger Administration predicts that the transfer of HSP responsibility to DDS will result in savings to the general fund because of a reduction in the number of state staff needed to administer the program. The impact that such a reduction in staff has on DDS' ability to efficiently and effectively administer the HSP remains to be seen.

CHILD CARE / CHILD DEVELOPMENT

New Rulemaking Packages **Records Reproduction and Removal in** **Licensed CCL Facilities Regulations**

On April 30, 2004, DSS published notice of its intent to amend—on a permanent basis—sections 80044, 80045, 80066, 80070, 84063, 87344, 87345, 87566, 87570, 87571, 87844, 87866, 87870, 88069.7, 88070, 89119, 89182, 89244, 89245, 89370, 89566,

101200, 101201, 101217, 101221, 102391, and 102392, Title 22 of the CCR, to give DSS Community Care Licensing (CCL) staff the express authority to copy client or facility documents, or to remove them if necessary for copying, thus, emphasizing the licensing program's authority to audit and inspect facilities, and to copy facility records on demand during normal business hours. The proposed regulations also contain safeguards that prohibit the licensing staff from removing emergency or health-related information (which is separately defined for each type of facility), unless other copies of those documents are available, and set out standards for the safe removal and timely return of records to facilities. Specifically, the regulations require the licensing staff to create a list of records to be removed, sign and date the list upon removal, leave a copy of the list with the facility administrator, and return the records undamaged and in good order within three business days. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 18.)

Update: At this writing, the changes still await review and approval by OAL.

Criminal Record Exemption Regulations

On July 16, 2003—on an emergency basis—DSS adopted new section 102416.1 and amended sections 80001, 80019, 80019.1, 80019.2, 80054, 80061, 80065, 80066, 87101, 87219, 87219.1, 87454, 87565, 87566, 87801, 87819, 87819.1, 87861, 87865, 87866, 101152, 101170, 101170.1, 101170.2, 101195, 101212, 101216, 101217, 102352, 102370, 102370.1, 102370.2, 102395, 102416, 102417, and 102419, Title 22 of the CCR, regarding the requirements and procedures for criminal background checks, including fingerprinting, and criminal background check exemptions for persons who work or are present in licensed facilities that provide care to children and dependent adults. On August 29, 2003, DSS published notice of its intent to adopt these provisions on a permanent basis. On November 12, 2003, and again on March 11, 2004, DSS readopted these changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 20 and Vol. 4, No. 2 (2003) at 29.)

Update: On August 20, 2004, OAL approved DSS' permanent adoption of these changes.

EDUCATION

New Rulemaking Packages **Charter School Facilities Program**

The Charter School Facilities Program provides funding to qualifying entities for the purpose of establishing school facilities for charter school pupils. The Program provided for \$100 million to be set aside from bonds issued under the Kindergarten-University Public Education Facilities Bond Act of 2002, and \$300 million from bonds issued under the Kindergarten-University Public Education Facilities Bond Act of 2004, for the purposes of financing charter school construction projects. A first round of applications was reviewed in 2003 to distribute the initial \$100 million, and a second application round began on April 1, 2004, and ended on July 29, 2004.

SB 15 (Alpert) (Chapter 587, Statutes of 2003) made a number of changes to the Program. For example, SB 15 requires that a charter school facility preliminary application must demonstrate either (1) that a charter petition for the school for which the application is submitted has been granted by the appropriate chartering entity prior to the application deadline determined by the State Allocation Board (SAB), or (2) that an already existing charter has been amended to include the school for which the application is submitted and approved by the appropriate chartering entity prior to the deadline determined by the SAB. Also, SB 15 expanded the definition of the term "financially sound" to include a charter school that has operated for less than 24 months immediately preceding the submission of the application for Program funding, if it is managed by staff who have at least 24 months of documented experience, as measured by criteria established by the California School Finance Authority (CSFA), and if the charter school applying for funds has an educational plan, financial resources, and the facilities expertise to be deemed financially capable, as measured by criteria established by CSFA. SB 15 also requires SAB, in conjunction with CSFA, to adopt total per project funding caps for charter school facilities, and requires SAB to adopt other funding limits as specified.

On July 9, 2004, CSFA published notice of its intent to amend sections 10152 through 10162, and adopt sections 10163 and 10164, Title 4 of the CCR, to address changes made by SB 15 and to clarify several issues that arose during the first round of funding applications. At this writing, these changes await submission to OAL for review and approval.

IMPACT ON CHILDREN: According to the California Charter Schools Association, at least five charter schools have closed because of facilities problems, and many others around the state have to settle for cramped or ill-suited campuses. Some charter school advocates

believe school districts are not complying with state law requiring them to provide facilities to charter schools where appropriate. On the other hand, many public school facilities suffer the same problems (*see* the Uniform Complaint Procedures regulatory proposal described below).

Recent, conflicting reports on the performance of students in charter schools, compared to publicly-educated students, continue the debate over the expansion and expenditures of charter schools in California (which currently has 512 charter schools). In December 2004, a federal Education Department analysis of test scores from 2003 showed that children in charter schools generally did not perform as well on exams as those students in regular public schools. Also, the federal Department found that schools that were not chartered by a school district, but functioned as independent districts, tended to do worse than those over which districts exercised oversight. Finally, the analysis showed no difference in performance between charter schools run by commercial companies and those managed by nonprofit organizations. Within weeks of the release of this report, the findings of an additional study by Harvard University concluded that California charter schools seem to be working; charter students are 8.5% better in reading and 5% better in math, based upon results from the state's standardized exams. Some advocates believe that the California experiment with charter schools has succeeded and should be advanced. Charter schools must have public school district oversight in California; however, there is the possibility of expansion of this oversight responsibility to cities, universities, and private business.

To the extent that this regulatory proposal will assist eligible and financially sound charter schools to obtain appropriate facilities, it will benefit the state's children.

California High School Exit Examination

In order to receive a high school diploma, a student completing grade twelve or adult school student must pass the California High School Exit Examination, which tests basic language-arts and mathematics knowledge. On July, 23, 2004, the California Board of Education published notice of its intent to amend sections 1200, 1203, 1204.5, 1206, 1207, 1207.5, 1209, 1210, 1211, 1211.5, 1215, 1215.5, 1216, 1217, and 1225, Title 5 of the CCR, to make global, technical changes to conform to other existing regulations and to ensure consistency across school districts.

The proposed regulations make the following changes: (1) ensure the administration of the exit examination is consistent with other California testing programs; (2) make technical corrections throughout the regulations; (3) add data fields required because the exit exam is being used for the state's Academic Performance Index and federal

accountability purposes; and (4) to specify that districts will be held responsible for the cost of data correction when reporting deadlines are not met. Most significantly, new section 1204.5(b) provides that an eligible pupil shall have up to three opportunities to take sections on the exam that he/she has not passed. Under the proposed regulations, school districts must offer eligible students either three opportunities during grade 12 or two in grade 12 and one in the year following grade 12 to take sections of the exam not yet passed.

On September 7, 2004, CDE held a public hearing to take comments on the proposed regulations. On September 15, 2004, CDE issued a 15-day notice of modifications to the regulatory text. Specifically, in order to comply with federal law, the definition of "significant medical emergency" (as determined by a licensed physician) sufficient to excuse a 10th grade student from taking the exam was added to the regulations. The comment period for the 15-day notice closed on September 29, 2004. At this writing, the regulations await review and approval by OAL.

IMPACT ON CHILDREN: The Education Code allowed CDE the option to delay the date upon which students completing grade 12 are required to pass the exam as a condition of receiving a high school diploma. Advocates, such as Californians for Justice, criticized the Department and state leaders for unfairly punishing students for the state's failure to provide a high quality education. Advocates argued they first wanted to see qualified teachers in classrooms, up-to-date textbooks, and clean schools before requiring all students to pass an exam in order to receive a diploma. In July 2003, CDE delayed the exam passage requirement to the graduating Class of 2006. This action was based in part on initial findings of an independent study of the exam, which found that the exam requirement has been a major factor in the dramatically increased coverage of state academic standards at the middle and high school levels, and that many factors suggest that the efficacy of standards-based instruction will successively improve for each class after 2004. CDE also directed the exam be reduced in length from three days to two. The administration of this exam began in February 2004 for graduates of the Class of 2006.

Upon graduation, society expects students to have learned and retained basic knowledge and skills as a result of thirteen years of public education. The idea of testing students on this knowledge and holding them and their schools accountable will benefit children in the long run. The proposed regulations reflect only minor changes in the exam itself, which students taking the test will recognize simply as additional verbiage and survey questions. In the short term, these adjustments are not likely to affect the students. However, the data gathered will help hold schools accountable for student performance and assist schools in

better preparing target student groups whose performance falls short of the pass rate required.

For further discussion of the CAHSEE, see the previous issue of the Children's Advocacy Institute's *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 31-32, available at www.cachildlaw.org. See also the same website for a more detailed discussion of California test results and new graduation requirements (*California Children's Budget 2004-05*, at Chapter 7).

Standardized Testing and Reporting (STAR) Program

In 1997, the Legislature enacted the Standardized Testing and Reporting (STAR) Program for California schools. The STAR Program requires each student, grades 2 through 11, to be tested each year using the California Standardized Test (CST), an English language assessment (rated according to five levels of performance: advanced, proficiency, basic, below basic, and far below basic), and the California Achievement Test, 6th Edition Survey (CAT/6), a nationally norm-referenced test (allowing individual student performance to be compared with test scores set by the norm group). The CAT/6 tests students in grades 2 through 8 only in reading, writing, and spelling; and in grades 9 through 11 in math and science. The CAT/6 allows school districts to determine where students compare on local, state, and national levels.

Each spring, California schools administer the STAR test. Generally, STAR testing is administered to all students under the same conditions; students are given the same amount of time and test instructions are given in the same manner. However, qualified special education or other disabled students can be afforded specified accommodations and/or modifications—similar to those received in the classroom—to enable them to take the STAR test. Individual student test scores are typically available the following fall. The California Department of Education uses the data gathered through this test to compute school and district Academic Performance Index (API) and Adequate Yearly Progress (AYP) scores. These scores are intended to monitor school growth targets and determine whether a school or district is in need of designation as a program improvement school/district or even state intervention.

On July 23, 2004, the CDE published notice of its intent to amend sections 850, 851, 852, 853, 853.5, 854, 855, 857, 858, 859, 861, 862, 863, 864, 864.5, 865, 866, 867, 867.5, 868, and 870, Title 5 of the CCR, to make numerous changes to the existing provisions as follows:

- ◆ provide consistency with other California standardized tests (e.g., the California High School Exit Examination and the California English Language Development Test);

- ◆ make technical changes correcting inconsistent language and terms;
- ◆ add a section on test administration variations that all students may receive;
- ◆ modify provisions for below grade level testing;
- ◆ modify test material delivery and return dates;
- ◆ add the California Alternate Performance Assessment (in lieu of the CST and CAT/6 discussed above) as appropriate for students with significant cognitive disabilities, as identified in the student's Individualized Educational Program (IEP);
- ◆ strengthen test security language;
- ◆ add an affidavit for proctors and administrators stating they are qualified and trained to administer the exam;
- ◆ expand student demographic data collected;
- ◆ reinforce the confidentiality of the exam and exam reports;
- ◆ make changes to enable the state to comply with the accountability standards specified under the federal No Child Left Behind Act.

On September 7, 2004, CDE held a public hearing in Sacramento. On September 15, 2004, CDE issued a 15-day notice of modifications to the regulatory text. Specifically, in order to comply with federal law, the definition of "significant medical emergency" (as determined by a licensed physician) sufficient to excuse a student from taking the exam was added to the regulations, in addition to one other technical change. The comment period for the 15-day notice closed on September 29, 2004. At this writing, the regulations await review and approval by OAL.

IMPACT ON CHILDREN: The STAR testing process has greatly affected the education system in California. Continued revision of the process is needed in order to allow the test to effectively serve students. The changes do not address the underlying criticism that the examination is too narrow and leads to "teaching to the test" without regard to writing skills, analytical ability, or the arts. The proposed regulations rather attempt to confront basic problems in test administration and to enhance data gathering. Expanding collection of geographic information will allow schools to target groups of students who need additional assistance. Better preparing administrators of the exam will protect the validity of the test. Allowing children to have accommodations specific to

their learning styles and needs will provide more representative information about the student for the school to better serve the student.

For further discussion of the STAR Program, see the previous issue of the Children's Advocacy Institute's *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 32–33. See also *California Children's Budget 2004–05*, at Chapter 7, both available at www.caichildlaw.org.

School Bus Passenger Restraint System

Section 27316 of the California Vehicle Code requires all Type 1 school buses manufactured on or after July 1, 2005, and all Type 2 school buses manufactured on or after July 1, 2004, which are purchased or leased for use in California, to be equipped with a lap/shoulder restraint system at each designated seating position. On July 23, 2004, the California Board of Education published notice of its intent to add section 14105, Title 5 of the CCR, to implement Education Code sections 38047.5 and 38047.6, which require that all passengers riding in school buses wear lap/shoulder safety belts meeting applicable federal safety standards. The Board, through the implementation of the proposed regulations, seeks to reduce the number of child injuries and deaths that occur while riding in school buses in California. The proposed regulations require that lap/shoulder seatbelts be worn by all passengers while the bus is in motion, except where inhibited by a certified physically disabling condition or medical condition, or in the case of an emergency. The proposed regulations also indicate that passengers must be given instructions on proper use of the restraint system.

On September 7, 2004, the Board held a public hearing in Sacramento to take comments on the proposed regulations. The following day, it adopted the regulations, and thereafter, the regulatory package was submitted to OAL. On November 9, 2004, OAL approved these regulatory changes; they became effective on the same date.

IMPACT ON CHILDREN: The change in law leading to these regulatory amendments resulted from an accident in San Miguel that involved a school bus transporting students to the California School for the Deaf in Fremont. During its travel, the vehicle veered off the highway, rolled over twice, and ejected two of the passengers. Both of the child passengers subsequently died from their injuries. Family and friends of the victims wondered why seatbelts were not required on school buses. Subsequently, the Legislature adopted sections 27316 and 27316.5 of the Vehicle Code requiring that all school buses manufactured after specified dates be equipped with seatbelts. However, advocates question the efficacy of the reform since there is no requirement that the state or school districts retrofit or phase out older buses.

Advocates are concerned with CDE's implementation of the Education and Vehicle Code sections for several reasons. First, the regulations do not have sufficient clarity to be implemented properly and uniformly by school districts. The subsection specifically excludes from wearing a seatbelt "a passenger with a physically disabling condition or medical condition which would prevent appropriate restraint in a passenger restraint system, providing that the condition is duly certified by a licensed physician or licensed chiropractor who shall state in writing the nature of the condition, as well as the reason the restraint is inappropriate." Unfortunately, this section creates more questions than it answers. For example, what is the effective time limitation for a doctor's note? Since student note forgery is not an unknown phenomenon, must anyone review the certification for authenticity? If the adult in charge suspects forgery or fraud, can they check with the physician, chiropractor, or a parent or legal guardian?

Furthermore, the terms "physically disabling condition" and "medical condition," to exempt a child from wearing a seatbelt, are not defined. Under current regulations (9 CCR section 1293), even children confined to wheelchairs are ensured proper restraint and security devices while riding in buses. Are there other alternatives to wearing a seatbelt when a child presents with a condition that will make use of the seatbelt problematic? Advocates believe CDE should provide more guidance for school districts on these issues so that the legislative mandate to increase safety in school buses can be realized.

Advocates are also concerned about a child's right to privacy to his/her medical information (see Article 1, section 1 of the California Constitution) may be compromised by the application of section 14105(e), which requires the child's licensed physician or chiropractor to "state in writing the nature of the condition." Is it necessary to disclose the medical condition to institute alternative measures short of wearing a seatbelt in every case?

Requiring children riding in school buses to wear seatbelts is a change in the law that is long overdue. Regrettably, it will be implemented only as new buses are purchased. Implementing rules should accelerate compliance to the extent possible, and further clarify the medical exemption.

Definition of Significant Growth— II/USP and HPSG

Under the Immediate Intervention/Underperforming Schools Program (II/USP), the Superintendent of Public Instruction, with the approval of the Board, is required to identify schools that failed to meet their Academic Performance Index (API) growth targets and have an API score below the 50th percentile in the previous school year relative to other schools. A number of potential conse-

quences may result from a school's underperformance. After the first year of participation, the potential consequences include, for example, interventions and reassignment of school personnel. Where a school fails to meet its growth targets after 24 months, it may continue to participate in the program for an additional year, but only where it shows "significant growth" as determined by the Board. After 36 months, a school that does not meet its growth target is no longer eligible to receive funding for the II/USP.

Under the High Priority Schools Grant Program (HPSG), if after 24 months a school has not met its growth target in each year, it is subject to review by the Board. Such a review may include an examination of the school's progress relative to reports submitted to CDE. If after 36 months a school has not met its growth targets each year, but demonstrates significant growth, it shall continue to participate in the program and receive funding. If after 36 months a school fails to achieve significant growth, it faces state intervention or sanctions.

On September 17, 2004, the Board published notice of its intent to adopt sections 1030.5 and 1030.6, Title 5 of the CCR, to specify standards to determine eligibility for continued participation in these programs by establishing a distinction between a school that fails to achieve any growth and one that achieves its growth target. The proposed regulations also establish criteria to determine if a school demonstrates "significant growth" for those participating schools that do not have a valid API score.

On November 23, 2004, the Board released a modified version of this rulemaking proposal for an additional fifteen-day public comment period. Among other non-substantive changes, the revised proposal provides that a school achieves significant growth when its schoolwide API growth is greater than zero and less than its API growth target pursuant to Education Code section 52052(c).

At this writing, the proposed changes await submission to OAL for review and approval.

IMPACT ON CHILDREN: As noted by the Board, the proposed regulatory language serves two purposes: (1) it specifies a clear standard to determine whether a school has achieved significant growth on the API, and (2) it establishes a criteria to determine whether a school demonstrates academic growth for those II/USP and HPSG participants that do not have a valid API score. The purpose behind strengthening these requirements is to ensure that children attending low-performing schools are given an appropriate free public education. Increased accountability for schools themselves is necessary for student achievement.

Statewide Charter Schools

AB 1994 (Chapter 1058, Statutes of 2002) amended the Charter School Act of 1992 to create new responsibilities for the Board to review and approve charter schools of statewide benefit that propose to operate on multiple sites. On September 17, 2004, the Board published notice of its intent to adopt sections 11967.6, 11967.7, and 11967.8, and amend sections 11967, 11968, and 11969, Title 5 of the CCR, to implement AB 1994. The proposed changes would clarify existing law with regard to the Board's process for reviewing charter petitions that have been denied by a county office of education after denial by a local school district; establish a process and criteria for Board review and approval of charter schools of statewide interest that will operate on multiple sites; clarify the funding process to be used for statewide charter schools; and clarify the Board's process for numbering charter schools that will operate on multiple sites.

On November 17, 2004, the Board released a modified version of its proposal for an additional fifteen-day public comment period. As modified, proposed section 11967.6 would require that a petition to establish a statewide benefit charter school do the following:

- ◆ comply with all statutory requirements otherwise applicable to charter schools, except those relating to geographic and site limitations;
- ◆ if applicable, comply with all requirements of law relative to the provision of independent study;
- ◆ describe how an annual independent audit of the statewide benefit charter school will be conducted in keeping with applicable statutes and regulations and indicate how the statewide benefit charter school's individual schools will be appropriately included in the audit process;
- ◆ incorporate a plan that provides for initial commencement of instruction in at least two schools, which shall be in at least two different school districts or two different counties;
- ◆ include an assurance that the instructional services for similar student populations described in the charter will be essentially similar at each school site and, thus, that each pupil's educational experience will be reasonably the same with regard to instructional methods, instructional materials, staffing configuration, personnel requirements, course offerings, and class schedules;
- ◆ describe how the statewide benefit charter school will participate as a member of a special education local plan area, and ensure a coordinated structure for the

provision of necessary programs and services specific to students with Individual Education Programs (IEPs);

- ◆ demonstrate success in operating charter schools previously approved in California as evidenced by improved pupil academic performance and annual financial audits with no audit findings or exceptions;
- ◆ describe how local community input for each site included in the plan was solicited (or will be solicited);
- ◆ contain sufficient signatures either of parents, guardians, or of teachers in keeping with Education Code section 47605(a)(1) for each school proposed in the first year;
- ◆ include an assurance that the school district and county superintendents where each school will be located will be notified at least 120 days prior to commencement of instruction;
- ◆ address all charter elements specified in Education Code section 47605, adapted appropriately for application at the statewide level;
- ◆ contain or address any provisions or conditions specified by the Board at the time of charter approval;
- ◆ contain a plan for operations of the statewide benefit charter school that describes the distinction between centralized and individual school level responsibilities, and include a staffing plan to implement the activities at the designated level. The plan shall address statewide benefit charter school operations including, but not limited to, academic program, facilities and school site operations, legal and programmatic compliance, financial administration, governance, and decision-making authority; and
- ◆ provide a list of each school that will be operated by the statewide benefit charter school, with specified information.

The State Board of Education may not approve a petition for the operation of a state charter school under Education Code section 47605.8 unless it finds that the proposed state charter school will provide instructional services of statewide benefit that cannot be provided by a charter school operating in only one school district, or only in one county. The Board's finding in this regard shall be made part of the public record of the Board's proceedings and shall precede the approval of the charter.

Pursuant to modified section 11967.6(b), instructional services of a statewide benefit must include unique factors and circumstances that can only be accomplished as a

statewide benefit charter and not as a single district or single county charter. A statewide charter petition must show specific benefits to pupils, communities where individual school sites would be located, the state, and the school itself (*e.g.*, in fundraising, community partnerships, or relationships with higher education institutions). Merely describing administrative benefits to a statewide charter operator, or expressing a desire to serve in more than one district or county, will be considered insufficient to show a statewide benefit.

At this writing, the proposed changes await submission to OAL for review and approval.

IMPACT ON CHILDREN: The regulatory changes proposed here ensure that statewide charter schools have adequate oversight by the state, and accountability measures so that students attending the charter schools have the same or better opportunities compared to children educated in the public school system. Since charter schools were instituted on the premise that they would do a better job of educating our children, compared to the public school system, they must be carefully monitored to assure taxpayer funds are spent appropriately and that students succeed.

Supplemental Education Services Providers

The federal No Child Left Behind Act (NCLB) Act of 2001 requires that Title I-funded schools that are in year two or beyond in program improvement status must provide eligible students supplemental educational services. The NCLB mandates the State Education Agency (SEA) to develop and implement a process to approve applicants to become approved providers. In approving applicants to become approved providers, the SEA must consider factors such as the prospective providers' demonstrated record of effectiveness, fiscal soundness, and ability to work collaboratively with parents and LEAs in providing supplemental educational services. In addition, the SEA must describe procedures for monitoring and evaluating provider effectiveness and for terminating an approved provider.

On September 24, 2004, the Board published notice of its intent to amend section 13075 and adopt sections 13075.1, 13075.2, 13075.3, and 13075.4, Title 5 of the CCR, to describe the responsibilities of prospective providers, and provide that approved providers have to ensure that eligible students who are attending Title I-funded schools in year two and above of program improvement status receive appropriate supplemental educational services.

Among other things, the proposed changes would provide that "demonstrated record of effectiveness" means that an eligible applicant has documentation of (1) improved student academic performance in individual stu-

dent scores on national, state, district or other assessments in English language arts or mathematics, and (2) improved student academic performance as measured by written teacher assessments of student growth in English language arts or mathematics.

The proposed regulations would also provide that provider status may be terminated for any of the following reasons:

- ◆ the provider has failed to provide information requested by CDE to allow CDE to monitor and evaluate the program;
- ◆ the provider has failed to monitor and evaluate the progress of students receiving services;
- ◆ the provider has failed to contribute to increasing the academic proficiency in English language arts or mathematics for two consecutive years for a majority of students served, as demonstrated by student scores on national, state, district or other assessments in English language arts or mathematics for grades 2–11 and by teacher recommendations for grades K–1 and grade 12;
- ◆ the provider has failed to meet applicable federal, state, and local health, safety, or civil rights laws; or
- ◆ the provider requests voluntary removal from the approved list.

On December 1, 2004, the Board released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. Among other non-substantive changes, the modifications provide two additional reasons for Board termination of a provider: (1) if the provider fails to comply with certain documentation requirements set forth in proposed section 13075.2, or (2) the provider fails to meet the reporting requirements set forth in proposed section 13075.3.

At this writing, the proposed changes await submission to OAL for review and approval.

IMPACT ON CHILDREN: Supplemental educational services are tutoring or other supplemental academic enrichment activities beyond the regular school day. Services are to be high quality, research-based, and designed to improve the students' academic achievement. Students are eligible for services if they are in Title I schools, are not meeting Board content standards in reading and math, and are from low-income families. Overall, these regulatory changes seek to provide a means to ensure that supplemental educational service providers are competent and effective, thus providing a real benefit to children needing their services.

Uniform Complaint Procedures & Nondiscrimination and Educational Equity

In September 2004, Governor Schwarzenegger authorized settlement of the case *Williams v. State*, No. 312236 (San Francisco Superior Court, filed May 17, 2000). On December 10, 2004, the San Francisco Superior Court approved the notice of settlement in the case and ordered CDE to make information about the settlement available to all students (who may file objections to the settlement). A hearing for final approval of the settlement has been scheduled for March 23, 2005. The litigants in the *Williams* case, including the American Civil Liberties Union, demanded in a class action that the state meet its constitutional guarantee of equal access to public education by hiring more qualified teachers, providing textbooks, and fixing broken school facilities. Declarations submitted by students attending select California high schools confirmed that students were often not allowed to take books home to study, and in some classes no textbooks were provided in the classroom. Students complained about having too many substitute teachers, no desks, no air conditioning or heating, and rat droppings on textbooks. Students further complained that using the bathroom at school was difficult, if not impossible, because there were long lines, no soap, and no toilet paper. Sometimes there were no working bathrooms on an entire school campus for students to use.

The lawsuit placed blame on several named state officials, including the Superintendent of Public Instruction, the California Department of Education, and the State Board of Education, for failing to enforce federal and state standards at schools throughout the state. The plaintiffs contended that the state's delegation of duties to the 1,000 plus school districts led to its failure to assure even minimum standards for school facilities, textbooks, materials, equipment, and quality teachers. Former Governor Davis responded by filing a cross-complaint against the 18 named plaintiff school districts in the case and hiring an expensive, private law firm to defend the state against the allegations and litigate its case against the districts for several years. A number of reports issued during 2001 and 2002 supported the plaintiffs' allegations that courses, physical plant, instructional materials, and other educational basics are not provided to minority schools, in violation of the students' constitutional right to an education.

On November 19, 2004, CDE published notice of its intent to amend sections 4600, 4610, 4611, 4620, 4621, 4622, 4630, 4631, 4632, 4633, 4640, 4650, 4651, 4652, 4660, 4661, 4662, 4663, 4664, 4665, 4670, 4671, and adopt sections 4680, 4681, 4682, 4683, 4684, 4685, 4686, and 4687 to Title 5 of the CCR, to make numerous changes regarding the system of processing complaints of unlawful discrimination and alleged violations of federal and state laws or regulations for those activities and programs that receive state or federal funding. The definition of "gender"

is also added to the anti-discrimination regulations in accordance with SB 1234 (Chapter 700, Statutes of 2004).

The following outline represents the complaint procedure, as required by federal law and as proposed in these regulations:

- ◆ The complainant (*e.g.*, parents, students, school employees, school committees, or other interested parties) must receive notice of complaint procedures from the local education agency at least annually and copies of the notice must be provided free of charge. This notice must advise recipients of the identity of the person at the local level responsible for processing complaints, and must be in a language or other mode of communication that the recipient will understand.
- ◆ A complainant may file a written complaint with the local education agency for any alleged violations of laws, and must follow the steps listed in the local complaint procedure.
- ◆ If dissatisfied, a complainant may appeal the decision of the local education agency to CDE within 15 days of the receipt of the decision.
- ◆ If still dissatisfied, a complainant may appeal CDE's decision to the State Superintendent of Public Instruction within 35 days of the receipt of CDE's decision. If the Superintendent does not respond within 15 days, the request for reconsideration/appeal shall be deemed denied.
- ◆ In addition to providing notice to potential complainants, as stated above, the local education agency must do the following under the proposed regulations: ensure compliance with applicable federal and state laws and regulations; designate a staff member to be responsible for complaint resolution; adopt complaint policies and procedures consistent with these regulations; and protect complainants from retaliation.
- ◆ The local agency must implement procedures regarding when an individual, public agency, or organization alleging a violation of federal or state statute(s) may file a written complaint with the local agency.
- ◆ The local agency must implement procedures clarifying that discrimination complaints must be filed with the local agency or CDE by a person who was harmed or by a person on behalf of others who were harmed, and these complaints must be filed within six months from the occurrence or when the actions are first acknowledged. Further, the local agency and the CDE must protect the confidentiality of the parties and the facts related to the case of discrimination.
- ◆ The local agency shall investigate a complaint (mediation is no longer required) and complete a written report within 60 days of receipt of the complaint. The local agency must also give the filing party an opportunity to present evidence relevant to the complaint, and advise the complainant regarding their appellate rights to CDE. The regulations specify that the local agency decision should be based upon the evidence, findings of fact, and conclusion of law; however, nothing prohibits a local agency from resolving complaints prior to the formal filing of a written complaint.
- ◆ If notified by CDE of an appeal, the local agency must submit to CDE the original complaint, a copy of its decision, a summary of the nature and extent of the investigation it conducted, a copy of the investigative file, a report of any action taken to resolve the complaint, a copy of the local agency's complaint procedures, and any other relevant information. CDE shall not receive evidence from the parties that could have been presented to the local agency during the investigation.
- ◆ If dissatisfied, the local agency may appeal CDE's decision to the State Superintendent within 35 days of CDE's decision. If the Superintendent does not respond within 15 days, the request for reconsideration/appeal shall be deemed denied.
- ◆ CDE must keep a file for every written complaint it receives, refer each complaint to the local agency for resolution when appropriate, and request a report or other information of the local agency's action when appropriate.
- ◆ CDE must conduct either mediation or an investigation when (1) the local agency fails to act within 60 days or an agreed-upon time period; (2) a complainant appeals a local agency decision; and (3) the Department determines that direct intervention is necessary under specified circumstances.
- ◆ CDE can require corrective action by a local agency concerning compliance issues identified through investigations of complaints, and can provide technical assistance to correct compliance issues. If CDE finds that the local agency decision is supported by substantial evidence, it must deny the appeal. If CDE finds merit to the appeal, it can order remedial action by the local agency.
- ◆ New sections 4680 through 4687 set forth the specific complaint requirements resulting from the settlement of the *Williams* case. Complaints regarding any deficiencies related to instructional materials, emergency or urgent facilities conditions that pose a threat to

the health and safety of pupils or staff, and teacher vacancy or misassignment (e.g., teacher lacks subject matter competency for the class assigned to) shall be filed with the principal of the school where the problem exists. The principal shall remedy a valid complaint within 30 working days, and must report back to the complainant (if requested), and the district superintendent, regarding the resolution of the complaint within 45 working days of the initial filing of the complaint.

- ◆ A complaint beyond the authority of the principal shall be forwarded within 10 working days to the appropriate school district official for resolution. If not satisfied, a complainant may seek resolution from the governing board of the school district. Specified quarterly reports of complaints/resolutions must be made public by each school district. Additional appeal provisions with the State Superintendent are also available.
- ◆ All complaints and responses are public records.
- ◆ Although the school may have a complaint form available, it is not required that a student use the designated form, and the complaint will still be considered.
- ◆ Only those complainants who identify themselves are entitled to a response from the local agency and higher state agencies. Anonymous complaints will be accepted.
- ◆ Notices regarding the right to complain must be posted in all classrooms in each school district by January 1, 2005.

The Uniform Complaint Procedures outlined above apply to the following programs administered by CDE: adult basic education, consolidated categorical aid, migrant education, vocational education, child care and development, child nutrition, and special education. These procedures also apply to the filing of complaints alleging unlawful discrimination in any program or activity conducted by a local agency, which is funded directly by, or that receives or benefits from any state financial assistance.

CDE held a public hearing in Sacramento on January 4, 2005. At this writing, the regulations await review and approval by OAL.

IMPACT ON CHILDREN: Most local education officials argue that California is not spending enough on her schools and her students. There is even evidence of this failure as seen in the *Williams* case, as school districts try to balance their budgets against cost-of-living increases, teacher raises, and increases in workers' compensation and health care costs. Meanwhile, the state has not increased its funding to schools to offset these increases, and local

districts are limited in their ability to raise money because of the limitations of Proposition 13 and the leading *Serrano* case.

A recent report by the National Education Association ranked California 25th in the nation in per pupil spending for fiscal year 2003–04. This seemingly “high” ranking from the National Education Association, however, failed to account for California’s higher cost of living, as well as accounting tricks used to balance recent budgets. In contrast, recent adjusted data from the National Center for Education Statistics placed California 45th in the nation in per pupil spending in 2001. And since 2001, the state made cuts in 2003–04, withheld \$2 billion in Proposition 98 (Prop. 98) guaranteed funding in fiscal year 2004–05, and is considering additional withholding of Prop. 98 funding for 2005–06. This could result in an even lower ranking—possibly even dead last in the nation in per pupil spending if funding is not increased. Although there is disagreement over what amount California is actually spending on her students, and how to calculate that amount (count only Prop. 98 monies versus count all funding from federal, state, and local sources and assume the average daily attendance, which is typically 4–5% below actual enrollment figures), reports confirm that California is spending less than the national average of \$8,208 per pupil.

A recent study by Rand Corporation is the first comprehensive look at California’s public schools and shows just how far our schools have fallen from the national prestige they enjoyed in the 1970s. The study found California’s public schools performed worse than most of their peers nationally on almost every standard. Only students in Louisiana and Mississippi perform worse than California students on the National Assessment of Educational Progress. California’s average ratio of 21 students per teacher is higher than the nationwide average of 16–1. Lack of investment in public education is evident: in the mid-1970s, Californians spent 4.5% of their income on public education; according to the Rand study, that dropped by 1.2% in the 1980s and still remains far below the national average.

It is not disputed that California ranks 49th in the nation in students per teacher (class size) and continues to increase fees and tuition for higher education, while decreasing the capacity for public higher education slots in community colleges and universities. All of this translates to less preparation for available jobs in the new international economy.

[Update on Previous Rulemaking Packages](#) [Countywide Charter Schools](#)

On January 23, 2004, the Board of Education published notice of its intent to adopt section 11967.8, Title 5 of the CCR, to clarify the process for providing funding to coun-

tywide charter schools and how financial audits will be conducted for those schools. Similar regulations exist for statewide charter schools. The proposed regulations clarify that a “sponsoring local education agency” is the school district where a pupil attending the charter school resides, which will ensure that local tax funds are transferred appropriately. The proposed regulations will also allow for necessary arrangements to be made for countywide charter school participation in the state’s teacher and employee retirement programs. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 21.)

Update: CDE has subsequently withdrawn this rulemaking action.

Vision Screening Regulations

California Education Code sections 49452, 49455, and 49456 provide for periodic pupil vision screening, basic components of the screening, and parental notification of possible vision defects. On January 23, 2004, the Board of Education published notice of its intent to amend sections 590 through 596, Title 5 of the CCR, in order to make the regulations consistent with existing statutes and more accurately reflect the procedures performed in the schools. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 22.)

Update: On August 9, 2004, OAL approved the Board’s amendments.

Withholding Funds— Special Education Mandates

On May 21, 2004, the Board published a notice of its intent to adopt sections 3088.1 and 3088.2, Title 5 of the CCR, to establish procedures consistent with federal and state law that enable the California Department of Education to withhold funding from local educational agencies (LEAs) that do not comply with applicable law. The proposed regulations will allow noncompliant LEAs to continue receiving funding if progress is being made toward compliance with special education mandates. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 22.)

Update: On July 14, 2004, the Board released a modified version of these proposed sections for an additional fifteen-day public comment period. Among other things, the changes revise the definition of the term “substantial non-compliance” to include an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program. The revisions also provide that if a hearing is

requested by an LEA, technical rules of evidence shall not apply, but relevant written evidence or oral testimony may be submitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs; a decision of the hearing officer to withhold funding shall not be based solely on hearsay evidence but must be supported by evidence produced at the hearing showing substantial noncompliance with the provisions of special education law.

At this writing, the proposed sections await review and approval by OAL.

Enhancing Education Through Technology (EETT)

As part of the No Child Left Behind Act of 2001 (Public Law 107-110), the Enhancing Education Through Technology (EETT) competitive grant program was created to improve academic achievement through technology. On August 26, 2003, the Board of Education adopted emergency regulations to disseminate the first round of grant funding. On January 30, 2004, the Board published notice of its intent to amend—on a permanent basis—sections 11973, 11974, 11975, 11977, 11978, and 11979, Title 5 of the CCR, to clarify instructions and align calendar dates for the application for EETT competitive grant funding. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 23.)

Update: On May 24, 2004, OAL approved the permanent adoption of these amendments.

General Educational Development Test (GED)

On March 26, 2004, the Board of Education published notice of its intent to amend section 11530, Title 5 of the CCR, to raise the GED application fee from \$12 to \$20. The purpose of the proposed regulation is to cover the 76.7% cost increase since the 1995–96 school year. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 24.)

Update: On September 22, 2004, OAL approved this amendment.

Instructional Materials Follow-up Adoptions

In order to establish a process for the follow-up adoption of instructional materials in grades K–8, the Board of Education published notice of its intent to amend sections 9515 and 9517, and adopt section 9517.1, Title 5 of the CCR, on March 26, 2004. The proposed regulations distinguish and define primary adoption and follow-up adoption of instructional materials, and maintain consistency with current terminology in the statutory language. (For background information on this rulemaking package, see

Children's Regulatory Law Reporter, Vol. 5, No. 1 (2004) at 24.)

Update: The Board submitted its rulemaking file to OAL for review on October 22, 2004; OAL approved these changes on December 8, 2004.

Charter School Facilities Program

In June 2003, the California School Finance Authority adopted emergency regulations regarding the Charter School Facilities Program, which provides construction funding for charter schools. On April 16, 2004, the Authority published notice of its intent to permanently amend sections 10152 through 10162, and adopt sections 10163 and 10164, Title 4 of the CCR. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 24.)

Update: On July 2, 2004, the Authority published a notice indicating its decision not to proceed with the rulemaking proposal referenced in the April 16, 2004 notice. On July 9, 2004, the Authority published notice of a new rulemaking proposal on this subject (see above). On July 27, 2004, the Authority readopted these changes on an emergency basis.

California English Language Development Test (CELDT)

Under existing regulations, English language proficiency is assessed through the California English Language Development Test, which is generally administered to any student whose primary language is other than English. On May 21, 2004, the Board of Education published its notice of intent to amend sections 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516, 11516.5, and 11517, and adopt new section 11516.6, Title 5 of the CCR, to clarify what is required of school districts to properly administer the CELDT. These changes are required under Education Code sections 313 and 60810 *et seq.*, in order to be in compliance with federal Title III No Child Left Behind Act accountability standards. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 25.)

Update: On July 14, 2004, the Board released a modified version of this rulemaking package for an additional fifteen-day public comment period. In addition to many minor changes, the revised language includes the following new provisions:

- ◆ Newly proposed section 11511.6 provides that no aggregate or group scores or reports that are compiled pursuant to Education Code section 60851 shall be reported electronically, in hard copy, or in other media, to any audience other than the school or school district where the pupils were tested, if the aggregate or group

scores or reports are composed of three or fewer individual pupil scores. In each instance in which no score is reported for this reason, the following notation shall appear: "The number of pupils in this category is too small for statistical accuracy or privacy protection." In no case shall any group score be reported that would deliberately or inadvertently make public the score or performance of any individual student.

- ◆ Two new responsibilities are attributed to the CELDT district coordinator: overseeing the collection of all pupil data, and immediately notifying the test contractor of any security breaches or testing irregularities in the district before, during, or after the administration of the test.

- ◆ The CELDT security affidavit, which is to be completed by each test examiner and test proctor, is revised to provide, among other things, that the affiant will not review any test questions, passages, or other test items with pupils or any other person before, during, or following the test; will not develop scoring keys or review or score any pupil's responses except as required by the contractor's administration manual(s) to prepare answer documents for machine or other scoring; and will administer the test(s) in accordance with the directions for test administration as set forth in the contractor's manual for test administration.

- ◆ Section 11516 is revised to provide that all pupils shall have sufficient time to complete the test as provided in the directions for test administration.

- ◆ Section 11516.5 is amended to provide that presentation accommodations may include testing over more than one day for a test or test part to be administered in a single setting; supervised breaks within a section of the test; and administration of the test at the most beneficial time of day to the student.

- ◆ The previously proposed section 11516.6 would be renumbered to 11516.7, dealing with alternate assessments for pupils with disabilities, and a new section 11516.6 would set forth modifications for pupils with disabilities, noting that students with disabilities shall be permitted to take the test with certain modifications if specified in the pupil's individual education plan for use on the test, standardized testing, or during classroom instruction and assessments.

- ◆ Section 11517 is substantially revised to provide that the amount of funding to be apportioned to the school district for the costs of administering the test shall be the amount established by the Board to enable school districts to meet the requirements of administering the test to pupils in K-12 in the school district. The number of

tests administered shall be determined by the certification of the school district superintendent pursuant to Section 11517.

◆ Newly added section 11517.5 would provide that each school district shall annually receive an Apportionment Information Report that includes specified information on tests administered during the previous fiscal year.

The Board submitted its rulemaking file to OAL on November 23, 2004 for review and approval; OAL's review is expected to be completed on or by January 6, 2005.

Defining Persistently Dangerous Public Schools

On May 21, 2004, the Board published notice of its intent to adopt sections 11992, 11993, and 11994, Title 5 of the CCR, to clarify and provide guidance on the implementation of the statewide policy definition for designating persistently dangerous schools. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 26.)

Update: On September 15, 2004, the Board released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. Among other things, the revised package expanded the discussion of how incidents by former students were to be reported, defined the term "incident" when pertaining to a firearm violation by a non-student, and set forth how a local educational agency may contest CDE's determination that one or more of its schools is persistently dangerous. The revised regulatory proposal also defined the term "during school hours" to mean from thirty minutes before the initial school bell to thirty minutes after the closing school bell, and defined the term "on school grounds" to mean the immediate area surrounding the school, including buildings, gyms, athletic fields, and site parking lots.

On November 17, 2004, the Board released a second modified version of its rulemaking proposal for another fifteen-day public comment period. In this revision, the Board clarified that the term "school sponsored activity" means any event on the grounds of the school district supervised by district staff at which students are present, including transportation to and from school.

At this writing, the proposed changes await submission to OAL for review and approval.

No Child Left Behind Teacher Requirements—Highly Qualified Teachers

On May 21, 2004, the Board published notice of its intent to amend sections 6100, 6115, and 6125, and adopt

sections 6116 and 6126, Title 5 of the CCR, to conform the state regulations to federal definitions and guidelines regarding teacher qualifications, in order to assist local school districts in complying with federal law and continue receiving federal Title I funding. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 27.)

Update: The Board submitted its rulemaking file to OAL on October 10. On November 11, 2004, OAL approved the Board's adoption of these changes.

Math and Reading Professional Development Program

California Education Code sections 99236 and 99233 provide teachers, instructional aids, and paraprofessionals the opportunity to participate in professional development activities in the subject areas of mathematics, science, and language arts. With the intent of clarifying the Education Code and increasing the program's availability, the Board of Education published notice of its intent to amend sections 11981 and 11985, Title 5 of the CCR, on June 21, 2004. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 28.)

Update: On November 4, 2004, OAL approved the Board's amendments.

CHILD PROTECTION

Update on Previous Rulemaking Packages **Records Reproduction and Removal in** **Licensed CCL Facilities Regulations**

(See Child Care section.)

Independent Living Program (ILP)/ **Transitional Independent Living Plan** **(TILP)/Transitional Housing Placement** **Program (THPP) & Transitional Housing** **Program-Plus (THP-Plus)**

On October 31, 2003, DSS amended—on an emergency basis—sections 11-400, 11-410, 31-002, and 31-206, adopted sections 30-501, 30-502, 30-503, 30-504, 30-505, 30-506, 30-507, 30-900, 30-901, 30-902, 30-903, 30-904, 30-905, 30-906, 30-907, 30-908, 30-909, 30-910, 30-911, 30-912, 30-913, 30-914, 30-915, 30-916, 30-917, 30-918, 30-919, 30-920, and 31-236, and repealed and adopted section 31-525 of the MPP, addressing four separate but related elements: the Independent Living

Program (ILP), the Transitional Independent Living Plan (TILP), the Transitional Housing Placement Program (THPP), and the Transitional Housing Program-Plus (THPPPlus). Also on October 31, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. On April 29, 2004, DSS readopted these changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 30 and Vol. 4, No. 2 (2003) at 41.)

Update: DSS submitted its certificate of compliance to OAL on October 26, 2004; at this writing, OAL is still reviewing the permanent regulations.

Transitional Housing Placement Programs

On September 26, 2003, DSS published notice of its intent to adopt new sections 86000 through 86087.1, and amend section 86088, Title 22 of the CCR, to implement the provisions of AB 427 (Hertzberg) (Chapter 125, Statutes of 2001). That measure expanded the age of youth served in licensed transitional housing placement programs (THPPs) to persons who are at least 16 years of age and not more than 18 years of age, except as specified, and creates a separate, license-exempt, county-optional, certified THPPPlus program for youth 19–21 years of age. On October 27, 2003, DSS adopted these provisions on an emergency basis. On April 26, 2004, DSS readopted these provisions on an emergency basis, and on May 24, 2004, DSS released a modified version of this rulemaking package for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 30 and Vol. 4, No. 2 (2003) at 42.)

Update: On November 4, 2004, OAL approved DSS' permanent adoption of these changes.

Foster Youth Personal Rights

On August 1, 2003, DSS published notice of its intent to amend sections 80072, 83072, 84072, 84172, and 84272, Title 22 of the CCR, to set forth the foster youth personal rights enumerated in AB 899 (Liu) (Chapter 683, Statutes of 2001). On June 4, 2004, DSS released a modified version of this rulemaking proposal for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 31 and Vol. 4, No. 2 (2003) at 44.)

Update: On August 16, 2004, OAL approved DSS' amendments.

Family Reunification Child Support Referral Requirements

AB 1449 (Keeley) (Chapter 463, Statutes of 2003) required the Department of Child Support Services

(DCSS), in consultation with DSS, to establish and promulgate, by October 1, 2002, specified regulations by which the local child support agency may compromise an obligor's liability for public assistance debt in cases where the parent separated from or deserted a child who consequently became the recipient of aid under the AFDC-FC or CalWORKs programs, if specified conditions are met, and DCSS determines that compromise is necessary for the child's support. On August 1, 2003, DSS published notice of its intent to amend sections 31-206 and 31-503 of the MPP, to implement its portion of AB 1449. On May 20, 2004, DSS released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 31 and Vol. 4, No. 2 (2003) at 45.)

Update: On July 1, 2004, DSS released a second modified version of its rulemaking proposal for an additional fifteen-day public comment period. Following that public comment period, DSS submitted the rulemaking file to OAL for review. However, on September 13, 2004, OAL disapproved the regulations on the grounds that they failed to comply with the consistency and clarity standards contained in Government Code section 11349.1.

On December 1, 2004, DSS released a third modified version of its rulemaking proposal. Many of the modifications DSS has made to its original proposal incorporate changes as suggested by child advocates, including the Children's Advocacy Institute. For example, the language as contained in the December 2004 version expands the scope of section 31-503 to include any child receiving AFDC-FC in accordance with Welfare and Institutions Code section 11400, instead of children receiving family reunification services. Further, the revised regulations provide factors for counties to consider in determining the best interests of the child, and require each social worker to document in the child's case file the determination of whether it is in the best interest of the child to refer the child's case to the local child support agency and the basis for this determination. Also, the revised regulations provide that when a determination has been made that it is not contrary to the best interest of the child to refer the child's case to the local child support agency, the social worker shall notify the parent that he/she has access to the grievance procedures set forth in section 31-020 of the MPP, provided that the parent appeals the agency's decision in writing within five working days of their receipt of the notice.

Public comments regarding the third modified proposal were due on or by December 16, 2004.

Criminal Record Exemption Regulations

On July 16, 2003—on an emergency basis—DSS adopted new section 102416.1 and amended sections 80001, 80019, 80019.1, 80019.2, 80054, 80061, 80065,

80066, 87101, 87219, 87219.1, 87454, 87565, 87566, 87801, 87819, 87819.1, 87861, 87865, 87866, 101152, 101170, 101170.1, 101170.2, 101195, 101212, 101216, 101217, 102352, 102370, 102370.1, 102370.2, 102395, 102416, 102417, and 102419, Title 22 of the CCR, regarding the requirements and procedures for criminal background checks, including fingerprinting, and criminal background check exemptions for persons who work or are present in licensed facilities that provide care to children and dependent adults. On August 29, 2003, DSS published notice of its intent to adopt these provisions on a permanent basis. On November 12, 2003, and again on March 11, 2004, DSS readopted these amendments on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 32 and Vol. 4, No. 2 (2003) at 46.)

Update: On August 20, 2004, OAL approved DSS' permanent adoption of these changes.

JUVENILE JUSTICE

New Rulemaking Packages **Religious Services to Wards**

Section 1705 of the Welfare and Institutions Code states that it is the intent of the Legislature that all persons in the custody of the California Department of Youth Authority (CYA) be afforded reasonable opportunities to exercise religious freedom. In order to comply with federal and state constitutional and statutory protections, on July 16, 2004, CYA published notice of its intent to permanently amend section 4751 and adopt sections 4750 and 4750.1, Title 15 of the CCR, to ensure that wards of the state receive appropriate religious freedom.

Under these proposed regulations, the facility superintendent must provide all wards with access to a religious service or alternate religious service at least once a week, unless the ward is on temporary detention or administrative lockdown, assigned to a special management program, serving disciplinary decision-making system room restrictions, attending mandated treatment groups, attending case conferences, attending institutional classification committee hearings, attending Youth Authority Board hearings, attending assigned school classes, or if a staff member of the facility determines that a ward presents a safety risk to a religious service and obtains a manager's approval. The proposed regulations define terms specific to religious freedom; protect chaplain-ward confidentiality, except when safety or security of facility staff or wards may be compromised; provide for reasonable opportunity to express religious beliefs through participation in religious services, observance of holy days, personal property, grooming, diet, and literature; and describe activities that are strictly prohibited.

CYA held a public hearing on September 1, 2004 in Sacramento. After receiving several comments on the proposed regulations and making some of the suggested changes, CYA issued a fifteen-day notice, then a second fifteen-day notice. According to CYA's Final Statement of Reasons, new subsection (b) (section 4750.1) is added to clarify that CYA shall not place a substantial restriction on a ward's exercise of religion unless the exercise is inconsistent with a compelling governmental interest (including safety and/or security interests) or promotes violence or illegal acts, and that CYA shall document what alternatives were considered and allow the least restrictive means that does not violate the above standard. Further, in section 4750.1(d)(2)(D), formerly (c)(2)(D), the language, "Staff, with a manager's approval, determine that the ward or group of wards presents a safety and/or security risk to a religious service" was removed and replaced with "Ward or group of wards present a safety and/or security risk to a religious service, as determined and documented by staff." Other technical and non-substantive changes were made as well. At this writing, the regulations await review and approval by OAL.

IMPACT ON CHILDREN: The U.S. Constitution grants every individual the right to religious freedom. Children and youth in the custody of the state should not be deprived of these liberties. The proposed amendments seek to protect this liberty interest while balancing the safety and security needs particular to children who are in the state system.

The pertinent public comments made by the Prison Law Office (PLO) were the catalyst for the changes made by CYA in its first modification of the regulations (*see above*). First, PLO pointed out that the standard in the initial proposed regulations was more restrictive than the standard required under federal law. PLO expressed concern that the proposed regulations would remove the statutory mandate established in the Religious Land Use and Institutionalized Persons Act of 2002 (42 U.S.C. §§ 2000cc, *et seq.*) requiring that prison officials demonstrate a compelling governmental interest before placing a substantial burden on the exercise of religious freedom. PLO's second concern was that the proposed regulation did not require that the least restrictive means be used to further the government's compelling interest.

CYA chose to modify and add language to meet PLO's concerns. The modified language of new section 4750.1(b) reads: "The Department shall not place a substantial restriction on a ward's exercise of religion unless the exercise is inconsistent with a compelling governmental interest (including safety and/or security interests) or promotes violence or illegal acts." In response to the second concern, CYA chose to make an addition to section 4750.1(b) to read: "The Department shall document what alternatives were considered and allow the least restrictive means that

does not violate the above standard.” CYA found this language addressed PLO’s concerns and met federal and state standards.

A separate comment from a member of a county probation office expressed concern that allowing wards to wear religious articles such as crosses, medallions, or medicine bags, underneath the ward’s clothing, and to carry other artifacts to and from religious services and programs, is contradictory to CYA’s safety and security standard; these articles can be used for self-mutilation, as a weapon, or for destruction of property. In its Final Statement of Reasons, CYA clarified that if an article is misused to inflict harm on oneself, others, or property, it will be considered a safety and security issue and will be removed. To address this issue, CYA further stated that it will develop regulations detailing what types of materials may be worn by wards.

Conflict of Interest Code

Pursuant to Government Code sections 87300 through 87302, the Conflict of Interest Code designates employees who must disclose certain investments, income, interests in real property, and business positions, and who must disqualify themselves from making or participating in the making of governmental decisions affecting those interests. Section 87306 of the Government Code requires CYA to amend its code whenever positions are being added or deleted or whenever the duties of existing positions are substantially changed. On September 24, 2004, CYA published notice of its intent to permanently amend section 4020, Title 15 of the CCR, to reflect CYA’s reorganization, positions held within CYA, and the disclosure categories assigned to those positions as listed in Appendices A and B, attached to the regulatory package.

The following positions were added to the list of employees who must make financial and other personal disclosures: Ombudspersons; Staff Services Manager I, Safety Office; Consultants; Youth Authority Administrators; Unit Managers; Parole Agents; Section Chiefs; Bureau Chiefs for Accounting, Budget, Personnel, and Training Services; Chief of Security; Dentist; Physician & Surgeon; Supervisor of Building Trades; Staff Services Manager II (Business Manager); Assistant Chief of Education; Site Principals; Youth Authority Administrator (Branch Business Manager); and Youth Authority Board Executive Officer, Board Members, and Board Representatives. The following positions were deleted from the list of employees who must make conflict of interest statements: Assistant Director, Equal Employment Opportunity; Staff Services Analyst/Associate Governmental Program Analyst – Contracts; and Program Administrators other than the Business Manager. The following positions require changes to disclosure categories: Staff Counsel (all levels); Special Agent in Charge, Investigative Services Section;

Sr. Management Auditor (Audit Manager); Division Chief and Bureau Chiefs of the Administrative Services Branch; Medical Director; Program Administrators (Camp Superintendent); Treatment Team Supervisors (Camp Assistant Superintendent); Training Officers (all levels); and the Superintendent of Education.

CYA accepted public comment on the proposed regulations through November 9, 2004. No public hearing was held or requested. Upon approval by OAL and filing with the Secretary of State, all affected CYA employees will be required to complete a Statement of Economic Interest within 30 days of the effective date of the amended code. At this writing, the regulations await review and approval by OAL.

IMPACT ON CHILDREN: CYA has nine facilities statewide that house approximately 3,900 youth (up to 25 years of age) who have been convicted of serious crimes. This system costs the state close to \$400 million each year; about \$80,000 per ward per year. CYA is legally required to reform and rehabilitate youth, however, recent studies show that somewhere between 74% and 90% of wards are arrested on new charges within several years of their release from CYA.

Beginning in 2003, the Attorney General released a series of six reports that he commissioned in response to a class action taxpayer lawsuit filed in January 2002 by the Prison Law Office and three other non-profit entities (*Farrell v. Harper*), which generally alleged that CYA imposes cruel and unusual punishment on the youth in its custody, instead of the rehabilitative treatment as intended under state and federal law, and that CYA improperly spends money on these unlawful policies and practices. The Attorney General reports focused on mental health care, substance abuse programs, health care programs, sex offender programs, educational programs, and general conditions at CYA facilities statewide. Overall, these reports revealed a great number of problems within the youth correctional system, including harsh conditions, youth suicides, violence, over-medication of wards, and lack of rehabilitative opportunities—and, not surprisingly, resulted in turning out youth who were worse off than when they entered the system. The reports also documented great unmet needs of CYA wards in terms of receiving adequate mental health services and substance abuse treatment.

Based upon the findings in these reports, Governor Schwarzenegger convened a stakeholder group to plan reforms for CYA. The Legislature also held hearings on this issue. Increased and sustained media attention has thrust CYA reform efforts into the limelight, and for good reason. Presumably in response to the public outcry, on November 17, 2004, the Governor announced that CYA officials entered a settlement in the *Farrell v. Harper* case.

The settlement requires CYA to provide wards with adequate and effective care and treatment and rehabilitation services, including reducing the level of violence and use of force within facilities, improved medical and mental health care, reduced use of lock-ups, and better educational opportunities. CYA has until January 2005 to develop detailed plans to improve all aspects of its operation of facilities. The settlement named a court special master to oversee all court-ordered reforms, and to issue reports on CYA's progress. CYA officials believe that more therapeutic treatment of wards will require smaller living units, better staff-to-ward ratios, and more enhanced counseling and treatment, all of which cost money, or require massive re-allocations of current funding.

In response to the settlement, the following statement was made by Walter Allen, the newly-appointed CYA Director, on November 16, 2004:

"The Prison Law Office landmark lawsuit compelled our department to take a hard look at the delivery of its services and conclude that what was being done was not working. The resulting settlement agreement between the Youth Authority and the Prison Law Office will help provide the resources needed to return the CYA to its former status as a national model in public safety and juvenile offender rehabilitative services. With the settlement of this case, CYA now has an agreed upon process to correct the deficiencies and is back on the road to being a place where California juvenile offenders will get the treatment they need to return to society as productive citizens. Since my appointment as Director last December, we have been moving toward a vision of a more therapeutic environment for the troubled juveniles who are placed under our care... one in which the needs and security of each juvenile offender committed to the Department is the top priority. This vision includes reducing institution violence; looking at nationally recognized best practices for juvenile facilities; building an expanded activity and education component; providing enhanced casework staffing; increasing staff training; creating stronger linkages with offender families and community stakeholders; and making sure the people who have been hurt by crime have an equal voice in the justice system. We must ensure victims their rights, while holding the offender accountable. This is the direction we are headed and this settlement agreement provides us one of the maps to get there. Finally, I want to recognize our dedicated CYA staff, who have continued to work every day to provide treatment and rehabilitation services to these juvenile offenders. It is only with their continued efforts that we will be able to make the necessary changes to build a better CYA."

An admission of wrongdoing is a necessary first step to meaningful change. CYA is currently involved in a top-to-

bottom reevaluation of its effectiveness and function. The changes in staff/employee assignments and similar changes to the conflict of interest code regulations are all part of this process. To the extent that CYA is effectively reformed and can become something closer to the model of rehabilitation it is intended to be, that will greatly benefit the youth who experience and later exit the juvenile delinquency system in California.

AGENCY DESCRIPTIONS

Following are general descriptions of the major California agencies whose regulatory decisions affecting children are discussed in the *Children's Regulatory Law Reporter*:

California Department of Child Support Services.

The Department of Child Support Services (DCSS) was created by AB 196 (Kuehl) (Chapter 478, Statutes of 1999), effective January 1, 2000, to oversee the California child support program at both the state and local levels. AB 196, along with several other bills, created a massive restructuring of the child support program in California. In addition to creating DCSS within the California Health and Human Services Agency and expanding the state's role, the legislation requires that responsibility of the program at the local level be moved out of the district attorney's offices into new local child support agencies in each county. DCSS' enabling act is found at section 17000 *et seq.* of the Family Code; DCSS' regulations appear in Title 22 of the CCR. DCSS' website address is www.childsup.cahwnet.gov.

California Department of Developmental Services.

The Department of Developmental Services (DDS) has jurisdiction over laws relating to the care, custody, and treatment of developmentally disabled persons. DDS is responsible for ensuring that persons with developmental disabilities receive the services and support they need to lead more independent, productive and normal lives, and to make choices and decisions about their own lives. DDS executes its responsibilities through 21 community-based, nonprofit corporations known as regional centers, and through five state-operated developmental centers. DDS' enabling act is found at section 4400 *et seq.* of the Welfare and Institutions Code; DDS' regulations appear in Title 17 of the CCR. DDS' website address is www.dds.ca.gov.

California Department of Education and State Board of Education.

The California State Board of Education (Board) adopts regulations for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocation-

al schools of the state. The State Board is the governing and policy body of the California Department of Education (CDE). CDE assists educators and parents to develop children's potential in a learning environment. The goals of CDE are to set high content and performance standards for all students; build partnerships with parents, communities, service agencies and businesses; move critical decisions to the school and district level; and create a department that supports student success. CDE regulations cover public schools, some preschool programs, and some aspects of programs in private schools. CDE's enabling act is found at section 33300 *et seq.* of the Education Code; CDE regulations appear in Title 5 of the CCR. CDE's website address is www.cde.ca.gov; the Board's website address is www.cde.ca.gov/board.

California Department of Health Services. The California Department of Health Services (DHS) is a statewide agency designed to protect and improve the health of all Californians. Its responsibilities include public health and the licensing and certification of health facilities (except community care facility licensing). DHS' mission is to reduce the occurrence of preventable disease, disability, and premature death among Californians; close the gaps in health status and access to care among the state's diverse population subgroups; and improve the quality and cultural competence of its operations, services, and programs. Because health conditions and habits often begin in childhood, this agency's decisions can impact children far beyond their early years. DHS' enabling act is found at section 100100 *et seq.* of the Health and Safety Code; DHS' regulations appear in Titles 17 and 22 of the CCR. DHS' website address is www.dhs.ca.gov.

California Department of Mental Health. The Department of Mental Health (DMH) has jurisdiction over the laws relating to the care, custody, and treatment of mentally disordered persons. DMH disseminates education information relating to the prevention, diagnosis, and treatment of mental disorder; conducts educational and related work to encourage the development of proper mental health facilities throughout the state; and coordinates state activities involving other departments and outside agencies and organizations whose actions affect mentally ill persons. DMH provides services in the following areas: (1) system leadership for state and local county mental health departments; (2) system oversight, evaluation and monitoring; (3) administration of federal funds; and (4) operation of four state hospitals (Atascadero, Metropolitan, Napa and Patton) and an Acute Psychiatric Program at the California Medical Facility at Vacaville. DMH's enabling act is found at section 4000 *et seq.* of the Welfare and Institutions Code; DMH regulations appear in Title 9 of the CCR. DMH's website address is www.dmh.ca.gov.

California Department of Social Services. The California Department of Social Services (DSS) adminis-

ters four major program areas: welfare, social services, community care licensing, and disability evaluation. DSS' goal is to strengthen and encourage individual responsibility and independence for families. Virtually every action taken by DSS has a consequence impacting California's children. DSS' enabling act is found at section 10550 *et seq.* of the Welfare and Institutions Code; DSS' regulations appear in Title 22 of the CCR. DSS' website address is www.dss.cahwnet.gov.

California School Finance Authority. The California School Finance Authority (CSFA) was created in 1985 to oversee the statewide system for the sale of revenue bonds to reconstruct, remodel, or replace existing school buildings, acquire new school sites and buildings to be made available to public school districts (K-12) and community colleges, and to assist school districts by providing access to financing for working capital and capital improvements. The members of CSFA are the State Treasurer, the Superintendent of Public Instruction, and the Director of the Department of Finance. CSFA's enabling act is found at section 17170 of the Education Code; CSFA's regulations appear in Title 4 of the CCR. CSFA's website address is www.treasurer.ca.gov/csfa.

California Victim Compensation and Government Claims Board (formerly the Board of Control Victims of Crime Program). This Board's activities are largely devoted to reimbursing eligible victims for certain expenses incurred as a direct result of a crime for which no other source of reimbursement is available. The Board compensates direct victims (persons who sustain an injury as a direct result of a crime) and derivative victims (persons who are injured on the basis of their relationship with the direct victim at the time of the crime, as defined in Government Code section 13960(2)). Crime victims who are children have particular need for medical care and psychological counseling for their injuries. Like other victims, these youngest victims may qualify for reimbursement of some costs. The Board's enabling act is found at section 13900 *et seq.* of the Government Code; its regulations appear in Title 2 of the CCR. The Board's website address is www.boc.ca.gov.

California Youth Authority. State law mandates the California Youth Authority (CYA) to (1) provide a range of training and treatment services for youthful offenders committed by the courts, (2) help local justice system agencies in their efforts to combat crime and delinquency, and (3) encourage the development of state and local crime and delinquency prevention programs. CYA's offender population is housed in eleven institutions, four rural youth conservation camps, and two institution-based camps. CYA's facilities provide academic education and treatment for drug and alcohol abuse. Personal responsibility and public service are major components of CYA's program strategy. CYA's enabling act is found at section 1710 *et seq.* of the

Welfare and Institutions Code; CYA's regulations appear in Title 15 of the CCR. CYA's website address is www.cya.ca.gov.

Youthful Offender Parole Board. This Board enhances public safety, creates offender accountability, and reduces criminal recidivism by ensuring appropriate lengths of confinement and by prescribing treatment-effective programs for individuals seeking parole from the California Youth Authority. Welfare and Institutions Code section 1719 authorizes the Board to revoke or suspend parole; set a parole consideration date; recommend treatment programs; determine the date of next appearance; authorize release on parole and set conditions thereof; discharge persons from the jurisdiction of the Youth Authority; return persons to the court of commitment for redispotion by the court; return nonresident persons to the jurisdiction of the state of legal residence; and adjust length of incarceration based on institution violations (add time) or for good behavior (reduce time). The Board's enabling act is found at section 1716 *et seq.* of the Welfare and Institutions Code; the Board's regulations appear in Title 15 of the CCR. The Board's website address is www.yopb.ca.gov.

FOR FURTHER INFORMATION

The California Children's Budget, published annually by the Children's Advocacy Institute and cited herein, is another source of information on the status of children in California. It analyzes the California state budget in eight areas relevant to children's needs: child poverty, nutrition, health, special needs, child care, education, abuse and neglect, and delinquency. The *California Children's Budgets* for 2004-05 and 2002-03 are currently available at www.caichildlaw.org.

RULEMAKING GLOSSARY

Administrative Procedure Act (APA): Chapters 3.5, 4, 4.5, and 5 of the Government Code statutes were designated by the Legislature as the Administrative Procedure Act. Chapter 3.5, beginning at section 11340, describes the process state agencies must follow in adopting regulations and OAL's review authority. Chapters 4, 4.5, and 5 deal with a different arm of state government, the Office of Administrative Hearings, and the procedures which agencies must follow in order to take disciplinary action against a licensee.

Appeal: An agency whose regulations are disapproved by OAL may request the Governor's office to review OAL's decision. This process is called a request for review and is initiated within ten days of the receipt of the opinion of disapproval issued by OAL. A response to the appeal must be made by OAL within ten days. The Governor's office will provide a written response to the appeal within fifteen days of the receipt of OAL's response. All appeals

and responses are published in the *California Regulatory Notice Register*.

California Code of Regulations (CCR): This is the repository for all current regulations adopted by state agencies required to publish regulations in the CCR. The CCR is made up of 26 separate titles or categories.

California Regulatory Notice Register: This is a weekly publication; it contains notices of proposed rulemaking action, a summary of regulations approved by OAL and filed with the Secretary of State, and other information relating to the regulatory process.

Certificate of Compliance: Emergency regulations lapse by operation of law unless the agency files a completed rulemaking action with OAL or OAL approves a readoption of the emergency regulation. A completed rulemaking action includes the proposed permanent regulation, the rulemaking record, and a statement that the agency has complied with all regular rulemaking procedures (a "certificate of compliance").

Emergency Regulations: Agencies can put regulations into effect immediately by declaring that an emergency exists. OAL reviews all emergencies and has ten days in which to approve or disapprove the emergency action. The APA defines an emergency as a situation where action is necessary for the "immediate preservation of the public peace, health and safety, or general welfare." Emergency regulations can remain in effect up to 120 days and may be extended by the Director of OAL for good cause.

To implement an emergency regulation on a permanent basis, the agency must publish notice and accept comments as is done with non-emergency regulations. This must be completed before the end of the 120-day period, unless an extension has been authorized by the Director of OAL.

Housing Costs: If a proposed regulatory change will result in increased cost in the construction of housing, the Notice of Proposed Action must include a statement, to alert those that may be affected.

Informative Digest: The Informative Digest is part of the Notice of Proposed Action; it is a clear and concise summary of the existing laws and regulations, if any, that are directly related to the proposed new language, and the effect of these changes. (The informative digest is patterned after the digest contained in bills that are considered by the Legislature.) The purpose of the Informative Digest is to allow the public to quickly determine the effect of the regulations so that they will be able to make comments about the proposed action.

Judicial Declaration: A decision or opinion rendered by a court declaring the legal status of an agency regula-

tion. Any interested person may request this declaration of a superior court.

Notice of Proposed Action (Notice of Intent to Adopt/Amend/Repeal a Regulation): The Notice is a formal document prepared by a state agency to alert the public that a regulatory activity is planned. It is the first step in the rulemaking process. It states the type of regulatory activity planned (adopt, amend, or repeal) and the date that the public comment period ends. Also include is the name of a contact person to whom the public may submit comments regarding the proposed regulatory activity.

The Notice is mailed to each person on the state agency's mailing list and is also published in the weekly *California Regulatory Notice Register*. Any interested person may request to be added to an agency's mailing list in order to receive notification of regulatory activity.

Office of Administrative Law: OAL is a state agency established by the Legislature in 1980 to provide oversight of regulatory actions by other state agencies, with the authority to approve or disapprove regulations based on legal and procedural requirements. OAL also is responsible for making regulatory determinations on whether an agency is illegally enforcing a requirement that should be, but has not been, adopted pursuant to the APA process. OAL oversees the compilation and publication of the CCR, the *Notice Register*, and other legal and informational materials of interest to the public and private sectors.

Petition Process: This is the process by which anyone may request a state agency to adopt, amend, or repeal a regulation. The agency has thirty days from receipt of the petition to deny the request or schedule the matter for a public hearing in accordance with APA notice and hearing procedures. If the petition is denied, the petitioner may request the agency to reconsider. (See Government Code §§ 11340.6, 11340.7.)

Public Comment Period: The APA requires state agencies to set aside a 45-day period to receive input on proposed regulatory changes from the public. Announcement of the 45-day comment period is contained in the Notice of Proposed Action which is printed in the weekly *California Regulatory Notice Register*. The comment period begins on the day after the date of publication in the *Notice Register*; the agency also sends a copy of the Notice to all persons on its mailing list.

Public Hearing: A state agency may or may not schedule a public hearing on the regulatory action under consideration during the comment period. If none is scheduled, any interested person may request one and the agency must comply if the request is received no later than fifteen days before the end of the comment period.

Regulation: The APA defines a regulation as "every rule, regulation, order, or standard of general application ... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure...." Regulations have the full force and effect of law (Chapter 3.5, section 11342.600).

Request for (Regulatory) Determination: In response to a request by any interested person, OAL is authorized to issue a "determination" whether a state agency is illegally enforcing a requirement that has not been adopted as a regulation as per the APA. (See Government Code § 11340.5.) Due to severe budget constraints, OAL ceased issuing determinations in January 2003.

Rulemaking Record: The rulemaking record, also known as the rulemaking file, is compiled by a state agency and submitted to OAL for review. It is the official record of the rulemaking proceeding and is the basis for OAL decisions on whether to approve or disapprove the regulations adopted by the state agency. The rulemaking record is available for inspection by the public. For permission to inspect a rulemaking record, contact the state agency involved.

State Agency: State agencies, as defined in the APA, are those executive branch state departments, offices, boards, or commissions that adopt, amend, or repeal regulations, published in the CCR.

Statement of Reasons, Initial: The Initial Statement of Reasons describes why the agency believes the regulation is necessary and provides the basis for the agency decision to take this particular course of action. The Initial Statement of Reasons must be made available upon request.

Statement of Reasons, Final: This is an updated version of the Initial Statement of Reasons, and is submitted to OAL in the rulemaking record. It contains any new information not identified initially and a summary of each objection or recommendation made by the public together with an explanation of how the proposed regulations were modified to accommodate each public comment, or explanation as to why specific comments were put aside. It is included as part of the rulemaking record and is the basis for OAL review of the proposed regulations.

Statute: A statute is a law enacted by the Legislature. After the statute has been enacted, a state agency may adopt, amend, or repeal regulations that will implement, interpret, or clarify the statute.

Sufficiently Related Changes: If a state agency proposing to adopt a regulation determines that, as a result of comments received during the 45-day comment period, the text of the proposed regulation should be modified, it may

do so as long as it provides an additional fifteen-day comment period. A fifteen-day comment period is authorized if the changes to the text are “sufficiently related” to the original text proposed. “Sufficiently related” means that a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted. Changes that are more substantive require the agency to start the process anew and provide an additional 45-day comment period.

Text: The text is the actual language of the proposed regulatory change. When an agency plans to adopt, amend, or repeal regulations, the text of the proposed regulations must be made available to the public upon request. This gives the public a chance to review the exact language of the regulations and to submit comments to the agency during the public comment period.

THE CALIFORNIA REGULATORY PROCESS

The Administrative Procedure Act (APA), Government Code section 11340 *et seq.*, prescribes the process that most state agencies must undertake in order to adopt regulations (also called “rules”) which are binding and have the force of law. This process is commonly called “rulemaking,” and the APA guarantees an opportunity for public knowledge of and input in an agency’s rulemaking decisions.

For purposes of the APA, the term “regulation” is broadly defined as “every rule, regulation, order or standard of general application...adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure....” Government Code section 11342(g). Agency policies relating strictly to internal management are exempt from the APA rulemaking process.

The APA requires the rulemaking agency to publish a notice of its proposed regulatory change in the *California Regulatory Notice Register*, a weekly statewide publication, at least 45 days prior to the agency’s hearing or decision to adopt the change (which may be the adoption of a new regulation or an amendment or repeal of an existing regulation). The notice must include a reference to the agency’s legal authority for adopting the regulatory change, an “informative digest” containing a concise and clear summary of what the regulatory change would do, the deadline for submission of written comments on the agency’s proposal, and the name and telephone number of an agency contact person who will provide the agency’s initial statement of reasons for proposing the change, the exact text of the proposed change, and further information about the proposal and the procedures for its adoption. The notice may also include the date, time, and place of a public hearing to be held by the agency for receipt of oral testimony on the proposed regulatory change. Public hearings

are generally optional; however, an interested member of the public can compel an agency to hold a public hearing on proposed regulatory changes by requesting a hearing in writing no later than fifteen days prior to the close of the written comment period. Government Code section 11346.8(a).

Following the close of the written comment period, the agency must formally adopt the proposed regulatory changes and prepare the final “rulemaking file.” Among other things, the rulemaking file—which is a public document—must contain a final statement of reasons, a summary of each comment made on the proposed regulatory changes, and a response to each comment.

The rulemaking file is submitted to the Office of Administrative Law (OAL), an independent state agency authorized to review agency regulations for compliance with the procedural requirements of the APA and for six specified criteria—authority, clarity, consistency, necessity, reference, and nonduplication. OAL must approve or disapprove the proposed regulatory changes within thirty working days of submission of the rulemaking file. If OAL approves the regulatory changes, it forwards them to the Secretary of State for filing and publication in the California Code of Regulations, the official state compilation of agency regulations. If OAL disapproves the regulatory changes, it returns them to the agency with a statement of reasons. The agency then has 120 days within which to correct the deficiencies cited by OAL and resubmit the rulemaking file to OAL.

An agency may temporarily avoid the APA rulemaking process by adopting regulations on an emergency basis, but only if the agency makes a finding that the regulatory changes are “necessary for the immediate preservation of the public peace, health and safety or general welfare....” Government Code section 11346.1(b). OAL must review the emergency regulations—both for an appropriate “emergency” justification and for compliance with the six criteria—within ten days of their submission to the office. Government Code section 11349.6(b). Emergency regulations are effective for only 120 days.

Interested persons may petition the agency to conduct rulemaking. Under Government Code section 11340.6 *et seq.*, any person may file a written petition requesting the adoption, amendment, or repeal of a regulation. Within thirty days, the agency must notify the petitioner in writing indicating whether (and why) it has denied the petition, or granting the petition and scheduling a public hearing on the matter.

References: Government Code section 11340 *et seq.*; Robert Fellmeth and Ralph Folsom, *California Administrative and Antitrust Law: Regulation of Business, Trades and Professions* (Butterworth Legal Publishers, 1991).



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