



# Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 4, No. 1 (2003)

## Highlights

*Poverty:* Proposed CalWORKs Regulations Implement California's State-Funded "Safety Net" for Children of an Adult Whose Sixty-Month TANF Time Limit Has Expired

*Nutrition:* Regulatory Changes Implementing the Food Stamp Reauthorization Act of 2002 Restore Food Stamp Eligibility to All Legal Immigrant Children

*Access to Health Care:* DHS Regulations Implement First Medi-Cal Provider Rate Increase in Twelve Years; DHS Increases Newborn Screening Program Fee Over 42% in Six Months

*Child Care:* Revised DSS Regulations Require Child Care Licensees to Inform Parents of Their Right to Criminal Record Exemption Information About Adults Associated with the Facility

*Foster Care:* Proposed Regulations Implement New Supportive Transitional Emancipation Program for Emancipated Foster Youth; DSS Seeks to Amend Family Foster Homes Regulations

## Key

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from January 1, 2002, through October 31, 2002; actions on those packages through October 31, 2002; and updates on previously-reported regulatory packages through October 31, 2002.

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 35–36) or publications:

CCR:	California Code of Regulations
CDE:	California Department of Education
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

## 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—about their needs for 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.

### **Children's Advocacy Institute Staff**

**Robert C. Fellmeth**, *Executive Director*  
**Julie D'Angelo Fellmeth**, *CPIL Administrative Director*  
**Elisa Weichel**, *CAI Administrative Director*  
**Lupe Diaz**, *Senior Policy Advocate*  
**Debra Back**, *CAI Staff Attorney*  
**Collette Galvez**, *CPIL Staff Attorney*  
**Stephanie Reighley**, *Executive Assistant*  
**Louise Jones**, *Administrative Assistant*  
**Cynthia Dana**, *Executive Assistant*

*Contributing Law Student Intern*  
**Heather Boxeth**

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# **CHILD POVERTY**

## **New Rulemaking Packages**

### **CalWORKs Sixty-Month Time Limit Procedures**

Federal welfare reform provides that no person may receive Temporary Aid to Needy Families (TANF) assistance for more than sixty months; this time limit is intended to provide an incentive to cash aid recipients to achieve self-sufficiency through employment before the time limit expires. Welfare and Institutions Code sections 11454 and 11454.5 mandate a sixty-month time limit on the receipt of CalWORKs cash aid by adults, with specific exceptions (*e.g.*, Welfare and Institutions Code section 11454(e) allows adults who meet certain criteria to receive aid beyond the time limit, and section 11454.5(b) allows certain months of aid to be exempt from the time limit).

Although TANF funding is only available after sixty months for hardship cases, California law establishes a state-funded “safety net” which provides limited aid, beyond the sixty-month TANF time limits, for the children of adults whose time limit has expired. However, DSS’ regulations do not specify how to calculate safety net benefits. Since recipients who have been continuously on aid since the time limits were established will reach their sixty-month limit on January 1, 2003, regulatory changes are necessary to specify how state-funded safety net aid is calculated.

On February 28, 2002, DSS—on an emergency basis—adopted sections 40-107.141, 40-107.142, 40-107.143, 40-107.144, 40-107.15, 40-107.151, 40-107.152, 42-302.114, 42-302.114(a)-(c), 42-302.21(h)(1), 42-302.3, 44-133.8, and 82-833, and amended sections 40-107.14, 40-107.16–.19, 42-301.2, 44-133.51, and 82-823 of the MPP related to the sixty-month time limit. Among other things, the action makes the following changes:

- An applicant, recipient, or former recipient of CalWORKs cash assistance must be informed of his/her time on aid. This information is important to ensure that recipients know of the approach of their time limits to prepare for the resulting grant reduction, and to ensure recipients are provided exemptions to which they are entitled.
- At the time eligibility for aid is authorized, the county must inform the applicant,

by notice of action, of the number of countable months that the recipient received aid, the specific months that were exempt from the time limit, and the remaining number of months that the recipient may be eligible to receive aid.

- At redetermination, the county must inform the recipient, by notice of action, of the number of countable months that the recipient received aid as reported on the most recent notice of action, the cumulative number of countable months that the recipient received aid, the specific exempt months since the last notice of action, and the reminding number of months that the recipient may be eligible to receive aid.

- Counties are responsible for informing recipients, in writing, at the 54<sup>th</sup> countable month on aid by using one of two listed methods of notification.

- When another state requests the number of months of TANF assistance received by a former CalWORKs recipient, the county where the aid was last received must promptly respond to the other state's request, and must also inform the former CalWORKs recipient of the information that was provided to the other state.

- State-only programs, such as the Separate State Program for Two-Parent Families and the Segregated State Program for Legal Immigrants, are not subject to the federal sixty-month time limit.

- Counties are to use specified criteria to determine if a recipient is eligible for the exception that extends aid beyond the sixty-month time limit for individuals who have a history of participation and cooperation with welfare-to-work requirements, but who are found to be unable to maintain employment or to participate in welfare-to-work activities, and conduct periodic review of the impairment or condition that prevents an individual from maintaining employment or participation in welfare-to-work activities. Exceptions include, but are not limited to, documented impairments that severely limit the individual's ability to successfully maintain employment or participate in activities for twenty or more hours per week or for which the local labor market conditions limit the availability of employers that could reasonably accommodate the individual's physical and/or mental limitations, and victims of domestic abuse for whom the county has waived work requirements resulting in a failure to participate or progress in welfare-to-work activity.

- The notice sent to deny or approve a recipient's request for an exemption or

exception must include the reason for the determination and the individual's right to appeal.

■ Safety net benefits are to be calculated using specified criteria for remaining assistance unit (AU) members once the sixty-month time limit is reached. When a parent who is required to be in the AU becomes ineligible for aid due to the sixty-month time limit, the parent's income is included in the grant calculation, but the parent's needs are not included. Parents still have a duty to support their children, so their income must be considered. For non-parent caretaker relatives living in the home (who have no duty to support the children in the AU), neither the income nor the needs of such relatives are considered unless they willingly contribute income to the child. Stepparents not required to be in the AU and living in the home have their income and needs considered in the grant calculation.

On March 1, 2002, DSS published notice of its intent to adopt these changes on a permanent basis, and on April 17 held a public hearing on the regulatory package. On June 28, 2002 and October 2, 2002, DSS readopted the changes on an emergency basis. At this writing, the permanent regulations await review and approval by OAL.

**Impact on Children:** Almost one million California children receive TANF assistance for basic subsistence. That number is likely to increase over the next several months, because of both unemployment and the abandonment of necessary child care for recipients who have achieved employment. Parents of over one-half million California children face sixty-month federal TANF cut-off notices over the next two years.

California has pledged to continue "state-only" assistance for the "children's share" once adult recipients meet the sixty-month limit. Child advocates argue that pronouncements indicating that just the "parent's share" would be cut is merely public relations spin meant to imply that children are being held harmless. However framed, the result is a sharp reduction at the sixty-month mark; for example, benefits for the benchmark family of a mother and two children will be reduced by one-third, to just over \$400 in total monthly cash assistance for rent, utilities, clothing, *et al.*

The remaining major safety net for children is food stamps, which have been reduced over the past eight years in relation to inflation to allow for just over one-third of

the nutritional needs of affected children. Accordingly, a substantial portion of the TANF grant will be necessary to supplement food stamps for food. (See discussion in Chapter 2 of the *California Children's Budget 2002–03*, available at [www.cachildlaw.org](http://www.cachildlaw.org).) Overall, this combined child safety net (TANF plus food stamps) has been reduced over the past decade from close to the poverty line to about 70% of the line—prior to any federal cut-off or amount reduction at the sixty-month mark.

Perhaps most ominously, it is unclear whether even the state-only “child’s share” will be available for safety net protection, given the current state budgetary crisis and the weak political power of impoverished children. Even if receiving state-only support, most children will nevertheless sink to below one-half of the poverty line, to a level experts describe as “extreme poverty,” indicating serious developmental consequences for children under five years of age. Where state-only support is lacking, the consequences will vary depending upon the availability of relatives and charity, and the ability of the child welfare system to take children away from impoverished parents where courts adjudicate failure to provide sustenance as a form of “neglect” (a difficult finding and one usually possible only after malnutrition damage is visibly documented).

Some elements of the proposed rules raise constitutional or basic issues of equity. For example, the rules debit a full month from the lifetime sixty-month maximum of an adult, even for partial months in which the adult was included in an AU that received a cash grant. A parent who works just under the minimum 32-hour minimum per week and requires a small stipend is debited in exactly the same manner as is a parent with one child who does not work at all. This feature is of particular importance given the common and understandable pattern of half-time or three-quarter time work often available to these impoverished and undereducated parents. As those most recently hired, such workers are first in line for hour reduction when business turns down. Instead of crediting parents for such initiative, the Bush Administration is proposing to bend in the opposite direction, and require a full forty-hour workweek for minimum work requirement compliance.

Further, the regulations fail to exclude those months from the sixty-month limit where the state or counties have failed to provide reasonable training or work opportunity, as provided by CalWORKs. Similarly, months should not be debited from

the sixty-month limit where the state has failed to provide adequate child care—which federal welfare reform requires of states. This issue is of particular importance given the December 2002 gubernatorial proposal to cut off all child care for those who have left TANF for more than two years. The proposed rules do not provide for the deduction of months based on such factors, instead providing exemptions to individuals 60 years of age or older; individuals with specified caretaking responsibilities; disabled individuals; individuals with documented impairments, as specified; and victims of domestic abuse. While these categories are authorized by the CalWORKs statute for such exception, the rules do not interpret them with clarity or breadth, and they do not include other bases for exclusion that could be authorized by applicable law.

Finally, the rules do not comport with basic constitutional due process, as they do not include notice of hearing rights assured by *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the U.S. Supreme Court held that a pre-termination evidentiary hearing was required for “an initial determination of the validity of welfare termination.” The Court found that for welfare recipients who lack independent resources, such due process must occur prior to termination of benefits, given their importance to personal subsistence. As proposed, the state’s rules not only fail to provide for such due process, they avoid notice of its existence.

### **AB 1692 CalWORKs Amendments**

On March 1, 2002, DSS published notice of its intent to amend sections 42-701, 42-711, 42-712, 42-718, 42-719, and 42-721 of the MPP to implement AB 1692 (Chapter 652, Statutes of 2001), which requires that DSS expand the activities permitted for post 18- or 24-month time limit CalWORKs cash assistance recipients to include U.S. Department of Labor (DOL) Welfare-to-Work Grant program paid community service or work experience. This expansion allows counties to utilize existing DOL Welfare-to-Work programs to provide community service or work experience jobs to recipients who have reached their 18- and 24-month time limit. Under these regulatory changes, recipients will be in actual employment settings that will enhance their skills and future employability. Section 42-710.22 of the MPP is adopted to clarify that an individual who was receiving aid in the month prior to implementation of the Welfare-to-Work Program in the county is eligible for 24

cumulative months of aid, even if the individual does not receive aid continuously. If the individual has a break in aid before the expiration of the 24-month period, and then reapplies, the individual is not restricted to the 18-cumulative-month period described in section 42-710.1. The proposed regulations also clarify existing language and correct erroneous cross-references contained in current Welfare-to-Work regulations.

The public comment period ended on April 17, 2002, after a public hearing on that same date. At this writing, the permanent changes await review and approval by OAL. **Impact on Children:** Theoretically, CalWORKs requires counties to give TANF recipients 18–24 months to complete job training/placement and secure employment. Where private sector jobs are not found, the statute requires that counties provide actual jobs—either by funding providers (usually in the public service sector) or by direct employment. This rule allows counties to meet this obligation through DOL-financed community service work. The rule implements AB 1692, to allow greater flexibility and enhanced use of federal funding to meet the requirement of work within 24 months.

However, neither the regulatory change nor the statute address the underlying problem: With or without DOL grant help, counties do not have the capacity to pay for or to provide employment for the 80% of TANF recipients required to be so employed by the 24-month mark of assistance. The budget crisis of 2002–03, exacerbated for 2003–04, occurs at the confluence of the sixty-month cut-off for many, and a modest economic downturn. Applying limited DOL funds to relieve local counties of CalWORKs employment obligations will not substantially affect the overwhelming problem of CalWORKs statute non-compliance in directed work. The impact on children from this failure of assured employment, given the fact that such failure does not waive the sixty-month expiration of federal benefits, suggests that the rule will not ameliorate the extreme poverty inducing impact on children.

### **CalWORKs 180-Day Family Reunification Extension**

AB 429 (Chapter 111, Statutes of 2001) allows parents of children who have been removed from the home and are receiving out-of-home care to continue to receive CalWORKs funded services, such as substance abuse and mental health services, if the county determines such services are necessary for family reunification. On August 1, 2002, DSS—on an emergency basis—adopted sections 40-181.1, 42-710.66, 42-

711.512, 42-711.558, 42-721.13, 42-721.131, 42-721.413, 80-301, and 82-812.68, and amended sections 42-711.551, 42-711.6, 42-711.8, and 44-314 of the MPP to implement AB 429. These regulatory changes ensure that services necessary for family reunification will be available to eligible parents. Among other things, the changes include the following provisions:

- Children receiving out-of-home care are to be considered temporarily absent from the AU for up to 180-consecutive days when: (1) the child has been removed from the parent(s) and placed in out-of-home care; (2) the AU was receiving CalWORKs assistance when the child was removed from the parent(s); and (3) the county has determined that the provision of CalWORKs services is necessary for family reunification. These regulations extend the temporary absence provisions from thirty days to up to 180-consecutive days for certain children receiving out-of-home care.

- Only biological or adoptive parents of a child who has been removed from the home may continue to receive CalWORKs family reunification services, and the parent(s) must be otherwise eligible and have a reunification plan in place.

- Parent(s) eligible for family reunification services are not eligible to receive a cash grant.

- Welfare-to-work services will be available to eligible reunification parents; reunification parents continue to be eligible for supportive services and are subject to the rules regarding underpayment and overpayment; and time limit requirements, as specified, apply to reunification parents.

- A good cause extension to the 180-day temporary absence period is available in certain situations. A good cause extension may be granted for the number of days between the date of the child's removal and the date that the court orders the reunification plan. A good cause extension may also be granted when the county determines that additional time is needed beyond the 180 days of the reunification plan. The extension may be in effect until the family reunification plan is terminated.

- Parents in a reunification case are subject to a six-month redetermination requirement; a reunification redetermination is required to reopen a CalWORKs case if a family reunifies either before or after the initial six-month plan period; and reunification cases are permitted to suspend monthly eligibility reporting for as long as the court-

ordered reunification plan is in place.

- Participation in welfare-to-work activities or services shall not count toward an individual's 18- or 24-month time limit, if such participation is limited to those welfare-to-work activities that are required pursuant to the terms of a court-ordered child welfare services/family reunification plan and the individual has not already signed a welfare-to-work plan.

- A sanctioned individual is not precluded from participating in or receiving CalWORKs welfare-to-work activities, which includes mental health and substance abuse treatment, and supportive services, when the county has determined that such services are necessary for family reunification.

- A welfare-to-work assessment shall not be required for family reunification parents whose assigned welfare-to-work activities and services are limited to those welfare-to-work activities and services that are specified in a court-approved family reunification plan and the county has elected to utilize the family reunification case plan in lieu of the welfare-to-work plan.

- A welfare-to-work assessment and plan will be required for family reunification parents who are provided with welfare-to-work activities and services that are not specified in a court-ordered family reunification case plan.

- Under specified circumstances, a family reunification parent is exempted from the CalWORKs noncompliance and sanction provisions, and allow for the continued provision of CalWORKs activities and services until the family reunification case plan is terminated by the court or the individual reaches the sixty-month time limit.

- Any months in which a sanctioned individual is considered a family reunification parent counts toward meeting any minimum or mandatory sanction period.

- In compliance with *Nickols v. Saenz* (San Francisco Superior Court Case No. 310867, August 25, 2000), a month in which the AU is eligible for a zero basic grant will not be considered as a month in which the AU received aid for Maximum Family Grant (MFG) purposes.

On August 30, 2002, DSS published notice of its intent to adopt these changes on a permanent basis; the Department held public hearings on the proposals on October 15 in Monterey Park, October 16 in Sacramento, and October 17 in Oakland.

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

**Impact on Children:** Although many advocates support the proposed changes substantively, they are concerned that certain language is inconsistent, does not accurately reflect the statutory language being implemented, and could be construed arbitrarily by counties if not corrected.

For example, section 42-711.512 states “[a] county may provide a sanctioned individual with welfare-to-work activities and services, if the individual is considered a reunification parent pursuant to the temporary absence/family reunification provisions of Section 82-812.68, and the county determines that such services are necessary for family reunification.” Section 82-812.681 states “[c]hildren removed from the home and receiving out-of-home care may be considered to be temporarily absent for a period of up to 180-consecutive days and the parent or parents remaining in the home will be eligible for CalWORKs services when...[t]he county has determined that provision of CalWORKs services is necessary for family reunification.” By using the word “may” at the beginning of these sections, DSS implies that counties have discretion whether to provide the identified services. This appears to be inconsistent with Welfare and Institutions Code section 11203(b), which states that a “parent or parents shall be considered living with the needy child or need children for a period of up to 180 consecutive days of the needy child’s or children’s absence from the family assistance unit and the parent or parents shall be eligible for services under this chapter” if specified conditions are met.

Further, the provisions do not indicate how counties will determine whether services are necessary for reunification. The regulatory language, as drafted, could be applied arbitrarily by counties due to a lack of specificity. Also, if a reunification parent meets the criteria, but does not receive services, there does not appear to be any mechanism to appeal or challenge the county’s determination.

### **Intercounty Collection of CalWORKs Overpayments and Food Stamp Overissuances**

On October 25, 2002, DSS published notice of its intent to amend sections 40-187.1, 40-188.139, 40-190.51, 40-190.52, 40-190.521, 40-190.522, 40-190.523, 40-190-524, and 40-190.524 of the MPP, in order to change the procedure by which

CalWORKs cash aid overpayments are collected when recipients move from one county to another. Under current policy, when a CalWORKs recipient moves from County A to County B, County B is supposed to collect any overpayments originating in County A and reimburse County A the amount collected. Discussions with county staff indicate that overpayments are not being collected by County B on behalf of County A. DSS' proposed amendments would allow County B to retain any monies collected and any resulting incentive funds. This would serve as an incentive for counties to collect overpayments originated in another county, thereby increasing collections and reducing grant costs.

The proposed regulations will also change the procedure for the recovery of food stamp overissuances when recipients move to another county. Currently, when a recipient moves from County A to County B, County A initiates or continues an overissuance collection. If County A is unable to initiate an action, then County B initiates collection procedures and receives the resulting incentive. These amendments will, in all instances, require that County B initiate or continue the collection action until the overissuance is fully repaid or the recipient moves to a subsequent county. County B will report the collection and be entitled to any collection incentive.

DSS is scheduled to hold public hearings on this regulatory package on December 17, 2002 in Monterey Park and December 18, 2002 in Sacramento.

***Impact on Children:*** These proposed changes are expected to benefit DSS (through increased collections and CalWORKs grant cost savings) and counties (through increased overpayment collections, CalWORKs grant cost savings, and increased incentive funds). Although children will be affected when overpayments or overissuances are required to be repaid by adults in their household, DSS' initial statement of reasons does not include an estimate of how many households this might involve or the financial impact of such repayments.

### **Refugee Cash Assistance/Entrant Cash Assistance Amendments**

New federal regulations provide states with the option of operating a publicly-administered Refugee Cash Assistance (RCA)/Entrant Cash Assistance (ECA) program consistent with the provisions of each state's TANF program with regard to determination of eligibility, treatment of income and resources, benefit levels and

budgeting methods. California counties are now allowed to operate RCA programs in accordance with the CalWORKs program, instead of the obsolete Aid to Families with Dependent Children (AFDC) program. California counties have been forced, up until now, to maintain and apply two separate and distinctly different sets of program policies and procedures for their RCA and CalWORKs clients even though RCA eligibility and grants are determined across the state by TANF/CalWORKs workers and automated systems.

On January 25, 2002, DSS published notice of its intent to adopt sections 69-209 and 69-210; amend sections 69-201, 69-202, 69-203, 69-204, 69-205, 69-206, 69-207, 69-208, 69-211, 69-212, 69-213, 69-214, 69-215, 69-216, 69-217, 69-301, 69-302, 69-303, 69-304, 69-305, and 69-306; and repeal sections 69-210 and 69-221 of the MPP, to implement and make specific state and federal law regarding the RCA/ECA programs. Among other things, the rulemaking package would change the starting date for asylees to the date they are granted asylum, rather than the date they entered the U.S., which makes it possible for asylees to access refugee resettlement assistance and benefits. The proposed changes also enable county welfare departments (CWDs) to provide cash assistance and services under the Refugee Resettlement Program to refugees/ entrants who would otherwise be determined ineligible because they are lacking complete documentation. If the eligibility worker cannot easily make an eligibility determination based on a refugee's/entrant's available information, these regulations enable the worker to provide RCA benefits to the refugee/entrant while the worker conducts a further investigation. The proposed regulations also ensure that counties cannot deny RCA and services to eligible asylees who have not yet received their Social Security numbers.

On January 30, 2002, DSS adopted these changes on an emergency basis. DSS accepted public comment until March 13, 2002, and held public hearings on the regulations on March 12 and 13, 2002. On July 3, 2002, OAL approved DSS' adoption of the changes on a permanent basis.

***Impact on Children:*** In addition to assuring that RCA refugees are treated more equitably with the general welfare population, this rulemaking package has specific elements which will beneficially impact children. For example, the revised regulations

specify that the parent or relative who has primary responsibility for care to a child six months of age or under is exempt from RCA employment/training requirements; specify that an unaccompanied minor continues to meet the definition of “unaccompanied minor” until the minor is united with a non-parental adult, either relative or non-relative, willing and able to care for the child to whom legal custody and/or guardianship is granted under state law; specify that a woman who is pregnant and provides medical verification that the pregnancy impairs her ability to be regularly employed or participate in employment/training related activities is exempt from such activities; and specify that an exemption based on a medically verified pregnancy may also be granted when the CWD determines that participation will not readily lead to employment or that a training activity is not appropriate.

### **Child Support**

***Collection and Distribution of Child Support (Barnes Notice)***. On May 29, 2002, the Department of Child Support Services (DCSS)—on an emergency basis—adopted section 119184, Title 22 of the CCR, and repealed subsection 12-225.3 of the MPP (which will be relocated to section 119184). The emergency changes, which went into effect on July 1, 2002, implement and interpret Family Code sections 17306 and 17401.5, 42 U.S.C. section 654(5), 45 C.F.R. section 302.54, and the judgment in *Barnes v. Anderson, et al.*, No. CIV S-90-0579, filed December 14, 1998 (U.S. District Court for the Eastern District of California). Among other things, the revisions require each local child support agency to issue standardized forms—a “Monthly Statement of Collections and Distribution,” CS 916, dated 03/02 and a “Notice of Important Information,” CS 917, dated 03/02—to each custodial party who is a recipient of child support services.

Pursuant to new section 119184, each local child support agency must send statements and notices to all custodial parties within 45 days from the end of the statement period when there is either a collection or distribution of support during the period covered by the statement. Among other things, the statement indicates all payments received by the local child support agency from a noncustodial parent during the applicable month, and how the money was distributed. The notice provides recipients with an explanation of the monthly statement.

On July 5, 2002, DCSS published notice of its intent to adopt these changes on a permanent basis. The public comment period closed on August 19, 2002. At this writing, the permanent changes await review and approval by OAL.

***Child Support: Bonding of Employees.*** On July 22, 2002, DCSS adopted—on an emergency basis—section 111550, Title 22 of the CCR, to implement federal law by setting forth requirements and criteria for bonding of employees who receive, disburse, handle, or otherwise have access to any child support collections under the child support enforcement program required by Title IV-D of the Social Security Act. Section 111550(a) defines which employees require bonding, the requirements for sufficient bond amounts, and compliance requirements of other public and private agencies under a plan of cooperation or service agreement. Section 111550(b) provides that bonding requirements may be satisfied by a county’s self-bonding or self-insurance program if the amount is adequate to cover any loss of child support funds as a result of employee dishonesty. Section 111550(c) sets forth the criteria for certification for counties that self-bond or self-insure. Section 111550(d) provides that each child support agency must provide proof of bonding upon request. Section 111550(e) states that bonding requirements do not limit the ultimate liability of the Title IV-D agency for losses of support collections from the state’s program.

On August 9, 2002, DCSS published notice of its intent to adopt these changes on a permanent basis. At this writing, the permanent revisions await review and approval by OAL. ***Child Support: Case Closure.*** On March 25, 2002, DCSS—on an emergency basis—adopted sections 110385, 110449, 110554, 118020, and 118203, Title 22 of the CCR, and repealed sections 12-229, 12-300, 12-301.0 -12-301.3, and 12-302.0–.5 of the MPP, in order to establish a standard process for the case closure of child support service cases. These sections define terms and phrases pertaining to the child support program and the case closure process, and specify the requirements for case closure, including closing a case, reopening a closed case, record retention and disposal, and releasing, removing, rescinding, and terminating establishment and enforcement actions when a case is closed.

Among other things, new section 118203 requires each local child support agency to establish and use a system for closing Title IV-D cases and shall close any

case when it meets at least one of the following fifteen case closure criteria:

- there is no longer a current support order and no arrearage payments were made in the preceding twelve-month period, and assigned and unassigned arrears total less than \$500 or arrears are unenforceable under state law;

- the noncustodial parent or alleged father is deceased and no further action can be taken, including a levy against the estate;

- paternity cannot be established because of specified factors;

- the noncustodial parent's or alleged father's residence, employment address, earnings, and assets are unknown and the agency has made a diligent effort to find that information;

- the local child support agency determines that the noncustodial parent has no earnings or assets which could be levied or attached for support and the noncustodial parent cannot pay support for the duration of the child's minority for specified reasons;

- the noncustodial parent lives in a foreign country, as specified;

- the local child support agency has provided non-Title IV-D location-only services, as requested by the custodial parent, legal guardian, attorney, or agent of a child who is not receiving public assistance, whether or not such services were successful;

- a recipient of services who is currently not receiving public assistance under Title IV-A requests closure of a case and there is no assignment for medical support and no assigned arrears;

- the court determines it would be inappropriate to establish a child support order for a case in which retroactive child support for past assistance paid is the only issue;

- there has been a finding of good cause, as specified, or other exceptions to cooperation with the local child support agency, and the state or county welfare department (CWD) has determined that support enforcement may not proceed without risk of harm to the child or caretaker;

- except as specified, a local child support agency is unable to contact a non-Title IV-A recipient of services over a sixty-day period after having made at least one attempt to contact the recipient of services by telephone, sending a letter by first-class

mail to the last known address of the recipient of services, and after using the Department of Motor Vehicles and other locate sources to locate the recipient of services;

- a non-Title IV-A recipient of services, except a medically-needy only recipient, is uncooperative and an action by the recipient of services is essential for the next step in providing Title IV-D services;

- a recipient of services has moved to another county or state and applied for services in the other county or state, and the local child support agency documents in the case record that contact was made with the other county or state to confirm that the recipient of services has applied for services in the other county or state, and, in the case of an inter-county transfer, to confirm that the case, with its support order and arrears, has been transferred;

- a local child support agency documents failure by an initiating state in an interstate case to take an action which is essential for the next step in providing Title IV-D services; or

- a Title IV-D case is erroneously opened and no Title IV-D services can be appropriately provided for the case, and there is clear and complete documentation in the case file explaining why the case was erroneously opened and why no Title IV-D services can be provided.

On May 10, 2002, DCSS published notice of its intent to adopt these provisions on a permanent basis. At this writing, the permanent regulations await review and approval by OAL.

***Child Support: Plans of Cooperation.*** Federal and state law require DCSS to negotiate and enter into plans of cooperation with local child support agencies in order to carry out the requirements of the state plan and provide services relating to the establishment of paternity, and the establishment, modification, and enforcement of child support, spousal support, and medical support.

On May 2, 2002, DCSS—on an emergency basis—adopted sections 110411, 110625, 111110, 111120, 111210, 111220, and 111230, Title 22 of the CCR, and repealed sections 12-000 and 12-003 and Appendix I of the MPP. These regulatory changes establish requirements for consistent state/county plans of cooperation and

local plans of cooperation provisions to promote uniform quality of child support services statewide and from year to year, and include the following provisions:

- Section 111110 specifies the minimum provisions of the State/County Plan of Cooperation, which includes the local child support agency's obligations and standards of performance to locate custodial and non-custodial parents, establish paternity, establish, modify, and enforce child support and medical support orders, enforce spousal support orders, collect and distribute child support, prepare reports, and maintain records. Section 111110 further requires that the plans have a clear description of the specific duties and functions of each party involved, the financial arrangements between the parties, an agreement by each party to fulfill their respective obligations, conditions for revision or renewal of the plan, and circumstances under which a plan may be terminated, *et al.*

- Section 111110(d) requires an annual automation cooperation agreement between DCSS and the local child support agencies to "specify the responsibilities, activities, milestones, and consequences in regard to automation." Section 10081 also provides authority for DCSS to receive federal funding for its child support services automation system.

- Section 111120 specifies the administrative requirements of the State/County Plans of Cooperation, which include duration, renewal, amendment, signature, deadline, and potential consequences for failing to meet administrative requirements.

- Section 111210 specifies the circumstances under which a local child support agency is authorized to subcontract limited child support obligations to other county agencies by entering into Local Plans of Cooperation. The local child support agency remains accountable to DCSS for operating, supervising, managing, or overseeing Title IV-D functions under the provisions of the plan.

- Section 111220 specifies the minimum requirements of a Local Plan of Cooperation, which establishes a framework to maintain consistency statewide and from year to year.

- Section 111230 sets forth the criteria DCSS utilizes to approve Local Plans of Cooperation, including appropriateness, necessity, and cost reasonableness.

On June 14, 2002, DCSS published notice of its intent to adopt these provisions

on a permanent basis. At this writing, the permanent changes await review and approval by OAL.

**Director Qualifications.** Family Code section 17304(f) requires DCSS to establish qualifications for the administrator of each local child support agency. On August 14, 2002, DCSS adopted—on an emergency basis—new section 111560, Title 22 of the CCR, setting forth minimum qualifications for directors of local child support agencies. The new provision states that the director shall possess the equivalent to a bachelor's degree from an accredited college or university in business or public administration, psychology/sociology or related disciplines, or four years experience performing duties in a public agency of which two years were in a senior level administrative or management position.

Section 111560 also provides that when considering a director appointment, the appointing authority shall consider knowledge of government programs at the federal, state, or local level; ability to direct and administer the local child support agency to assure its effective and efficient operation; ability to work cooperatively with diverse interests groups, including advocacy groups, governmental organizations, and private entities; knowledge of the applicable state and federal civil and criminal laws, rules, and regulations relative to a child support program and the delivery of child support services; knowledge of the practices and procedures of the local courts relative to a child support program; ability to carry out the county's personnel management program; and ability to direct and administer the county local child support agency activities to assure compliance with applicable state and federal laws, regulations, and policies.

On October 4, 2002, DCSS published notice of its intent to adopt this section on a permanent basis. At this writing, DCSS' permanent adoption of the regulation awaits review and approval by OAL.

**Immediate Enforcement Actions.** Federal and state law require DCSS to implement administrative procedures and requirements for immediate enforcement actions, which include income withholding orders, medical support notices, real property liens, and reporting to credit agencies. On October 21, 2002, DCSS adopted—on an emergency basis—new sections 110226, 110242, 110251, 110336, 110337, 110355, 110485, 110547, 110615, 116004, 116018, 116036, 116038, 116042, 116061, 116062,

116063, 116110, 116102, 116104, 116106, 116108, 116110, 116114, 116116, 116118, 116120, 116122, 116124, 116130, 116132, 116134, and 116140 and amended sections 110250, 110474, 110660, Title 22 of the CCR. DCSS also repealed section 117042, Title 22 of the CCR, and MPP sections 12-107.3, 12-224.3, 12-228.7, 12-228.8, and 12-601–12-606.

The new provisions, among other things, define specific terms relating to immediate enforcement actions; specify the general requirements and timeframes necessary to prepare, serve, and terminate income withholding orders and medical support notices; specify the actions a local child support agency must take when a hearing regarding an income withholding order is requested and conducted; specify employer non-compliance notification requirements and contempt procedures for income withholding orders and medical support notices; specify the requirements and circumstances under which a national medical support notice may be processed and terminated; specify requirements for recording, creating, and releasing real property liens; specify circumstances under which to file a satisfaction of judgment and/or a substitution of payee; and specify requirements and timeframes for reporting child support obligations and arrearage to credit reporting agencies.

At this writing, DCSS has not published notice of its intent to adopt these changes on a permanent basis.

***Impact on Children:*** As has been noted in previous issues of the *Children's Regulatory Law Reporter*, momentous legislation enacted in 1999 and 2000 removed child support collection jurisdiction from California's district attorneys, and vested it with the new DCSS at the state level. The regulatory packages discussed above reflect DCSS' continued efforts to establish a new state structure which will facilitate the uniform provision of child support services by counties.

### **[Update on Previous Rulemaking Packages](#)**

#### **[Noncitizen Eligibility Certification Provisions](#)**

On May 24, 2001, DSS amended sections 63-102, 63, 300, 63-301, 63-402, 63-405, 63-501, 63-502, 63-503, 63-504, and 63-507 of the MPP, on an emergency basis, in order to effect several changes which impact the CalWORKs and Food Stamps programs. Among other things, the modifications define the term "inaccessible

resource,” clarifying that a resource or vehicle is exempt from consideration if its equity value is \$1,500 or less; define the term “indigent noncitizen” to mean a person who is sponsored but not able to find housing and food; provide a new computation to arrive at net self-employment income earned by members of a food stamp household; and exempt battered noncitizens from the sponsorship income deeming rules for a twelve-month period. On May 25, 2001, DSS published notice of its intent to adopt these changes on a permanent basis. On October 1, 2001, DSS readopted the changes on an emergency basis. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 6.)

**Update:** On February 21, 2002, OAL approved DSS’ permanent adoption of these changes.

### **CalWORKs Inter-County Transfers**

On November 30, 2001, DSS published notice of its intent to amend its inter-county transfer (ICT) regulations, which were established to ensure continuous services and cash aid to CalWORKs recipients when they move from one county to another. Among other things, the changes would set forth timelines counties must follow to ensure that necessary documentation and the responsibility for the provision of benefits is transferred on a timely basis; specify appropriate eligibility criteria to ensure that continuing CalWORKs recipients are not erroneously discontinued from aid; require the receiving county to initiate contact with the recipient to provide assistance with establishing aid in the new county of residence. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 7.)

**Update:** On July 22, 2002, OAL approved DSS’ permanent adoption of these changes.

### **Child Support: Program Administration and Complaint Resolution**

On June 26, 2001, DCSS adopted, on an emergency basis, new Division 13, Title 22 of the CCR (commencing with section 110000), regarding the child support program administration and complaint resolution process. Among other things, the new regulations specify which records are necessary for the administration of the Title IV-D program and must be maintained by local child support agencies; which information

used in the administration of the Title IV-D program is considered confidential and must be safeguarded; which information may be disclosed and the entities to whom disclosure may be made; the length of time Title IV-D records must be retained and the exceptions to those retention requirements; and requirements related to the disposal of Title IV-D records. The new regulations also set forth the customer service requirements that each local child support agency must ensure are met, and specify each local child support agency's responsibility to implement a complaint resolution process, not to discourage a complainant from filing a complaint or requesting a state hearing, and not to refuse to assist a complainant in requesting a state hearing.

On August 10, 2001, DCSS published notice of its intent to adopt these regulations on a permanent basis. The Department subsequently modified its proposal and released the revised sections for an additional fifteen-day public comment period. On December 18, 2001, OAL approved DCSS' readoption of these regulations on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 7.)

**Update:** On July 24, 2002, OAL approved DCSS' permanent adoption of these changes.

### **Child Support: Administrative Reporting, Quality Control, Performance Standards**

On September 6, 2001, DCSS adopted sections 111900, 111910, 111920, 121100, 121120, and 121140, Title 22 of the CCR, on an emergency basis, setting forth data submission requirements of local child support agencies in order to evaluate and maintain a suitable level of performance. The new provisions define the type of data required to be submitted, articulate the correct process to ensure accuracy, explain the requirements relating to both the federal incentive and state performance measures, denote the consequences of failure to meet due dates, emphasize cooperation of the local child support agency during audits and reviews, and specify the retention requirements for all of the reports submitted to DCSS. On October 19, 2001, DCSS 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. 3, No. 2 (2002) at 8.)

**Update:** On March 5, 2002, DCSS readopted these regulations on an

emergency basis. On October 9, 2002, OAL approved DCSS' permanent adoption of these regulations.

### **Child Support: Location of Persons or Assets**

On September 4, 2001, DCSS adopted new sections 110413, 110550, 113100, 113200, and 113300, Title 22 of the CCR, on an emergency basis, concerning the location of persons or assets for purposes of securing the collection of child support obligations. Specifically, the regulations clarify terms related to the location of noncustodial parents, outline the appropriate process whereby local child support agencies can locate noncustodial parents whose physical whereabouts are unknown, denote the requirements of enlisting the assistance of the Federal Parent Locator Service for Non-Title IV-D Locate Only Requests and Non-Title IV-D Parental Kidnapping/Child Custody Locate Only Requests, and explicate the confidentiality expectations related to the information received from locate resources. On September 21, 2001, DCSS 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. 3, No. 2 (2002) at 9.)

**Update:** On February 11, 2002, DCSS readopted these regulations on an emergency basis. On September 30, OAL approved DCSS' permanent adoption of these regulations.

### **Child Support: Case Intake Process**

On September 10, 2001, DCSS adopted new sections 110041, 110098, 110284, 110299, 110428, 110430, 110473, 110539, 112002, 112015, 112025, 112034, 112035, 112100, 112110, 112130, 112140, 112150, 112152, 112154, 112155, 112200, 112210, 112300, 112301, and 112302, and amended sections 110042, 110431, and 110609, Title 22 of the CCR, and repealed sections 12-103.1-.24, 112-110, and 12-220 of the MPP, on an emergency basis. These sections are designed to establish a standard process for the initiation of child support services cases. Among other things, the provisions define terms and phrases pertaining to the child support program and the case intake process, articulate the application and referral processes, assert the requirements of case opening, enumerate the appropriate procedures for case processing, stipulate the guidelines for cooperation, and set forth the procedure for

denoting the existence of family violence in a particular case. On October 19, 2001, DCSS published notice of its intent to adopt these provisions on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 10.)

**Update:** On February 21, 2002, DCSS readopted these regulations on an emergency basis. On August 15, 2002, OAL approved DCSS' permanent adoption of these provisions.

### **Child Support: Interstate Cases**

On September 24, 2001, DCSS adopted new sections 110250, 110374, 117016, 117019, 117021, 117025, 117030, 117036, 117042, 117047, 117049, 117052, 117054, 117064, 117074, 117080, 117083, 117085, 117089, 117091, 117094, 117200, 117300, 117301, 117302, 117303, 117400, 117401, 117402, 117403, 117404, 117405, 117406, 117407, 117500, 117501, 117502, 117503, 117504, and 117600, Title 22 of the CCR and repealed sections 12-104.433 through 12-104.5 and 12-226 of the MPP, on an emergency basis, in order to set forth the requirements imposed on local child support agencies involved in interstate efforts to collect child support. Specifically, these regulations define terms related to the processing of interstate cases, articulate the requirements of California as both the initiating or responding state in regard to the processing of Title IV-D interstate cases, clarify the conditions under which a local child support agency may execute long-arm jurisdiction or direct enforcement activities in place of a two-state interstate process, and incorporate in regulation provisions of the Uniform Interstate Family Support Act. On November 2, 2001, DCSS 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. 3, No. 2 (2002) at 11.)

**Update:** On March 19, 2002, DCSS readopted these regulations on an emergency basis. At this writing, DCSS' permanent adoption of these regulations awaits review and approval by OAL.

## **NUTRITION**

## New Rulemaking Packages

### **Food Stamp Reauthorization**

On May 13, 2002, President Bush signed the Farm Security and Rural Investment Act of 2002 into law. This Act contains the Food Stamp Reauthorization Act of 2002, which legislates mandatory changes to the Food Stamp Act of 1977. Most of these mandatory changes must be implemented effective October 1, 2002. On September 30, 2002, DSS amended—on an emergency basis—sections 63-403, 63-405, 63-409, and 63-502 of the MPP to implement the mandatory federal changes to the Food Stamp Program. Among other things, the changes restore food stamp eligibility to all legal immigrant children, regardless of date of entry to U.S., and to all legal immigrant adults who have been in the U.S. for five years; restore certain disabled noncitizens to federal food stamp eligibility; increase the resource limit for households with a disabled member from \$2,000 to \$3,000; and restructure the standard deduction from one amount for all households to 8.31 percent of the net income limit, which varies based on household size.

On October 4, 2002, DSS published notice of its intent to adopt these changes on a permanent basis; the Department held a public hearing on the rulemaking package on November 19, 2002 in Sacramento. At this writing, the permanent revisions await review and approval by OAL.

***Impact on Children:*** The federal revisions benefit children in various ways. In addition to restoring food stamp eligibility to all legal immigrant children, effective in federal fiscal year 2004, they eliminate the deeming requirements for immigrant children that count the income and resources of the immigrant's sponsor when determining food stamp eligibility and benefit amounts for the immigrant child, as well as the three-year deeming requirements for children.

### **Electronic Benefit Transfer (EBT) Regulatory Changes**

**(1) Implementation of EBT Regulations.** An on-line EBT system is a benefit issuance system in which benefits are stored in a central computer database and electronically accessed by cardholders at a point-of-sale terminal, automated teller machine, or other electronic fund transfer device utilizing a reusable plastic card. EBT is a proven technology and is operating in a majority of states.

AB 1542 (Chapter 270, Statutes of 1997), codified in Welfare and Institutions Code section 10065 *et seq.*, establishes the authority for a statewide EBT system to issue food stamp benefits and, at the county's option, the issuance of cash benefits. On May 1, DSS adopted—on an emergency basis—sections 16-001, 16-003, 16-005, 16-010, 16-015, 16-100, 16-105, 16-120, 16-130, 16-200, 16-201, 16-215, 16-300, 16-301, 16-310, 16-315, 16-320, 16-325, 16-400, 16-401, 16-410, 16-500, 16-501, 16-505, 16-510, 16-515, 16-517, 16-520, 16-600, 16-610, 16-700, 16-701, 16-750, 16-800, 16-801, 20-300, 44-300, 44-302, and 44-304 of the MPP, to implement pertinent federal provisions regarding the operation of an EBT issuance system for the Food Stamp Program; implement requirements in the Welfare and Institutions Code applicable to EBT benefit issuance for food stamps and cash benefits; and specify requirements regarding the EBT system, benefit accounts, EBT benefits, benefit transactions, adjustments, settlement, reconciliation and reporting, EBT card and PIN, training, and fraud.

On May 3, 2002, DSS published notice of its intent to adopt these provisions on a permanent basis. On August 30, 2002, DSS readopted the provisions on an emergency basis. At this writing, the permanent provisions await review and approval by OAL.

**(2) EBT Benefit Adjustments.** On July 24, 2002, DSS adopted—on an emergency basis—section 16-705 (Benefit Adjustments for EBT System Errors), Division 16 of the MPP. According to section 16-705.1, the benefit adjustment for EBT system errors is the process where a debit or credit is applied to an EBT account to correct a system error that is identified in the settlement process. This is carried out by an EBT Contractor, who adjusts the out-of-balance conditions that occur during the benefit redemption or settlement process as a result of a system error. Sections 16-705.3 and 16-705.4 provide that a recipient-initiated food stamp and/or cash adjustment must be requested within 90 calendar days of the original error transaction. Whereas, under section 16-705.5, a retailer- or commercial institution-initiated food stamp or cash benefit adjustment must be addressed by the EBT Contractor no later than 15 calendar days from the date of the original error transaction. Section 16-705.6 states the EBT Contractor must notify the recipient of any errors, and, if requested by the recipient, a

fair hearing process must be provided.

On August 9, 2002, DSS published notice of its intent to adopt section 16-705 on a permanent basis. At this writing, the permanent adoption of section 16-705 awaits review and approval by OAL.

**Impact on Children:** The federal government first tested the electronic benefit system in the 1980s in Pennsylvania, Minnesota, Maryland and New Mexico. Forty-one states use the electronic food-stamp cards, as do Alameda, San Bernardino, San Diego and Yolo counties in California. Many experts contend that the debit cards have advantages over food stamps. For example, the new system is expected to cut down on fraud in which someone illegally barter food stamps for cigarettes, alcohol or drugs; cards, which must be used with personal identification codes, might be harder to trade than paper coupons; and cards might lessen the stigma some people face using food stamps. Finally, EBT cards will eliminate costs associated with printing and disbursing paper coupons. Overall, the switch to the EBT system is expected to benefit food stamp recipients, over 70% of whom are children.

### **Noncitizen Eligibility Certification Provision Amendments**

In November 2000, the U.S. Department of Agriculture (USDA) issued its final rule amending the Food Stamp Program regulations to implement several provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA), as well as subsequent amendments to the PRA. The federal regulations are referred to as the “Noncitizen Eligibility and Certification Provisions,” and became effective in January 2001. Included within the final federal regulations were specific provisions that were subject to federal Office of Management and Budgets (OMB) approval before they could be implemented. OMB approved the provisions that follow in September 2001, and required they be implemented by the states no later than March 10, 2002.

On February 28, 2002, DSS amended—on an emergency basis—sections 63-100, 63-102, 63-103, 63-300, 63-300, 63-301, 63-500, and 63-503 of the MPP, to make the following changes to the Food Stamp Program:

- The changes set forth less restrictive application procedures for scheduling application interviews. The regulations discuss the procedure for scheduling the initial application interview and the procedures that county welfare departments (CWDs) must

follow to allow for a second interview. Specifically, if the applicant misses his/her first interview, it is the household's responsibility to reschedule a second interview. When the first scheduled interview is missed, the CWD is required to send a Notice of Missed Interview informing the applicant that the interview was missed, that the applicant is responsible for rescheduling, and the consequences for failure to reschedule within 30 days of the application date. If the applicant reschedules within 30 days, the application is not denied. If the household does not reschedule, the CWD can send a denial notice on the 30<sup>th</sup> day following the application date. This ensures that the CWD holds the food stamp application open throughout the processing time frame of 30 days.

- The revisions specify the recipient's right to be notified in advance if the county takes action to terminate the case during the twelve-month certification period. Within the certification period, the CWD must clearly notify the food stamp household of any information that is needed by issuing a Request for Information form and allow 10 days for the household to respond before any action can be taken against the household, such as termination of benefits.

- The amended language includes a new requirement for determining whether a sponsored noncitizen is considered indigent. A determination must be made by the CWD as to whether the noncitizen's income, including income given to the sponsored noncitizen by the sponsor, exceeds 130% of the poverty guideline for the household size. This regulation specifies that if the income is below 130% of the poverty guideline, the sponsored noncitizen is considered indigent without adequate income to obtain food and shelter, and food stamp benefits will be provided. When the sponsored noncitizen is found to be indigent, only the actual income the sponsored noncitizen receives directly from the sponsor or others is counted as income. This eliminates the deeming of income requirement of the sponsor to the sponsored noncitizen when income of the sponsored noncitizen is less than 130% of the poverty level. Deeming of the income to the sponsored noncitizen from the sponsor will now only occur when the income of the sponsored noncitizen exceeds 130% of the poverty level. This new indigent determination will provide sponsored noncitizens, who find themselves in a situation where they are unable to obtain food and shelter, with a means to meet their basic needs.

On April 5, 2002, DSS published notice of its intent to make these changes on a permanent basis. The Department held a public hearing on the proposals on May 23, 2002. At this writing, the permanent changes await review and approval by OAL.

***Impact on Children:*** As noted above, over 70% of food stamp recipients are children. To the extent these regulatory changes require CWDs to be more accommodating to parents in the food stamp application process, they will have a beneficial impact on the children involved.

### **California Food Assistance Program**

Among other things, AB 429 (Chapter 111, Statutes of 2001) amended section 18930(b)(4) of the Welfare and Institutions Code to repeal the September 30, 2001, sunset date that allowed eligibility to the California Food Assistance Program (CFAP) for certain legal noncitizens that entered the U.S. on or after August 22, 1996.

On March 1, 2002, DSS published notice of its intent to amend section 63-403 of the MPP, to permanently restore CFAP eligibility to certain legal noncitizens who entered the U.S. on or after August 22, 1996. As a result of these regulatory changes, CWDs will first check to see if the legal noncitizen is eligible for federal benefits based solely upon immigration status. If not, the noncitizen will automatically be eligible for the CFAP, regardless of their date of entry, and for an indefinite period of time. The repealed categorical requirements of section 63-403 will no longer be a factor in determining noncitizen eligibility for the CFAP because the CWDs will only need to check the federal requirements for participation determination.

On March 6, 2002, DSS adopted these changes on an emergency basis. DSS readopted the changes on an emergency basis on July 26, 2002 and September 30, 2002. At this writing, the permanent provisions await review and approval by OAL.

***Impact on Children:*** To afford some level of benefit protection to certain legal noncitizens that were deemed ineligible under the PRA, California implemented CFAP effective September 1, 1997. CFAP is a state-funded food stamp program that provides food stamp benefits to certain legal noncitizens who were deemed ineligible for federal food stamps benefits solely due to their immigration status. Despite the fact that all children (both citizens and legal immigrants) retain eligibility for food stamp benefits either through the current state or federal program, California Food Policy Advocates

(CFPA) reports that many of these children live in “mixed” households where the adult heads of household would have lost benefits with CFAP. The average food stamp recipient in California receives \$71 per month in coupons used to supplement the family’s food budget, which works out to \$0.78 per meal. According to CFPA, the food purchasing power lost when food stamps are cut is substantial, and potentially places these households—both single adults and households with children—at risk for increased food insecurity and hunger.

For a more detailed discussion of CFAP, see the Children’s Advocacy Institute’s *California Children’s Budget 2002–03* (San Diego, CA; June 2002) at 3-12 (available at [www.caichildlaw.org](http://www.caichildlaw.org)).

## ***HEALTH / SAFETY***

### **New Rulemaking Packages**

#### **Medi-Cal Provider Rates**

Welfare and Institutions Code section 14105(a) authorizes the Department of Health Services (DHS) to establish maximum reimbursement rates for health care services provided by Medi-Cal, and requires DHS to adopt regulations necessary to carry out this provision. Section 14105(a) requires DHS to adopt regulations establishing reimbursement rates that reflect budgeting decisions of the Legislature within one month after enactment of the Budget Act or any other appropriation that changes the level of funding for Medi-Cal services. AB 1740 (Chapter 52, Statutes of 2000), the 2000–01 Budget Act, required DHS to pay increased rates beginning August 1, 2000.

On July 16, 2002, DHS amended—on an emergency basis—sections 51503, 51503.2, 51504, 51505.1, 51505.2, 51505.3, 51507.1, 51507.2, 51507.3, 51509, 51509.1, 51514, 51507, 51521, 51527, 51529, and 51535.5, Title 22 of the CCR, in order to set the maximum reimbursement rates as appropriated by the Legislature in AB 1740 for selected physician and related services, and allied health services. The rate changes affected by this regulatory action include an average 16.7% increase for physician services, which includes a 40% increase for services provided in emergency rooms; 33% increase for California Children’s Services (CCS) physician services; 11%

increase for comprehensive perinatal services; 30% increase for neonatal intensive care; a 30% increase for psychology services; 30% increase for physical, occupational, and speech therapy and audiology services; 10% increase for respiratory care practitioners; 130% increase for chiropractic services; 54% increase for mammograms; 50% increase for breast pumps; 20% increase for medical transportation services; 100% increase for hearing aids and dispensing fee (the 100% increase for hearing aids includes a 30% increase for dispensing fee); and an average 19% increase for local educational agency (LEA) services. DHS has been paying these increased rates for services provided on or after August 1, 2000, the effective date of this emergency rulemaking.

In adjusting the rates, DHS focused on providers who received the lowest level of reimbursement rates—less than 38% of Medicare rates—and raised those rates to at least 43% of Medicare rates. DHS gave an average 13% increase to providers in the intermediate level (between 38% and 80% of Medicare rates), bringing those providers up to a maximum of 80% of Medicare. DHS did not change the rates of providers who receive 80% or more of Medicare rates. DHS allocated 56% of the funds on the intermediate level provider rates and 44% of the funds on the low level providers rates.

This regulatory action also amends section 51503, Title 22 of the CCR, to eliminate the incorporation by reference of the 1969 California Relative Value Studies (CRVS) in describing physician rates, and replace it with a new document entitled “Schedule of Medi-Cal Physician Rates,” published in June 2002 by DHS. The new schedule describes the terms and guidelines for rate payments, and includes a table of conversion indicators and factors, valid Medi-Cal physician modifiers, and a table of unit values and indicators. DHS decided to replace the CRVS with the new schedule because many significant advancements in medical care and terminology have occurred since 1969, and it became difficult to use the CRVS as a basis for a new rate when there was no corresponding nomenclature that defined the procedure.

On July 26, 2002, DHS published notice of its intent to adopt the changes on a permanent basis. DHS held a public hearing on these proposed regulations on September 13, 2002. At this writing, the final rulemaking package awaits adoption by DHS and review and approval by OAL.

While DHS' rulemaking process was pending, the Legislature was considering AB 442 (Committee on Budget). Section 103 of AB 442—a large budget trailer bill—would require DHS to eliminate the August 2000 rate increases discussed above, as of August 1, 2002, with the exception of the rates for California Children's Services Program, home health services, shift nursing, non-emergency medical transportation, and family planning services. AB 442's rate reductions also would not apply to rates paid to certain institutional providers, such as general acute care hospitals, that may provide any of the above mentioned services.

On September 30, 2002, Governor Davis signed into law both AB 442 and AB 3006, which repeals section 103 of AB 442, resulting in the maintenance of the 2000 increases to provider rates. The proposed reductions in rates would have saved the state \$360 million annually. In his signing message, the Governor acknowledged that low provider reimbursement rates reduce access to medical care by reducing the number of physicians willing to service Medi-Cal patients, and noted that "rolling back rates to pre-August 2000 levels would be offset by costs associated with increases in emergency room visits, administrative costs of implementing rate reductions, and the loss of physicians who would surely leave the Medi-Cal program."

**Impact on Children:** This fee increase is the first general across-the-board increase to Medi-Cal rates paid to physicians and allied health care providers in over fifteen years. Even so, these new rates still fall below the applicable federal upper payment limits, evidenced by provider rates paid through Medicare, the federal health care program for the elderly and disabled.

Child health care providers and advocates are becomingly increasingly concerned that children are not receiving adequate and timely access to health care under the Medi-Cal system. 42 U.S.C. section 1396a(a)(30)(A), Title XIX of the Social Security Act, the federal Medicaid Act, states that each state plan must "assure that payments are consistent with efficiency, economy, and quality of care and **are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area**" (emphasis added). This federal law is often referred to as the "equal access" standard for Medicaid. In essence, it means that

patients treated under Medicaid are entitled to the same quality of care and access to timely care as are individuals in the general population, which includes those covered by private health care insurance. The states are responsible for complying with this federal mandate. However, recent surveys and peer review studies on this issue show that children are not receiving equal access to health care services, as mandated by federal law.

Published in 2001, the American Academy of Pediatrics' Medicaid Reimbursement Survey showed that California's reimbursement rates for physicians and other health care providers who treat children are significantly less than what is paid under Medicare and are in many instances less than the national average fee-for-service rates. (These figures are derived from fee-for-service rates and do not exist for those Medi-Cal patients treated under a managed care setting, which leads to obvious problems in measuring compliance with federal law.)

Several studies have linked low physician provider rates with inadequate access to health care for children. One study entitled "*Access to Orthopedic Care for Children with Medicaid Versus Private Insurance in California*" by Dr. David Skaggs, published in Pediatrics in June 2001, concluded that children covered by Medi-Cal had significantly less access to timely orthopedic care than individuals covered by private insurance. Another study entitled "*Factors That Influence the Willingness of Private Primary Care Pediatricians to Accept More Medicaid Patients*" by Dr. Steve Berman, published in Pediatrics in August 2002, ranks California one of the lowest of all states for Medi-Cal provider rates, stating that only 33.1% of pediatricians participate in Medi-Cal in California. The study also finds a direct correlation between low provider reimbursement rates and lack of equal access to medical care and treatment, concluding that California's low provider rates result in poorer access by Medi-Cal patients.

The Legislative Analyst's Office (LAO) provides fiscal and policy advice to the state legislature. A recent LAO Report entitled "*A More Rational Approach to Setting Medi-Cal Physician Rates*" confirmed that rates paid to physicians for services provided under Medi-Cal are low compared to the rates paid by the federal Medicare Program and other healthcare purchasers. LAO also found that the Medi-Cal program has not met state and federal requirements for setting rates ensuring reasonable access to

health care. LAO found that DHS has no established, routine method for the periodic evaluation and adjustment of physician rates. In addition, LAO analyzed the relationship between rates and healthcare, and found that higher physician fees can improve both access to and quality of care received. LAO proposed that Medi-Cal rates be increased to 80% of Medicare rates.

Child advocates argue that the contrast between medical services for the elderly *vis-a-vis* children has the following context: (a) children incur less than one-fifth the per capita medical costs of the elderly; (b) senior citizens receive basic medical coverage, while almost 20% of the state's children are uncovered and must rely on emergency room *post hoc* treatment; (c) the state has available funds to cover almost all of the state's children at a one-third state match, but will send \$700 million back to Washington and fail to cover most of those who were intended for coverage; and (d) the child poverty rate remains at well over twice that of seniors (who are covered by social security). Nevertheless, proposed new public investment remains focused on additional pharmaceuticals funding for seniors.

Further, in December 2002, Governor Davis reneged on his promise to hold steady the already depressed Medi-Cal rates, instead proposing a 10% across-the-board cut, including CCS services for children. Those and other changes maintain or increase the unlawful disparity between compensation for pediatric medical services under Medi-Cal and identical or comparable services for the elderly under Medicare.

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 2002-03* (San Diego, CA; July 2002) at 4-6, 4-30-4-47, available at [www.caichildlaw.org](http://www.caichildlaw.org).

### **Newborn Screening Program**

**Fee Increase #1.** The Hereditary Disorders Act (Health and Safety Code section 125000, *et al.*) requires that all newborns in California be screened for heritable metabolic disorders, sickle cell disorders, and hereditary hemoglobinopathy. DHS must establish fees to support the operation of this program pursuant to Health and Safety Code sections 124977, 124996, and 125000(b). The newborn screening program is required to be fully supported by the fees collected by DHS for testing pursuant to

Health and Safety Code sections 124996 and 125000(b). Section 6508, Title 17 of the CCR, implements this legislation.

On December 28, 2001, DHS amended, on an emergency basis, section 6508(b), Title 17 of the CCR, to increase the fee for newborn screening program services from \$42 to \$56. On January 18, 2002, DHS published notice of its intent to amend section 6508(b) on a permanent basis. According to DHS, such a fee increase is necessary to keep the program consistent with medical standards, medical knowledge, and the mandates of the Hereditary Disorders Act. On May 16, 2002, OAL approved DHS' permanent adoption of this fee increase.

**Fee Increase #2.** On June 28, 2002, DHS again amended section 6508(b) on an emergency basis, increasing the fee for newborn screening program services from \$56 to \$60. On July 12, 2002, DHS published notice of its intent to amend the section on a permanent basis. According to DHS, this additional fee increase was also necessary in order to keep the program consistent with medical standards, medical knowledge, and the mandates of the Hereditary Disorders Act. At this writing, OAL has not approved the permanent revision of section 6508(b).

**Impact on Children:** The total fiscal impact of these changes on third-party payers, as well as the uninsured, will be over \$5.8 million—a 42.8% increase. CAI is unaware of any other government program fee increase of this magnitude that so heavily impacts the poor. This fee increase also contributes to rising costs for insured individuals because insurance companies will likely pass on the increase in the form of higher premiums and co-payments. No general fund monies cover the cost of newborn fees for those who are otherwise not insured through private health insurance or some other public health care plan, yet the state's objective is to screen each child born in California in order to prevent or cure certain hereditary disorders, thus, preventing a future burden on the state's health care system. The climate relating to access to medical care for the uninsured worsens each time a self-funding public health program significantly increases the cost of services. The state is not fully using federal matching funds (as evidenced by California's \$740 million give-back in September 2002), yet the uninsured are denied health care and continue to pay additional costs just to receive basic services such as newborn screening. Our state's fragmented system of public

health programs must be re-evaluated and replaced by a system of universal coverage of all children with parental assessment post hoc on a sliding scale based upon income.

### **Access for Infants and Mothers (AIM) 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 three sources: 88% through the Cigarette and Tobacco Products Surtax Fund (Proposition 99); 6% through the state's general fund and federal funds from Title XXI of the Social Security Act; and 6% through subscriber contributions. The AIM program covers pregnant women with family incomes above 200%, but not more than 300%, of the federal poverty level (FPL). Women with family incomes under 200% of the federal poverty level qualify for no-cost Medi-Cal services for their pregnancy, which is funded by state and federal monies. AIM requires a premium, which is typically 2% of the annual gross family income. Payment of \$100 is required for the infant's second year of coverage, unless records of up-to-date immunizations are submitted before the infant's first birthday. The additional annual payment, in this case, is reduced to \$50.

MRMIB estimates that 25% of women who apply under the AIM program are eligible for no-cost Medi-Cal pregnancy-related services. The Board is trying to balance the need for simplicity in eligibility determinations for the AIM program with the need for mirroring Medi-Cal eligibility requirements. According to MRMIB, its goal is to merge AIM and Healthy Families Program eligibility determinations under one administrative vendor by January 2004. Since Healthy Families covers children above 100% through 250% of the FPL, many infants leaving AIM at age two are eligible for Healthy Families.

On May 31, 2002, MRMIB published notice of its intent to amend sections 2699.100, 2699.200, 2699.201, 2699.202, 2699.205, 2699.206, 2699.207, 2699.210, 2699.300, 2699.301, 2699.303, 2699.304, and 2699.400 of Chapter 5.6, Title 10 of the CCR, in order to make explicit that participating health plans are required to provide benefits consistent with the Knox-Keene Health Care Service Plan Act of 1975, including its amendments (Health and Safety Code sections 1367–1374.16), and to

align specific benefit descriptions with Knox-Keene requirements. Among other things, the proposed changes would revise definitions, income documentation requirements, eligibility determination standards and procedures, and scope of benefits in order to provide greater consistency between AIM, Healthy Families, and Medi-Cal.

MRMIB held a public hearing on July 15, 2002. At this writing, the amendments await review and approval by OAL.

**Impact on Children:** As a result of this year's budget cuts to health care, and the prospect of further cuts in the coming year, state agencies should be seeking ways to cut costs and increase efficiency in existing programs. MRMIB is attempting to do this by restructuring the AIM program to be more fully aligned with the Healthy Families Program and Medi-Cal.

For years, many 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 existing health care programs, e.g., Medi-Cal. MRMIB's current rulemaking, which strives to streamline its program to function more efficiently with both Healthy Families and Medi-Cal, exemplifies why child advocates have been and continue to be critical of the AIM program, and others like it, that result in a fragmented, confusing, and expensive "system" of health care. The state's goal of providing health care coverage to all eligible children would be better met by providing universal coverage to all children in the state, with *post hoc* billing of ineligible individuals.

Notwithstanding this criticism of the state's fragmented health care system, AIM does provide coverage to many pregnant women and young infants—including prenatal care for uninsured moderate-income women—which 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 form of public assistance, like the AIM program, exist when the number of unemployed and uninsured rise. For more information, see the Children's Advocacy Institute's *California Children's Budget 2002–03* (San Diego, CA; June 2002) at 4-72 (available at [www.cachildlaw.org](http://www.cachildlaw.org)).

### **Healthy Families Program Parental Extension**

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's income, although low, is too high to qualify for the Title XIX Medicaid Program, Medi-Cal in California. In 1997, California passed AB1126 (Chapter 623, Statutes of 1997), which allowed it to both expand its Medi-Cal program and establish a new stand-alone children's health insurance program, the Healthy Families Program (HFP). DHS administers the Medi-Cal expansion through its own regulations, and MRMIB administers the Healthy Families Program. The basic structure of the HFP is set out in regulations found in Chapter 5.8 of Title 10 of the CCR.

Title XXI of the Social Security Act also permits states to apply for waivers to establish demonstration projects under section 1115 of the Social Security Act. In July of 2000, the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration), the federal agency that approves state requests for Title XXI funding, released guidelines describing how states could request 1115 waivers to use Title XXI funds for a variety of health coverage and service expansions. Title XXI section 1115 waivers allow states to demonstrate how state-initiated innovations not otherwise permitted under the law will help a state accomplish the goals of the SCHIP program. In December 2000, California submitted its section 1115 waiver request to CMS, requesting approval to expand the HFP to provide coverage to parents and other adults responsible for children enrolled in no-cost Medi-Cal or the HFP. California's section 1115 waiver request was approved by CMS on January 25, 2002 for a five-year period. The HFP expansion was to be implemented effective July 1, 2002, if funding was made available for parental expansion in the 2002–03 budget.

On April 29, 2002, MRMIB adopted — on an emergency basis — sections 2699.6606, 2699.6711, 2699.6631, and 2699.6717, and amended sections 2699.6500, 2699.6600, 2699.6605, 2699.6607, 2699.6611, 2699.6613, 2699.6617, 2699.6623, 2699.6625, 2699.6629, 2699.6700, 2699.6703, 2699.6705, 2699.6709, 2699.6800, 2699.6801, 2699.6809, 2699.6811, 2699.6813, 2699.6815, and 2699.6819 of Chapter 5.8, Title 10 of the CCR, in order to reflect changes made in AB 1015 (Chapter 946, Statutes of 2000), directing MRMIB to submit a parental coverage waiver and to implement the expansion on federal approval of the waiver. On May 24, 2002, MRMIB

published notice of its intent to adopt these changes on a permanent basis. Specific provisions of MRMIB's proposed rulemaking include the following:

- The HFP program would provide coverage to parents, stepparents, caretaker relatives, and legal guardians who live in the home with a child enrolled in no-cost Medi-Cal or the HFP.

- Because California committed to CMS that it would guarantee coverage in the HFP for all eligible children, the state may need to close HFP to new enrollments of child-linked adults if there is insufficient state and/or federal funds available for the program. Thus, the proposed changes would eliminate existing provisions that permit a waiting list for children, and instead establish guidelines governing the creation of a waiting list for child-linked adults should it become necessary.

- The changes specify the policies HFP will follow when determining whether child-linked adults are eligible to participate.

- Current HFP regulations specify why an individual may be disenrolled from the HFP and the timeframe for terminating the HFP coverage. Many of the reasons for disenrollment of children apply to child-linked adults, but the regulatory changes would specify additional reasons why child-linked adults may be disenrolled.

- The changes would enable the use of a new two-page form designed to add additional family members to HFP.

- To enable eligible child-linked adults to begin receiving coverage as quickly and easily as possible, the regulatory changes would allow these individuals, during an initial enrollment period of one year, to complete and submit a customized form that requests less information than is required on the Medi-Cal/HFP application.

- HFP requires participating health plans to identify subscriber children who are severely emotionally disturbed (SED) and to refer these individuals to their county mental health department for continued treatment of the condition. This benefit is not available to subscriber parents because the county mental health department does not provide SED services to persons over the age of 18. The regulatory changes would provide that subscriber parents will receive medically necessary mental health services through their respective health plans in accordance with the standards in the Knox-

Keene Health Care Service Plan Act of 1975, including its amendments.

- Other amendments would clarify that certain dental benefits are excluded for all subscribers.

- Current regulations detail the guidelines governing how rates paid to health plans are determined for subscriber children. Proposed changes to this section reflect the addition of parents to HFP, and establish the rates to be paid by parents for participation.

- Current regulations establish the procedures governing the program's actions in regard to overdue premium payments and disenrollments due to nonpayment of premiums. Proposed changes would bring payment of parent premiums in line with the process for children premiums. However, an incomplete premium payment will be applied toward children first, since children have primacy of enrollment over parents.

At this writing, there was no indication as to whether OAL approved the final regulatory changes.

***Impact on Children:*** On January 25, 2002, Governor Davis received federal approval to expand HFP coverage to parents of eligible children. Research shows that if parents can enroll in a program, they will also enroll their children. It was estimated that when the parental expansion was fully implemented, more than 300,000 uninsured parents in California could receive comprehensive medical, dental and vision health insurance coverage at low cost. The parental expansion was originally intended to begin in 2001–02 at 174,000 enrollees, and increase to 290,000 enrollees by 2003–04. However, the federal government's delay in approving California's waiver moved the proposed start of the expansion to 2002–03. Then in the May Revision of the 2002–03 proposed budget, Davis proposed to push back the implementation of the parental expansion to 2003–04, in order to relieve the general fund of the one-third portion state match.

As a result of California's failure to fully implement and use federal CHIP monies, California returned \$740 million to the federal government in September 2002. This is in addition to the \$706 million in federal CHIP monies California returned from fiscal years 1998 and 1999, according to MRMIB. While parental expansion of HFP may be

important for many reasons, the Administration's proposal continues the “patchwork quilt” approach to health coverage and further undermines efforts to coordinate the two main health care programs serving children—Medi-Cal and Healthy Families. Even if the waiver to allow parental inclusion is fully implemented, the state's child health policy will result in: (1) 1–1.5 million income-eligible children remaining uncovered, notwithstanding available federal funds at a 2-to-1 match sufficient to accomplish full coverage; and (2) over \$1 billion in total will be returned to the federal jurisdiction unexpended.

The state boasts that HFP enrollment has drastically increased. However, children remain uncovered due to a variety of barriers, such as required co-payments and premiums. The potential success of this program is overshadowed by accessibility problems that should be addressed by the Administration and Legislature.

For an in-depth discussion of the Healthy Families Program and its progress in providing health care to children in the state, see the Children’s Advocacy Institute’s *California Children’s Budget 2002–03* (San Diego, CA; June 2002) at 4-47 (available at [www.cachildlaw.org](http://www.cachildlaw.org)).

### **Permanent Amusement Rides—Technical Requirements**

On March 30, 2001, the Occupational Safety and Health Standards Board published notice of its intent to adopt new sections 3195.1–3195.15, Title 8 of the CCR, regarding the safe installation, repair, maintenance, use, operation, and inspection of permanent amusement rides. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 13.) However, on March 8, 2002, OSB published notice of its decision not to proceed with that regulatory proposal, and announced that it would initiate at a later date, with notice as required by law, a new proposal to adopt regulations pertaining to the same or similar subject matter.

On May 3, 2002, OSB published notice of its intent to adopt the Permanent Amusement Ride Safety Orders, sections 3195.1–3195.14, Title 8 of the CCR. Among other things, the revised rulemaking package includes the following provisions:

- The term “amusement ride incident” is defined to mean any event, failure, or

malfunction of a permanent amusement ride that (1) results in the ride being closed to patrons for more than twelve consecutive hours; or (2) reasonably and substantially appears (A) to have an impact on the safety of patrons; and (B) to be of a type that could occur in connection with rides of the same design.

- The term “authorized person” is defined to mean a person who (1) has been authorized by the owner or operator, in a determination which defines the specific duties and rides to which the authorization pertains, to attend, operate, inspect, test, or perform maintenance on permanent amusement rides and associated equipment; (2) has successfully completed specified training in the duties to which the authorization pertains; (3) performs his or her duties within the scope of the authorization; and (4) is capable of reading and comprehending all written instructions, including those on operator controls, that are required to be available to or to be in view of a person performing duties within the scope of the authorization.

- The owner or operator shall have and maintain at the facility documentation for each permanent amusement ride operated at the facility, as specified; follow all specified documentation procedures; and provide training in that documentation to each employee performing those procedures.

- All maintenance and inspection functions shall be performed by an authorized person.

- The owner or operator shall use effective signs, videos, or other similarly effective means of advising patrons of instructions, limitations, and warnings deemed necessary for patron safety by the owner or operator. When signs are used for this purpose, they shall be permanently and conspicuously posted at each permanent amusement ride.

- The owner or operator shall ensure that, at all times while the facility is open to the public, at least one person employed by or under the control of the owner or operator has current certification in first aid and cardiopulmonary resuscitation (CPR) and is readily available to render first aid and CPR to patrons as needed.

- Complete operation instructions for each permanent amusement ride shall be readily accessible to the operators and attendants of the ride.

- All ride operation and attendant functions shall be performed by an authorized person.

- The owner or operator shall not operate any permanent amusement ride with patrons on board in a manner inconsistent with the specified documentation, with specified exceptions.

- Ride conveyance vehicles shall be provided with emergency brakes or other equally effective emergency stopping controls, if upon failure of normal stopping controls, collision may reasonably be expected to occur and result in patron injury or equipment damage. Low speed vehicles designed for controlled collisions, such as bumper cars, do not require emergency stopping controls.

- Surfaces of permanent amusement rides with which a patron may come in contact shall be free from sharp, rough, or splintered surfaces, edges, and corners, and from unguarded or unprotected protruding studs, bolts, screws, and other projections. Surfaces that a patron may forcibly contact while in motion shall be adequately padded or otherwise designed and maintained to protect against injury.

- All moving parts with which patrons may come into contact shall be sufficiently guarded to protect against injury.

- All rides shall be operated and controlled only by authorized persons. All authorized persons designated to operate or control the ride shall be within immediate reach of the operating controls while the ride is in operation, even if automatic devices are used to control the time cycle of the ride.

- All rides shall have a stop switch within immediate reach of the authorized person or persons designated to operate or control the ride at all times while the ride is in operation.

- The owner or operator shall make and maintain, for at least five years, and make available to the Division upon request during any Division inspection, records of specified training, including the date provided, the name of the employee trained, the type of training provided, and the length of the training session; maintenance, repair, inspection, and testing performed on each permanent amusement ride; accidents required to be reported by section 344.15, Title 8 of the CCR; amusement ride

incidents; and for aquatic devices only, testing performed to determine water quality and all determinations of staffing levels to be maintained at aquatic devices.

■ The information on recorded accidents shall include but not necessarily be limited to the date of occurrence of the accident; the name of the ride and manufacturer of the ride where or on which the accident occurred; a detailed description of the accident; the names, addresses, ages, and telephone numbers of all persons involved in the accident, including but not limited to those injured, the ride operators and attendants, and witnesses, if any; and a description of the injury and treatment provided to the injured parties involved in the accident.

At this writing, the proposed regulations await adoption by OSB and review and approval by OAL.

**Impact on Children:** AB 850 (Torlakson) established the Permanent Amusement Ride Safety Inspection Program, subjecting amusement parks in California to minimal regulation for the safety of riders, particularly children. As the sponsors of the legislation argued, building permits and prior inspections are required for minor building projects, but machinery which moves children at high speed over concrete lacked inspection or standards. A series of highly publicized accidents stimulated the legislation. It is unclear how many deaths and serious injuries have been caused by park equipment malfunctions or related causes because of the lack of reporting attributable to amusement park operations. However, the legislation focused some public attention on the issue, resulting in publicity given to a series of accidents and substantial injuries at well-known amusement parks in the state.

Regulations implementing this new law are being adopted in two stages. Regulations setting forth the new safety inspection program were promulgated by the Department of Industrial Relations' Division of Occupational Safety and Health (DOSH) and approved by OAL on October 30, 2001 (for background information, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 14 and Vol. 3, No. 1 (2001) at 6). This current regulatory package — OSB's proposed Safety Orders — sets forth technical requirements, and is OSB's second attempt at such rulemaking (see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 13).

According to Saferparks, an organization devoted to the prevention of amusement ride-related accidents through research, public education, and political advocacy, OSB's revised proposal represents a significant improvement over its original proposal. However, according to written testimony submitted to OSB, Saferparks still had concerns regarding the proposed regulations, including the following:

- Saferparks urged OSB to add, as a general requirement, the mandate that permanent amusement rides operated for the public employ age- and size- appropriate safety protections. According to Saferparks, amusement park customers do not have the education or training required to determine how well a particular containment system will work for their body or their child's body. Thus, the state should clearly require ride owners to take responsibility for providing safety devices that effectively protect the full range of riders allowed on each ride.

- As proposed, the term "amusement ride incident" is defined as any event, failure, or malfunction of a permanent amusement ride that (1) results in the ride being closed to patrons for more than twelve consecutive hours; or (2) reasonably and substantially appears (A) to have an impact on the safety of patrons; and (B) to be of a type that could occur in connection with rides of the same design. Saferparks noted that the element contained in (2)(B) is inappropriate for various reasons. For example, many of California's leading theme parks have one-of-a-kind rides. Under the proposed language, failures that appear to have an impact on patron safety would not have to be logged on such rides. Further, not all failures or potential failures are related to "design"—some may have to do with the unsafe operation of a ride.

- Saferparks further urged that the proposed definition of the term "authorized person" address the issue of competence, and provided possible language for inclusion in the state's regulation.

- Saferparks urged that written emergency procedures and staffing levels be mandated for all amusement rides, not just aquatic devices, and that incident records be required to include a description of any repairs and/or modifications performed in response to an incident.

## **Varicella (Chickenpox) Immunization**

Under Health and Safety Code sections 120325–120375 and implementing regulations, children are required to receive certain immunizations in order to attend public and private elementary and secondary schools, child care centers, family day care homes, nursery schools, day nurseries, and development centers. SB 741 (Alpert) (Chapter 747, Statutes of 1999) added Varicella (chickenpox) to the required immunizations for children eighteen months and older currently enrolled in or entering child care centers, family day care homes, nursery schools, day nurseries, development centers and children entering schools who were not admitted to school in California before July 1, 2001.

On September 24, 2002, DHS amended—on an emergency basis—sections 6020, 6025, 6035, 6050, 6051, 6065, 6070, 6075, Title 17 of the CCR, to add Varicella to the required immunizations. Among other things, the amendments provide that pupils admitted to California public and private schools at the Kindergarten level or above before July 1, 2001 are exempt from the Varicella (chickenpox) requirement, as specified. Also, the revisions allow for permanent medical exemption from the requirement with physician documentation of clinical Varicella (chickenpox) disease.

On October 24, DHS published notice of its intent to adopt these changes on a permanent basis. At this writing, no public hearing is scheduled. The 45-day public comment period closes on December 13, 2002.

***Impact on Children:*** Most children in California will suffer from Varicella (chickenpox) before the age of thirteen. Until the introduction of the varicella vaccine, no effective medication or procedure was available to prevent children from this disease. In California, 1,000–2,000 children are admitted annually to hospitals with complications from the Varicella disease. Each year, several children die from infections secondary to the Varicella disease. Children are also restricted from school attendance when they have active Varicella disease, often missing 5–10 days of school. Varicella (chickenpox) poses a serious threat to Californians with organ transplants, cancer, HIV, and immune system diseases. Varicella can prove fatal to those individuals with compromised immune systems who come in contact with the disease. California has large number of persons who have had cancer, organ transplants, or HIV infection.

According to DHS, the substantial expansion in vaccine use that will result from this regulation will assist in eliminating the circulating Varicella virus from the population and lessen its threat to the health of children and adults, thus drastically reducing exposure to those persons who are defenseless against this disease because of compromised immunity.

### **Airborne Toxic Control Measure to Limit School Bus Idling and Idling at Schools**

The California Toxic Air Contaminant Identification and Control Program, set forth in Health and Safety Code section 39650 *et seq.*, requires the Air Resources Board (ARB) to identify and control toxic air contaminants within the state. Once a substance is identified as a toxic air contaminant, the statute requires ARB, after consulting with affected sources, interested parties, and air pollution control and air quality management districts, to prepare a “needs assessment” report based upon the degree of regulation appropriate for certain substances. In August 1998, ARB identified diesel exhaust particulate matter (diesel PM) as a toxic air contaminant, and published a report in October 2000 setting forth a risk reduction plan suggesting limiting idling time for certain heavy vehicles.

The 1999 Children's Environmental Health Protection Act requires the California Environmental Protection Agency to specifically consider children in setting ambient air quality standards and in developing criteria for toxic air contaminants. The Office of Environmental Health Hazard Assessment also identified diesel PM and several other toxic air contaminants associated with motor vehicle exhaust among the top priority pollutants affecting children's health.

As a result of this notification, ARB notified nearly 17,000 potentially affected individuals and organizations regarding the proposal to limit school bus idling and idling of certain vehicles around schools. As a result of public input and ARB's own investigation, on October 25, 2002, ARB published notice of its intent to adopt section 2480, Title 13 of the CCR, to reduce children's and the general public's exposure to diesel PM and other toxic air contaminants by limiting the unnecessary idling of specific vehicles. The regulation focuses on reducing school age children's exposure at and around schools and while riding school buses and other types of school transportation.

The regulations apply to heavy-duty (1) buses and vehicles whose purpose is to transport children at or below the 12<sup>th</sup> grade level to and from school and other activities; and (2) transit buses and vehicles other than buses that operate at or near schools. The proposed regulations would affect both the public and private transportation industry, and would accomplish the following:

- A driver of a school bus or other bus or heavy-duty vehicle would be required to manually turn off the vehicle upon arriving at a school and restart it no more than 30 seconds before departing.

- A driver of a bus or vehicle whose primary purpose is the transport of children (e.g., a school bus, school pupil activity bus, youth bus, or general public paratransit vehicle) would be subject to the same requirement when operating within 100 feet of a school and would be prohibited from idling more than five minutes at locations beyond schools.

- A driver of a transit bus or other heavy-duty vehicle, whose primary purpose is not the transport of children, would be prohibited from idling beyond five minutes within 100 feet of a school, and would be prohibited from idling on school grounds except within 30 seconds before departure.

- A motor carrier of an affected bus or vehicle would be required to ensure that drivers are informed of the idling requirements, track complaints and enforcement actions regarding the requirements, and keep records of driver education and tracking activities.

The proposed regulations would exempt specific idling situations where health, safety, or operational concerns were of greater importance. For instance, where idling occurs in the midst of traffic; to ascertain safe operating conditions of a bus or vehicle; to test, service, repair, or diagnose a problem with a bus or vehicle; to accomplish work, other than transportation, for which a vehicle was designed (e.g., controlling cargo temperature or operating a lift, drill, etc.); to operate equipment needed by persons with disabilities and heaters or air conditioners for special needs children; to operate defrosters or other equipment to prevent a safety or health emergency; or to recharge a hybrid electric bus or vehicle.

The penalty for each violation of section 2480, subsections (c)(1) - (4), will be a minimum civil penalty of \$100 and criminal penalties to the maximum extent provided by the law. Pursuant to 2480(g), ARB, the California Highway Patrol, peace officers, and air pollution control or air quality management districts are each authorized to enforce the new provision.

Public hearings on this regulatory package are scheduled to be held on December 12 and/or December 13, 2002, depending on ARB's agenda.

***Impact on Children:*** Following a study on the subject, ARB estimated children's risk of developing cancer associated with diesel PM exposure occurring near loading/unloading zones at schools. ARB reports the estimated risk values were less than ten potential cancer cases per million for most situations modeled, and potential cancer risks were found to increase as the number of buses and idling time increased. According to ARB, the proposed regulation is "a simple pollution prevention measure that can be easily implemented to significantly reduce children's, parents', teachers', and near-by residents' exposure to idling diesel PM and associated potential cancer risk and other adverse health effects."

### [Update on Previous Rulemaking Packages](#)

#### **Childhood Lead Poisoning Prevention Fees**

The Childhood Lead Poisoning Prevention Act of 1991 requires DHS to provide funding for the detection and prevention of childhood lead poisoning in California by assessing fees upon "manufacturers and other persons...that were formerly and/or are presently engaged in the stream of commerce of lead or products containing lead...." The Act directs DHS to adopt regulations establishing the mechanism and formula for collecting annual fees from those industries responsible for environmental lead contamination.

On July 19, 2001, DHS—on an emergency basis—repealed sections 33001 and 33010, adopted new sections 33001, 33002, 33003, 33004, 33005, 33006, 33007, 33008, 33009, 33010, 33011, 33012, 33013, 33015, 33015, and 33025, and amended sections 33020, 33030, and 33040, Title 17 of the CCR, in order to standardize procedures for applicants seeking exemptions from payment of the fees. The changes

also base the fee assessment on historic market share of lead-containing products, rather than current sales of non-leaded products. In addition, a list of examples of products encompassed by the definition of “architectural coating” has been augmented by the addition of varnishes, stains, and lacquers. On August 3, 2001, DHS published notice of its intent to permanently adopt these changes. On November 17, 2001, DHS readopted them on an emergency basis. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 12.)

**Update:** On March 19, 2002, DHS readopted these changes on an emergency basis. On August 22, 2002, the final regulations were filed by OAL (these changes are exempt from OAL approval pursuant to Health and Safety Code section 105310(h)).

## ***SPECIAL NEEDS***

### **New Rulemaking Packages**

#### **Early Start Intervention Program**

On June 14, 2002, the Department of Developmental Services (DDS) published notice of its intent to revise sections 52000, 52082, 52084, 52109, 52170, 52171, 52173, and 52175, Title 17 of the CCR, regarding the Early Start intervention programs for infants and toddlers with or at risk of developmental delay. As part of California’s grant application for funds under Part C of the Individuals with Disabilities Education Act (IDEA), DDS is required to make revisions to the Early Start regulations, consistent with 34 CFR Part 303. Among other things, the proposed changes would:

- amend the definition of the term “parent” to include a foster parent, if the natural parents’ authority to make the decisions required of parents has been limited or relinquished under state law, and the foster parent has no interest that would conflict with the interests of the child;
- require that evaluations for eligibility be conducted in natural environments whenever possible;

- clarify that a family’s private insurance is not a responsible payer for early intervention services, and that public agencies other than those listed might have responsibility for payment for early intervention services;
- specify time lines within which complaints regarding early intervention services must be filed with DDS;
- specify the types of remedies that may be included in complaint decisions;
- clarify that state complaint decisions are final and may not be appealed;
- specify procedures for responding to a complaint, when one or more issues contained in the complaint are also part of a due process hearing;
- clarify that if an issue is raised in a complaint that has already been decided in a due process hearing involving the same parties, then the hearing decision is binding;
- clarify that DDS shall resolve any complaint alleging the failure to implement a due process decision;
- clarify that discussions during mediation must be confidential and may not be used as evidence in subsequent due process or civil proceedings;
- require interagency agreements to include procedures to, among other things, ensure that a surrogate parent is not an employee of any state agency, regional center, LEA, or service provider involved in the provision of early intervention services to the infant or toddler; and
- provide that a surrogate parent is not an employee solely because he or she is paid by a state agency, regional center, or LEA to serve as a surrogate parent.

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

***Impact on Children:*** Infants and toddlers from birth through 36 months may be eligible for Early Start intervention services if—through documented evaluation and assessment—they (1) have a developmental delay in either cognitive, communication, social or emotional, adaptive, or physical and motor development including vision and hearing; (2) have established risk conditions of known etiology, with a high probability of resulting in delayed development; or (3) are at high risk of having a substantial developmental disability due to a combination of risk factors. Based on the child's

assessed developmental needs and the families concerns and priorities as determined by each child's Individualized Family Service Plan (IFSP) team, early intervention services may include assistive technology, audiology, family training, counseling, home visits, health services, medical services for diagnostic/evaluation purposes, nursing services, nutrition services, occupational therapy, physical therapy, psychological services, respite services, service coordination (case management), social work services, special instruction, speech and language services, transportation and related costs, and vision services. Early intervention services are provided to eligible infants and toddlers and their families at no cost to the family.

Children with special needs are among our most vulnerable charges. Whether they need special instruction in school, special health care, or suffer from a mental debility, early intervention and investment can turn a lifelong expense into a lifelong asset. By bringing California's regulations into compliance with all applicable federal standards, these changes will ensure that infants and toddlers with disabilities and their families receive coordinated services early enough to make a difference.

### **Children with Disabilities**

Pursuant to federal law, each state must have on file with the Secretary of the U.S. Department of Education (DOE) policies and procedures that demonstrate that the state meets all of the eligibility requirements of the federal Individuals with Disabilities Education Act (IDEA) listed in section 1412(a), Title 20 of the United States Code. In response to California's June 2002 eligibility documents, DOE granted a conditional approval of fiscal year 2002 funds and indicated areas of California law, regulations, or policy that still do not address or establish enforceable requirements.

Accordingly, on October 25, 2002, the State Board of Education published notice of its intent to adopt new sections 440–450, 3015, 3020, 3032, 3041, 3044, 3082.1, 3082.5, and 3086.5, and amend sections 3001, 3052, 3080, and 3082, Title 5 of the CCR. Among other things, the proposed changes address confidentiality of information about individuals with exceptional needs, clarifying that parents have the right to inspect and review any education records relating to their children, including test protocols containing personally identifiable information about the child. The changes also require

each participating agency to keep a record of parties obtaining access to education records collected, maintained, or used. The changes address the individualized education program (IEP) accountability requirement that each public agency must make a good faith effort to assist the child to achieve the goals, objectives, or benchmarks listed in the IEP. Further, when a due process hearing has been requested by a parent, guardian, or an attorney representing the child, the notice must remain confidential. A model form to file when requesting a due process hearing shall be developed by the superintendent.

The Board is scheduled to hold a public hearing on these proposed changes on December 12, 2002, in Sacramento.

***Impact on Children:*** Overall, the proposed revisions appear to protect and promote confidentiality for children with special needs.

## ***CHILD CARE / CHILD DEVELOPMENT***

### **New Rulemaking Packages**

#### **Child Care Provider Notification Regulations**

On August 7, 2002, DSS amended—on an emergency basis—sections 101218.1, 102419, and 102421, Title 22 of the CCR, to implement its policy requiring child care licensees to inform parents of their right to information about any adults associated with the facility who have been granted a criminal record exemption. Additionally, the amendments add other parental rights provisions which previously were only listed in the Health and Safety Code and other regulatory sections. On August 30, 2002, DSS published notice of its intent to adopt these changes on a permanent basis.

Among other things, the regulatory changes provide that each child's parent or authorized representative has the following rights:

- to enter and inspect the child care center or family child care home in accordance with Health and Safety Code section 1596.857;
- to file a complaint against the licensee with the local licensing office in

accordance with Health and Safety Code section 1596.853;

- to review the facility's public file kept by the local licensing office in accordance with Health and Safety Code Section 1596.859;

- to review, at the facility, reports of licensing visits and substantiated complaints against the licensee made during the last three years in accordance with Health and Safety Code Section 1596.859; and

- to complain to the local licensing office and inspect the facility without discrimination or retaliation in accordance with Health and Safety Code Section 1596.857;

- to request in writing that a parent not be allowed to visit a child or take a child from the child care center provided the custodial parent has shown a certified copy of a court order pursuant to Health and Safety Code section 1596.857;

- to receive from the licensee the name, address, and telephone number of the local licensing office in accordance with Health and Safety Code section 1596.874; and

- to be informed by the licensee, upon request, of the name and type of association to the facility for any adult who has been granted a criminal record exemption, and that the name of the person may also be obtained by contacting the local licensing office.

DSS' move to inform the public if someone in a child care center or family child care home has a criminal record exemption is a result of the Second District Court of Appeal's decision in *CBS Broadcasting, Inc. v. Superior Court of Los Angeles County, State Department of Social Services* (2001) 91 Cal.App.4th 892. Among other things, the court's decision notes that the fact a specific individual suffered a criminal conviction is a matter of public record, and that, to the extent that such individual maintains any privacy interest in nondisclosure of such fact, he or she has subjected himself or herself to public review by virtue of applying for a license to work at, operate, or own a child daycare facility, which license also constitutes a matter of public record.

DSS held public hearings on this rulemaking package on October 15, 16 and 17,

2002. At this writing, the permanent regulations await review and approval by OAL.

**Impact on Children:** Overall, these regulatory changes will benefit children by enabling their parents to make informed choices about child care providers, and by clearly identifying other rights parents have *vis-a-vis* child care facilities. One concern is that the regulations as proposed only protect parents and authorized representatives from discrimination and retaliation for exercising certain rights (the right to inspect a child care facility and the right to lodge a complaint with DSS about a child care facility). Child advocates contend that protecting parents and authorized representatives from discrimination and retaliation for exercising any of their rights is warranted. For example, DSS should prohibit family child care homes and child care centers from discriminating or retaliating against a parent or authorized representative based on his/her exercise of the right to be informed of the name and type of association to the facility for any adult who has been granted a criminal record exemption. Thus, CAI encourages DSS to extend that protection to all of the articulated rights to ensure their utilization.

### **Child Care—Desired Results Regulations**

On March 5, 2002, the Superintendent of Public Instruction published notice of her intent to amend sections 18023, 18272, 18273, 18274, 18275, and 18279, and adopt new sections 18280 and 18281, Title 5 of the CCR, regarding the child development accountability system, which is aimed at achieving certain child and family desired results. Through this regulatory action, the Superintendent seeks to combine contract compliance monitoring and program quality into one review process using standardized procedures, measures, and instruments. Among other things, the regulatory package includes the following changes:

- The changes would require contractors to complete a development profile (a record of a child’s physical, cognitive, social, and emotional development) prescribed by CDE for each child who is enrolled in the program for at least ten hours per week. Contractors would be required to complete a development profile for each child within sixty calendar days of enrollment and at least at the following intervals thereafter: infants once every three months; toddlers once every four months; preschoolers once

every six months; and school-age children once every six months. Contractors would be required to complete a development profile for any child with an individualized education program (IEP) even if that child is enrolled for less than ten hours per week.

- The changes would specify that the standards for child development and education program component shall include, but are not limited to, the following factors: the program approach is developmentally, linguistically, and culturally appropriate; the program is inclusive of children with special needs; the program encourages respect for the feelings and rights of others; the program supports children's social and emotional development by building trust, planning routines and transitions so they can occur in a timely, predictable, and unhurried manner; the program helps children develop emotional security and facility in social relationships; the program provides for the development of each child's cognitive and language skills by experimentation, inquiry, observation, play, and exploration, ensuring opportunities for creative self-expression through activities such as art, music, movement, and dialogue, promoting interaction and language use among children and between children and adults, and supporting emerging literacy and numeracy development; the program promotes each child's physical development by providing sufficient time, indoor and outdoor space, equipment, materials, and guidelines for active play and movement; and the program promotes and maintains practices that are healthy and safe.

- The changes would require each contractor to develop and implement an annual plan for its self-evaluation process. The annual plan shall include a self-evaluation based on the use of a compliance review document prescribed by CDE; an assessment of the program by parents using a parent survey prescribed by CDE; an analysis of the self-evaluation findings and plans for any necessary changes; written documentation that an assessment of the program by parents, staff, and board members has been included in the self-evaluation process; and procedures for the ongoing monitoring of the program. The contractor shall submit a summary of the findings of the program self-assessment evaluation to the Child Development Division by June 1 of each year, and shall modify its program to address any areas identified during the self-evaluation as needing improvement.

Following an April 29, 2002 public hearing, CDE modified its proposal and released it for an additional fifteen-day public comment period, which ended on June 5, 2002. On July 10, 2002, CDE submitted the package to OAL for review and approval; however, the Department withdrew the package from OAL on August 20, 2002. CDE is expected to make further modifications to the rulemaking package and re-notice it for another fifteen-day public comment period.

***Impact on Children:*** CDE's Child Development Division (CDD) recently revised its approach to evaluating the child care and development services it provides, moving away from a process-oriented compliance model and toward a focus on the results desired from the system. This approach is intended to improve the results achieved for children and families through the child development services provided by CDE/CDD. CDD's Desired Results for Children and Families Program will document the progress made by children and families in achieving desired results, and will provide information to help practitioners improve their child care and development services. The new system is designed to identify the indicators and measures that demonstrate the achievement of desired results across the various domains of development for children from birth to age fourteen in child care and development programs; provide information that reflects the contributions made by each of the various types of CDE-funded child development programs in achieving the desired results; hold programs accountable to standards which support the achievement of desired results and can be used to measure program quality; provide a data collection mechanism for self-evaluation and independent evaluation of the quality of individual child development programs; and create a base of information on the relationships between processes and results which can be used to target technical assistance to improve practice in all child development programs. The primary objective of the desired results approach is to encourage progress toward the achievement of desired results by providing information and technical assistance to improve program quality.

### **[Update on Previous Rulemaking Packages](#)**

### **[CalWORKs Stage 2 and Stage 3 Child Care Regulations](#)**

On June 28, 2001, and again on October 26, 2001, the Superintendent of Public

Instruction adopted—on an emergency basis—Chapter 19.5 (consisting of sections 18400, 18405, 18406, 18407, 18408, 18409, 18409.5, 18410, 18411, 18412, 18413, 18414, 18415, 18416, 18417, 18418, 18419, 18420, 18421, 18422, 18423, 18424, 18425, 18426, 18427, 18428, 18429, 18430, 18431, 18432, 18433, and 18434), Title 5 of the CCR, to provide guidance to child care contractors on administering the second and third stages of CalWORKs child care services to all eligible families. Among other things, the proposed regulations clarify the eligibility requirements for recipients of CalWORKs Stage 2 and Stage 3 child care; set forth child care contractor responsibilities for maintaining family eligibility and data file information, the limitations on child care provider payments, and the requirements for parent fees and parent co-payments for Stage 2 and Stage 3; provide guidance for Stage 3 child care contractors on eligibility and prioritization of families when child care funding is insufficient to serve all eligible families, and direction on the actions to be taken by child care contractors if subsequent Stage 3 child care funds become unavailable; and specify contractor requirements for data reporting, program quality, and due process for parental appeals and notices of adverse action. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 15.)

**Update:** On March 12, 2002, OAL approved the permanent adoption of these changes.

## **EDUCATION**

### **New Rulemaking Packages**

#### **Educational Interpreter Standards**

Section 3065(t), Title 5 of the CCR, specifies the qualifications for personnel employed by nonpublic schools and agencies providing interpreting services for deaf and hard of hearing pupils. However, these qualifications were not consistent with the Individuals with Disabilities Education Act of 1997 (IDEA) and implementing federal regulations. Further, there were no qualifications set forth in the CCR for school district personnel providing interpreting services for deaf and hard of hearing pupils; each school district in California determined the qualifications for interpreters employed at their school

district.

On March 22, 2002, the State Board of Education published notice of its intent to amend sections 3051.16 and 3065, Title 5 of the CCR, to provide guidance on certification and requirements for educational interpreters for deaf and hard of hearing pupils. Specifically, the revised amendments require that any educational interpreter for deaf and hard of hearing pupils employed as of January 1, 2007, must be certified by the Registry of Interpreters for the Deaf (RID) (or an equivalent organization), or if providing cued speech interpreting services, by any certifying body recognized by the National Cued Speech Association.

The Board held a public hearing on this regulatory package on May 30, 2002 in Sacramento. On July 29, 2002, the changes were approved by OAL.

***Impact on Children:*** A 1999 informal study conducted by the state Department of Education included the following findings:

- only three of the 102 school districts that employed educational interpreters for deaf and hard of hearing pupils required the interpreters to be RID or NAD (National Association of the Deaf) certified;
- only six school districts required interpreters to have completed an Associate of Arts level interpreter training program;
- twenty-four school districts required “any combination of training and experience that could likely provide the desired knowledge and abilities”;
- seventeen school districts only required a high school diploma; and
- twenty school districts used instructional assistants to provide interpreting services for deaf and hard of hearing pupils in mainstream classrooms.

For deaf and hard of hearing pupils mainstreamed in California’s public schools, there had been no assurance of quality educational interpreting services, and no assurance of equal access to curriculum and instruction in the classroom as required by IDEA. According to CDE, many educational interpreters were hired with no demonstration of their skill level.

For years, experts in this area have urged policymakers to adopt stricter

qualifications for educational interpreters. For example, in a 1988 report to Congress entitled *Toward Equality: Education of the Deaf*, the Commission on Education of the Deaf stated that the law requires that “deaf students be integrated into regular classrooms to the maximum extent possible, but if quality interpreting services are not provided, that goal becomes a mockery.”

As noted by CDE, California’s students are being required to meet ever more rigorous academic standards and pass a high stakes high school exit examination in order to receive a high school diploma. Thus, it is critical that deaf and hard of hearing students receive services from qualified, well-educated interpreters in their mainstream classrooms. By setting uniform standards for interpreters working in California’s public and nonpublic schools, this regulatory change will help ensure that deaf and hard of hearing students receive equal access to curriculum and instruction in their classrooms, and stand a better chance of successfully completing their educational goals.

### **High School Equivalency Certificate (GED)**

California Education Code sections 51420 through 51427 establish the legal framework for the administration of the GED examination and the awarding of a California High School Equivalency Certificate. GED tests have been administered in the U.S. and California since 1942 by the GED Testing Service (GEDTS), a division of the national not-for-profit American Council on Education. GEDTS develops the GED tests, develops national policy guidelines, and contracts with agencies to administer the testing program. The Standards and Assessment Division of the California Department of Education is responsible for administration of the program in California. CDE contracts with local GED testing centers and supervises the centers in cooperation with GEDTS.

Beginning in January 2002, GEDTS started a new series of GED exams with entirely new test items. Individuals with partial scores on the pre-2002 GED exams were required to complete the GED exam before December 31, 2001. The new GED exam will be based on a different scale than the old test and cover significantly different content. Also beginning in 2002, GEDTS requires centralized scoring of all GED exams, which were previously scored by local testing centers, with the exception of the essay portion of the test and tests taken in Spanish.

On February 8, 2002, the Board of Education adopted, on an emergency basis, amendments to sections 11530 and 11531, Title 5 of the CCR, to bring administration of the GED in California into alignment with the new policies of the American Council on Education. On February 22, 2002, the Board published notice of its intent to adopt these changes on a permanent basis. Among other things, the proposed amendments change the definition of passing scores, clarify the meaning of several terms consistent with the new GEDTS procedures, and make minor technical corrections. The revised regulations will provide guidance to local testing centers on administering the new GED exams, reporting and interpreting scores, and determining examination fees.

On April 25, 2002, the Board held a public hearing in Sacramento on the proposed changes, which were approved by OAL on June 11, 2002.

***Impact on Children:*** The new GED examinations are consistent with the rejection of “social promotion” and the new statewide policy of required “exit examination” passage for all students receiving high school diplomas. The traditional GED examination was limited in content and lacked statewide consistency. The revised examination is intended to comport with the broader statewide policy of more meaningful performance-based diplomas. Thus far, the exit examination for tenth graders results suggest a substantial number of students will not pass. The GED examination may be an increasingly tempting alternative route to a diploma. Child advocates are concerned that it not end up as a second class path undermining the intent of meaningful diplomas. It is unclear at this point whether the changed examinations will accomplish their intended objectives.

### **Mathematics and Reading Professional Development Program**

AB 466 (Strom-Martin) (Chapter 737, Statutes of 2001) established the Mathematics and Reading Professional Development Program, designed to enable teachers, instructional aides, and paraprofessionals to participate in professional development activities in mathematics and reading/language arts over a four-year period. Education Code section 99236 authorizes the Superintendent of Public Instruction to design, and the State Board of Education to approve, regulations for the implementation and monitoring of the program.

On March 25, 2002, the Board adopted—on an emergency basis—new sections

11980, 11981, 11982, 11983, 11984, and 11985, Title 5 of the CCR. On March 29, the Board published notice of its intent to adopt these sections on a permanent basis. Among other things, the regulations define and clarify the assurances of compliance that LEAs must provide to the Board and CDE to apply for and implement a program grant; clarify teacher, paraprofessional, and instructional aide eligibility to participate in the program; clarify program funding allocation; authorize consortia applications; and define the timeline for LEA adoption of instructional materials to be used in providing professional development in mathematics and reading/language arts via this program. Specific elements of the rulemaking package included the following:

- Section 11980 requires LEAs applying for program funding to provide assurances to the Board that the professional development was delivered by a provider approved by the Board or provided by a California Professional Development Institute, as specified; the LEA has, or will have by the commencement of training, instructional materials for students that are aligned to state content standards in reading/language arts and mathematics in those grades and subject areas for which the LEA intends to receive payment for training teachers; and the LEA will provide a minimum of 20 hours of intensive professional development and a minimum of 20 hours of follow-up professional development to instructional aides and paraprofessionals. As originally proposed, section 11980(f) also required the LEA to obtain participant attendance signature verification no less than three times during each full day of training and no less than two times during each partial day of training. However, on June 6, 2002, the Board released a modified version of section 11980(f), which was amended to require that the LEA obtain participant attendance signature verification at the beginning and end of each full or partial day of training.

- Section 11981, regarding teacher eligibility, provides that teachers who hold a multiple-subject credential, whose primary assignment is to teach in a classroom that is not self-contained, and who are employed in a public school, are eligible to receive instruction in mathematics if their primary teaching assignment is mathematics and/or science, and may receive instruction in reading/language arts if their primary teaching assignment is reading/language arts or social science.

The Board held a public hearing on these proposed sections on May 30, 2002 in Sacramento. On August 15, 2002, OAL approved the Board's permanent adoption of these

provisions.

In a related matter, on June 28, 2002, the Board adopted—on an emergency basis—new section 11983.5, Title 5 of the CCR; on July 12, 2002, the Board published notice of its intent to adopt this section on a permanent basis. Section 11983.5 clarifies Education Code section 99231(c), which defines specified instructional materials to include “materials adopted by the State Board of Education after January 1, 2001, unless otherwise authorized by the State Board of Education.” Specifically, section 11983.5 includes a clarifying definition of the phrase “instructional materials.”

At this writing, the Board’s permanent adoption of section 11983.5 awaits review and approval by OAL.

***Impact on Children:*** AB 466 was sponsored by Governor Davis to address the many teachers, particularly in upper elementary grades and high schools, who have not been trained on Reading and Math Content Standards and Frameworks and, therefore, do not teach them. To move to a standards-based instructional system, all teachers need to be provided with professional development on standards and the instructional materials they will use to help students meet these standards. In January 2001, the state adopted K–8 textbooks and other instructional materials fully aligned to math standards; in January 2002, the state adopted K–8 textbooks and other instructional materials fully aligned to reading standards. Once districts buy state-approved books, they will need to have their teachers trained to use the books in the classroom.

CDE contends that the program and the related regulations “will greatly assist efforts to increase the academic performance of California’s children by enabling 176,000 teachers and 22,000 paraprofessionals and instructional aides to participate in high-quality professional development in mathematics and reading/language arts.” Arguably, the program would better benefit California’s children if the regulations required teachers participating in the professional development to demonstrate a certain level of competency in the subject following their participation in the professional development, and before they commence instruction pursuant to the Reading and Math Content Standards and Frameworks. Children will be most assuredly be tested in their mastery of these subjects—their instructors should be required to demonstrate their competence as well.

## California High School Exit Exam

To improve pupil achievement in California high schools and ensure that students who graduate from high school demonstrate grade-level competency in English/language arts and mathematics, the Legislature amended the Education Code in 1999 to authorize, among other things, the development of a California high school exit examination and administration of the examination in each public school and special school that provides instruction in grades 10, 11, and 12. The legislative changes established the exit examination, requiring that beginning in the 2003–04 school year, each pupil completing grade 12 must pass the exit exam to receive a high school diploma.

In June 2001, OAL approved the Board's regulations implementing the exit exam, with the exception of Article 3, specifying accommodations for students with disabilities or for English Language Learners. On November 20, 2001, the Board submitted to OAL a revised Article 3, which OAL approved on December 21, 2002. (For background information on these rulemaking packages, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at page 23 and Vol. 3, No. 1 (2001) at 15.)

On March 11, 2002, CDE commenced another rulemaking action regarding the high school exit examination. Specifically, the Board proposed to amend sections 1200, 1204, 1209, 1211, 1212, and 1220, Title 5 of the CCR, to provide further guidance on administration of the exam. As originally proposed in March 2002, the proposed changes included the following provisions:

- CDE proposes to expand the definition of the term “test administrator” to include a person assigned by a nonpublic school to implement a student’s individualized education program;

- The changes would define the term “accommodation” to mean any variation in the assessment environment or process. The regulations would also state that accommodations may include variations in scheduling, setting, aids and equipment, and presentation format, and that the term accommodation commonly refers to changes that do not alter in any significant way what the test measures or the comparability of scores.

- CDE would define the term “modification” to mean a variation in the assessment environment process that fundamentally alters what the test measures or affects the

comparability of scores.

- The regulations would require each school district to first offer the exam to each pupil in grade 10 at the spring administration (March or May). If a pupil is absent at the spring administration, the district must offer a make-up test at the next test date designated by the Superintendent of Public Instruction. On June 6, 2002, CDE released a modified version of this proposal, providing that if a pupil is absent at the 10<sup>th</sup> grade spring administration of the exam, the district must offer a make-up test at the next test date designated by the Superintendent of Public Instruction or on the next designated test date selected by the school district.

- No test may be administered in a private home or location except by a test administrator as defined in section 1200 (g), Title 5 of the CCR, who signs a security affidavit. No test shall be administered to a pupil by the parent or guardian of that pupil. This subdivision does not prevent classroom aides from assisting in the administration of the test under the supervision of a credentialed school district employee provided that the classroom aide does not assist his or her own child and that the classroom aide signs a security affidavit.

- School districts shall deliver the booklets for the exit exam to the school test site no more than two working days before the test is to be administered.

CDE submitted this rulemaking package to OAL for review and approval on July 10, 2002; however, the Department withdrew the package from OAL on August 20, 2002 for further modifications. On September 23, 2002, CDE released its second modified version of this regulatory package. This version of the package includes the following changes:

- CDE amended its previous definition of the term “accommodation” to provide that an accommodation is a change in how a test is presented, how a test is administered, or how the test taker is allowed to respond which is necessary to allow a pupil to participate in the test or examination, but does not fundamentally alter what the test measures or affects the comparability of scores.

- CDE amended its definition of the term “modification” to provide that a modification is any change in how a test is presented, how a test is administered, or in how a test taker is allowed to respond that fundamentally alters what the test measures or

affects the comparability of scores.

- Existing regulations provide that access to the exit exam materials is limited to pupils taking the exam for the purpose of graduation from high school, adult students taking the exam for the purpose of obtaining a diploma of graduation, and employees of a school district directly responsible for administration of the exam. CDE's September 2002 revisions would authorize access for persons assigned by a nonpublic school to implement students' individualized education plans.

CDE accepted public comment on the revised rulemaking package through October 8, 2002; at this writing, the amendments await review and approval by OAL.

***Impact on Children:*** As noted above, the new high school exit exams are intended to assure a minimum level of competence for conferral of a high school diploma. Some critics contend that the current examination/accountability orientation of public school policy leads to a narrow "teaching to the test" mentality and undermines critical thinking and skills not amenable to a multiple choice answer. However, others argue that the appropriate remedy to such a deficiency is test broadening and improvement, not abandonment of accountability measures.

These rules address special accommodations for special needs exam takers, proper advance notice of test taking, test security. Importantly, these tests are taken beginning in 10<sup>th</sup> grade to give students advance warning of progress needed. The results from the first year of testing are alarming, with the vast majority of test takers not passing. Results over the next two years are difficult to predict. However, current spending for K–12 is now in decline. Schools in impoverished neighborhoods have substantially more unaccredited teachers than do suburban schools. And class sizes, reduced in K–3 by former Governor Wilson, have not been extended to grades 4–12, with average class size now at 49<sup>th</sup> in the nation. California national test performance in grades 9–12 remains very low. The proposed 2003–04 budget includes major cuts from this base of over \$3 billion. In this context, child advocates support the exit exams as an additional monitor of recent and coming disinvestment.

### **Classroom- and Nonclassroom-Based Instruction in Charter Schools**

On March 15, 2002, the Board of Education adopted, on an emergency basis, new

Article 1.5, consisting of sections 11963, 11963.1, 11963.2, 11963.3, and 11963.4, Title 5 of the CCR, to implement the classroom- and nonclassroom-based instruction provisions of SB 740 (Chapter 892, Statutes of 2001), as set forth in Education Code sections 47612.5 and 47634.2. On March 22, 2002, the Board published notice of its intent to adopt Article 1.5 on a permanent basis.

SB 740 is intended to limit a charter school's funding for nonclassroom-based instruction in cases where nonclassroom-based instruction composes more than 20% of the instructional time offered by the charter school. It accomplishes this objective by requiring that average daily attendance (ADA) for affected students be subject to a determination of funding approved by the Board and by requiring that nonclassroom-based ADA be separately identified for apportionment purposes. A charter school that does not have an approved determination of funding receives no revenue for the affected pupils who receive nonclassroom-based instruction. Prior to SB 740, the state did not require charter schools to separately identify nonclassroom-based ADA.

SB 740 requires the Board to adopt regulations to define and establish general rules "governing nonclassroom-based instruction that apply to all charter schools and to the process for determining funding of nonclassroom-based instruction by charter schools" offering nonclassroom-based instruction other than that allowed as part of classroom-based instruction (*i.e.*, not more than 20% of the minimum instructional time required to be offered by law). SB 740 also requires the Board to adopt regulations setting forth criteria for the determination of funding for nonclassroom-based instruction which, at a minimum, specifies that the nonclassroom-based instruction is conducted for the instructional benefit of the student and substantially dedicated to that function. The criteria are to include the amount of the charter school's total budget expended on certificated employee salaries and benefits, on schoolsites (facilities used principally for classroom instruction), and on the teacher-pupil ratio in the school.

Among other things, the proposed regulations include the following provisions:

- For purposes of identifying and reporting that portion of a charter school's average daily attendance that is generated through nonclassroom-based instruction, classroom-based instruction in a charter school occurs only when all four of the following

conditions are met: (1) the charter school’s pupils are engaged in educational activities required of those pupils, and the pupils are under the immediate supervision and control of an employee of the charter school who is authorized to provide instruction to the pupils, as specified; (2) at least 80% of the instructional time offered at the charter school is at the schoolsite; (3) the charter school’s schoolsite is a facility that is used principally for classroom instruction; and (4) the charter school requires its pupils to be in attendance at the schoolsite at least 80% of the required minimum instructional time.

■ The requirement to be “at the schoolsite” is satisfied if either of the following conditions is met:

(1) The facility in which the pupils receive instruction is: (a) owned, rented, or leased by the charter school principally for classroom instruction; (b) provided to the charter school by a school district principally for classroom instruction; or (c) provided to the charter school free-of-charge principally for classroom instruction pursuant to a written agreement. When not being used by the charter school for classroom instruction, the facility may be rented, leased, or allowed to be used for other purposes (e.g., for evening adult classes not offered by the charter school, local theater productions, or community meetings) and still be deemed to be principally for classroom instruction.

(2) The pupils are on a field trip during which the pupils remain under the immediate supervision and control of the employee and are carrying out an educational activity required of the pupils.

■ The requirement to be “at the schoolsite” is not satisfied if the pupils are in a personal residence, even if space in the residence is set aside and dedicated to instructional purposes and/or the charter school rents or leases space in the residence for the provision of instruction. As used in this provision, a personal residence shall not include a facility that is licensed by a state or local government agency to operate as a facility in which pupils not related to the facility’s owners are provided custodial care and supervision (e.g., a licensed children’s institution or a boarding school).

■ A charter school may receive funding for nonclassroom-based instruction only if a determination of funding is made pursuant to Education Code section 47634.2. A determination of funding is a specific percentage approved by the Board for each affected

charter school, by which the charter school's reported nonclassroom-based average daily attendance must be adjusted by the Superintendent of Public Instruction prior to the apportioning of funds based upon that average daily attendance. A determination of funding shall only be approved if the charter school has submitted a request.

■ As originally proposed, the regulations provided that for 2001–02, a determination of funding approved by the Board shall be not less than 95% and not more than 100%. For 2002–03, a determination of funding request approved by the Board shall be 80%, unless a different percentage, which shall not be greater than 100%, is determined appropriate. For 2003–04 and thereafter, a determination of funding request approved by the Board shall be 70%, unless a different percentage, which shall not be greater than 100%, is determined appropriate.

The Board held a public hearing on this regulatory package on May 30, 2002, and on June 11, 2002, released a modified version of the regulations for a fifteen-day public comment period. Some of the things changes included in the revised package require the Department of Education to determine (1) each charter school's total expenditures for salaries and benefits for all employees who possess a valid teaching certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold, as a percentage of the school's total public revenues; and (2) the charter school's total expenditures on instruction and related services as a percentage of the school's total revenues. Those percentages and other related factors will then be used to determine the recommended level of funding for nonclassroom-based instruction. For example, pursuant to proposed section 11963.4(b)(4), for the 2003–04 fiscal year and each fiscal year thereafter, if the percentage calculated pursuant to (1) above is less than 40%, or the percentage calculated pursuant to (2) above is less than 60%, then the charter school's nonclassroom-based instruction is not substantially dedicated to the instructional benefit of the students, and the Advisory Commission on Charter Schools shall recommend that the Board deny the request for funding, unless there is a reasonable basis to recommend otherwise.

At this writing, the Board's permanent adoption of these regulations awaits review and approval by OAL.

**Impact on Children:** According to the supporters of SB 740, the reforms contained in that measure were premised on the fact that the independent study charter programs are generally less expensive to operate than traditional “brick and mortar” schools, and that there have been a number of documented abuses where independent study charters are misusing much of their state funding. To the extent that these regulations will help reduce that misuse, and perhaps increase the oversight of certain charter schools, these amendments will improve the educational experience for the children in attendance.

### **Facilities for Charter Schools / Dispute Resolution Regarding Facilities for Charter Schools**

Among other things, Proposition 39, enacted by the voters on November 7, 2000, amended Education Code section 47614 to impose a new requirement that school districts provide facilities to charter schools that serve at least 80 in-district students. Facilities must be sufficient to accommodate the charter schools in-district students in conditions reasonably equivalent to the conditions in facilities that students in district-operated schools attend. For use of the facilities, school districts may charge charter schools no more than a pro-rata share of district facilities costs paid from unrestricted general fund revenues.

On February 1, 2002, the Board published notice of its intent to adopt new sections 11969.1–11969.9, Title 5 of the CCR, providing guidance on charter school facilities. Among other things, the new sections include the following provisions:

- Facilities, furnishings, and equipment provided to a charter school by a school district shall remain the property of the school district.

- The ongoing operations and maintenance of facilities, furnishings, and equipment is the responsibility of the charter school. Projects eligible to be included in the school district deferred maintenance plan and the replacement of furnishings and equipment supplied by the school district shall remain the responsibility of the school district. The school district may require that the charter school comply with school district policies regarding the operations and maintenance of the school facility, furnishings, and equipment. However, school districts may not require charter schools to comply with policies in cases where actual school district practice substantially differs from official policies.

- The space allocated for use by the charter school, subject to sharing arrangements, shall be available for the charter school's entire school year.

- A school district may provide facilities that are located outside the school district's boundaries to a charter school; however, no school district is required to do so.

- A charter school must notify the school district when it anticipates that it will have over-allocated space that could be used by the school district. Upon notification, a school district may elect to use the space for school district programs. If the school district notifies the charter school that it does not intend to use the space, the charter school must continue to make payments for over-allocated space and pro rata share payments. The school district may, at its sole discretion, reduce the amounts owed by the charter school.

- The charter school's written facilities request must include reasonable projections of in-district and total ADA and in-district and total classroom ADA; a description of the methodology for the projections; if relevant, documentation of the number of in-district students meaningfully interested in attending the charter school; the charter school's instructional calendar; information regarding the general geographic area in which the charter school wishes to locate; and information on the charter school's educational program that is relevant to assignment of facilities. Projections of in-district ADA, in-district classroom ADA, and the number of in-district students shall be broken down by grade level and by the school in the school district that the student would otherwise attend.

- The school district shall review the projections and provide the charter school a reasonable opportunity to respond to any concerns raised by the school district regarding the projections. The school district shall prepare a preliminary proposal regarding the space to be allocated and the associated pro rata share amount, and provide a reasonable opportunity to review and comment on the proposal.

- The school district must provide a final notification of the space offered to the charter school by April 1 preceding the fiscal year for which facilities are requested. The charter school must notify the school district in writing whether or not it intends to occupy the offered space by May 1 or thirty days after the school district's notification, whichever is later. After the deadline, if the charter school has notified the school district that it intends to occupy the offered space, the charter school is committed to paying the pro rata share

amount as identified. If the charter school does not notify the school district by this deadline that it intends to occupy the offered space, the space shall remain available for school district programs and the charter school shall not be entitled to use facilities of the school district in the following fiscal year.

The Board held a public hearing on this regulatory package on April 25, 2002, and subsequently submitted them to OAL for review and approval. On July 30, 2002, OAL approved the Board's adoption of these sections.

In a related matter, on March 15, 2002, the Board published notice of its intent to amend section 11969.9, Title 5 of the CCR, to establish procedures for resolving disputes between school districts and charter schools arising over charter school facilities, as set forth above. On June 10, 2002, the Board released a modified version of its proposed amendments. Instead of amendments to section 11969.9, the modified proposal sought to repeal the amendments to section 11969.9 and adopt new section 11969.10, containing a dispute resolution procedure.

The Board subsequently adopted its revised package and submitted it to OAL for review and approval. OAL approved the regulations on August 13, 2002. However, OAL subsequently repealed its approval, on the basis that the Board had failed to obtain the concurrence of the Department of Finance (DOF) with the Board's estimate that the regulations would impose no costs on governmental entities. DOF formally advised OAL on September 11, 2002, that DOF does not agree with the Board's estimate of no costs. DOF further directed OAL to rescind its action that approved the proposed regulations and to return the regulations to the Board. Lacking the requisite concurrence of DOF, the approval and filing of these regulations was premature. Consequently, on September 11, 2002, OAL rescinded its action of August 13, 2002, and returned the regulations to the Board. At this writing, the Board is modifying its rulemaking package.

***Impact on Children:*** Although the performance of charter schools indicates promise, the possibility of abuse, financial diversion, and lost educational opportunity remain substantial. As charter schools increase in number and attendance, their monitoring and the policing of disputes between such schools and the districts in which they operate becomes important. Where such schools do not perform, they need to be

brought to task or terminated without undue delay.

Beyond such compelling problems are basic structural arrangements between the districts and these often experimental charter schools. They generally use public district facilities and equipment. How these facilities and related financial burdens are divided between such schools and the district is important to financial efficiency and optimum use of fixed cost assets. Theoretically, a charter school may “skim the cream” of a certain type of student from the public schools, and then effectively leave less per ADA for students remaining in district schools—possibly a population needing higher than average ADA investment. On the other hand, a district may be resentful of a charter experiment and view its success as an undesirable challenge, and use financial pressure to hamper what could be a valuable alternative educational approach.

These rules set forth some sensible initial guidelines for the division of finances, and allow a measure of charter school flexibility countenanced in the enabling statutes allowing such schools to be formed. On the other hand, the rules allow the district to use facilities which will not be fully utilized by the charter school, and establish timelines for notice of facility use and availability. Perhaps most important, the rules set forth the procedures for third party (Board of Education) intervention to decisively resolve disagreements in the interests of affected students.

### [Update on Previous Rulemaking Packages](#)

#### **Criteria for the Review and Approval of Charter School Petitions**

AB 544 (Lempert) (Chapter 24, Statutes of 1998) required the Board of Education to consider approval of charter schools that had previously been denied approval by a local education agency. AB 2659 (Lempert) (Chapter 580, Statutes of 2000) required the Board to—on or before June 30, 2001—adopt criteria to be used for the review and approval of charter school petitions. On August 24, 2001, the Board published notice of its intent to adopt section 11967.5, Title 5 of the CCR, to provide the necessary criteria for the Board to evaluate charter school petitions in a consistent and comprehensive manner, and to provide necessary clarity and guidance to charter school petitioners who may be considering appealing a charter denial to the Board. (For background information on this rulemaking package see *Children’s Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 19.)

**Update:** On March 1, 2002, OAL approved the Board's adoption of these provisions.

### **Reclassification of English Learners**

On November 23, 2001, the Board of Education published notice of its intent to repeal sections 4304, 4306, 4311, and 4312, and renumber other existing provisions, in order to provide one coherent system of regulations on English learners. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 18.)

**Update:** The Board held a public hearing on January 10, 2002, and has since modified the proposed regulations four times. Among other things, changes made to the original package would delete proposed language which would have allowed the school principal and educational staff to initiate a waiver request, leaving intact language enabling the school principal and educational staff to recommend a waiver to a parent or guardian; require that parents and guardians be informed in writing of any waiver request recommendation for an alternative program initiated made by the school principal and educational staff, and require that parents and guardians be given notice of their right to refuse the waiver recommendation; provide that if the parent or guardian elects to request the alternative program recommended by the school principal and educational staff, the parent or guardian must comply with the requirements of Education Code section 310 and all procedures and requirements otherwise applicable to a parental exception waiver; delete language which would have provided that once a waiver has been granted and a pupil has been enrolled in an alternative program, the pupil does not have to be placed in an English language classroom for a thirty-day period in subsequent years, as long as the pupil is enrolled in the alternative program, and language that required the written informed consent portion of the waiver to be renewed on a yearly basis; and require that all notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parent or guardian's primary language to the extent required under Education Code section 48985.

On July 24, 2002, the Board submitted its proposed regulatory changes to OAL for review and approval. However, on September 5, 2002, the Board withdrew the regulatory

package from OAL. At this writing, the Board is still modifying this regulatory package.

### **Award Programs Linked to API**

On August 2, 2001, the Board adopted emergency changes to section 1032, Title 5 of the CCR, and on August 24, 2001, the Board published notice of its intent to permanently amend sections 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, and 1039, Title 5 of the CCR, to clarify several provisions in the Academic Performance Index (API) regulations prior to the implementation of the 2001 API. The proposed revisions provide for the evaluation of the representativeness of a school's tested population in instances when the school's proportion of parental waivers compared to its Standardized Testing and Reporting (STAR) enrollment is greater than 10% but less than 20% prior to invalidation of the school's API; clarifies the condition under which a school's API will be invalid if the proportion of test-takers in any STAR content area is less than 85%; clarifies the definition of a test-taker to include only pupils who attempted to take a STAR content area included in the API; and provides a way that some schools with invalid 2000 APIs could be eligible for API awards in 2001. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 23.)

**Update:** On January 8, 2002, OAL approved the Board's permanent adoption of these changes.

## **CHILD PROTECTION**

### **New Rulemaking Packages**

#### **Supportive Transitional Emancipation Program (STEP) Regulations**

AB 427 (Hertzberg) (Chapter 125, Statutes of 2001) created the Supportive Transitional Emancipation Program (STEP), which promotes self-sufficiency by providing an assistance payment to emancipated foster youth until their 21<sup>st</sup> birthday under specified circumstances. The program is aimed at helping to support a vulnerable population at risk of homelessness, unemployment, welfare dependency, and incarceration. Youth participating in the Kinship Guardianship Assistance Payment Program (Kin-GAP) are also eligible for STEP when they emancipate.

The Aid to Families with Dependent Children–Foster Care (AFDC-FC) Program

provides a payment to foster youth until their 18th birthday; this payment can be extended to age 19 under certain circumstances. STEP provides a monthly stipend and medical benefits to these youths until their 21<sup>st</sup> birthday under specified circumstances. STEP also provides a case worker for the child who assists in the development of a STEP-Transitional Independent Living Plan (TILP), which outlines the child's goals for transitioning to adulthood, including education and employment. These funds and services will former foster youth finish their high school education, attend a college or technical training program, or develop work skills to become self supporting. By allowing the youth to finish their schooling and/or gain work skills, the youth will be more likely to acquire gainful employment and be less likely to end up homeless, incarcerated, or dependent upon public assistance.

On September 27, 2002, DSS published notice of its intent to adopt sections 90-200, 90-205, 90-210, 90-215, and 90-220 of the MPP, in order to implement STEP. Among other things, the proposed regulations provide definitions, STEP eligibility requirements, STEP county responsibilities, and STEP rates. Specific provisions include the following:

- The purpose of the Supportive Transitional Emancipation Program (STEP) is to provide financial assistance for those youth who have emancipated from the foster care system and are in need of financial assistance.

- A youth meets the minimum age requirement for STEP on his or her 18th birthday. Eligibility for STEP ceases the day before the youth's 21st birthday.

- The applicant must have been (1) receiving a Kin-GAP Payment on their 18th birthday; or (2) in foster care on the day before their 18th birthday and (a) the applicant was a court dependent, or (b) the applicant was in a foster care placement pursuant to a voluntary placement agreement, or (c) the rights of the parent(s) of the applicant were either relinquished or terminated involuntarily and the applicant was in a foster care placement, or (d) the applicant was a ward of the court and receiving an AFDC-FC payment, or (e) the applicant was the ward of a legal guardian and receiving a state AFDC-FC payment.

- A STEP-TILP must be in place for the youth, including educational, vocational, or other goals related to self-sufficiency. The youth must be participating in the activities

identified in the STEP-TILP.

- The youth must have emancipated from a county which is participating in STEP. If the county is not participating in STEP, the youth is ineligible for a STEP payment.

- Participation in STEP is at county option. Counties wishing to participate in STEP shall file a Letter of Intent with DSS no later than April 1 of each year. Once a county has chosen to participate, it may also choose to discontinue participation. Once a county decides to discontinue STEP, it must notify DSS ninety days prior to the proposed termination date of the county program. Once a county has notified DSS of its discontinuance, that county must continue to serve each youth currently participating in STEP consistent with the provisions of his/her STEP-TILP, or until they are no longer age eligible for the program. The county is not required to serve any new youth.

- Effective July 1, 2001, the STEP rate is \$597 (the STEP rate is the equivalent of the AFDC-FC rate for the 15–19 year-old age group). STEP payments shall be delivered in one amount no later than the fifth of the month and shall be paid on a prospective basis.

DSS held a public hearing on this regulatory package on November 13, 2002; at this writing, the changes await review and approval by OAL.

***Impact on Children:*** Former foster youth are a vulnerable population at risk of homelessness, unemployment, welfare dependency, incarceration, and other adverse outcomes if they exit the foster care system unprepared to become self-sufficient. Unlike 18-year-olds who can depend on family for ongoing support while they complete postsecondary education or develop career opportunities, emancipating foster youth have their primary source of support—AFDC-FC payments—terminated and are immediately expected to be self-sufficient. Some foster youth are not able to complete high school or other education or training programs due to ongoing trauma from parental abuse or neglect, and gaps in their educational attainment stemming from foster care placement. Completion of an educational or training program is an essential, minimum skill needed by foster youth in order to be competitive in today's economy.

STEP assists youth making the difficult transition from foster care to independent living by providing the opportunity for youth to develop independent living and employment skills. These programs are designed to improve their chances to be self-reliant and

self-directed adults by increasing their freedom and responsibility as they near emancipation. The goal is to provide the greatest amount of freedom possible in order to prepare the participating youth for self-sufficiency.

The state serves as the parent of foster care children. They have been abused , and it is incumbent on the state to perform not as a neglectful parent itself. A responsible and loving parent does not kick his son or daughter out of the house at 18 years of age. While AB 427 and DSS' implementing regulations are steps in the right direction, they do not grasp the responsibility of a parent. That obligation commonly involves keeping a child at home when that home is needed for additional years, helping to pay for college or schooling, help with that first job, even that first house down payment. The state has taken these children from parents and now serves that function; it should be setting an example, not shirking the same duties it has sanctioned others for avoiding.

Accordingly, foster care assistance to those providing parental services should continue until the youth is 23 years of age, if necessary. The age should be raised if special needs of the child require it, again, as we would expect of any devoted parent. Every child who is working toward employment and self advancement, and is in training or school and remains in good standing, should receive \$10,000 per year in living expenses, if not living with assisted foster care providers, \$3,000 per annum if they are and their room and shelter needs are met, and tuition, fees, and book expenses. Such assistance is not a handout—it is the investment that a responsible parent properly makes.

## **Implementation of AB 1695 / Child Welfare Services Provisions of AB 1695 /**

### **Foster Family Homes Emergency Regulations**

Following Congress' enactment of the Adoptions and Safe Families Act (the Act), the federal Department of Health and Human Services expressed concerns regarding California's compliance with the Act, and required California to articulate its existing process to demonstrate how the licensing of non-relative foster parents is the same as the approval of relative caregivers. AB 1695 (Committee on Human Services) (Chapter 653, Statutes of 2001) was urgency legislation which provided statutory clarification of California's process for licensing/approval of foster family homes. Among other things, AB 1695 included as exempt from the California Community Care Facilities Act, the approved

homes of relatives and non-relative extended family members; revised the requirements for licensure of foster family homes; authorized the Department of Justice to provide subsequent arrest notification to public agencies for the approval of relative caregivers and non-relative extended family members; clarified that the standards used to evaluate and grant or deny approval of the home of a relative or the home of a non-relative extended family member for the placement of a child shall be the same standards as set forth in regulations for licensing foster family homes; clarified safety requirements regarding placement in a relative's home in specified instances; and clarified the list of homes into which a dependent child or a ward of the juvenile court may be placed to specifically include the approved home of a relative or a non-relative extended family member.

On June 25, 2002, OAL approved DSS' emergency adoption of changes to sections 31-001, 31-002, 31-075, 31-401, 31-405, 31-410, 31-420, 31-440, and 31-445 of the MPP, to implement the above provisions of AB 1695. On August 9, 2002, DSS published notice of its intent to adopt these changes on a permanent basis; on September 25, 2002, DSS held a public hearing on these proposed revisions. On October 21, 2002, DSS readopted these changes on an emergency basis. At this writing, the permanent changes await review and approval by OAL.

In a related rulemaking proposal, on June 28, 2002, DSS published notice of its intent to amend sections 45-101, 45-201, 45-202, 45-203, 45-302, 45-304, and 80-310 of the MPP, in order to implement AB 1695. Among other things, the proposed changes (1) provide that the term "approved home" includes the home of a relative which meets the same standards as licensed foster family homes as set forth in the state's foster family home regulations or a family home which is the home of a nonrelative extended family member which meets the same standards as licensed foster family homes as set forth in the state's foster family home regulations; (2) delete provisions regarding "certified, licensed pending" homes; (3) state that the term "nonrelative extended family member" means an adult caregiver who has an established familial or mentoring relationship with the child which has been verified by the county welfare department; and (4) provide that up to \$10,000 in cash savings by a foster youth is exempt for purposes of determining AFDC-FC eligibility and grant amount.

DSS held public hearings on these proposed changes on August 12, 13, and 14,

2002. At this writing, the changes await review and approval by OAL.

In yet another rulemaking package implementing AB 1695, on June 26, 2002, DSS adopted emergency changes to Chapter 7.5, Title 22 of the CCR, regarding foster family homes. In addition to renumbering the foster family home regulations (into a new Chapter 9.5), the rulemaking package makes several other revisions, including the following:

- The term “foster family home” is defined as any home where the caregiver, in their own home, provides care and supervision for six or fewer foster children and the caregiver has control of the property. This also includes sibling care for up to eight children provided the requirements of Health and Safety Code section 1505.2 are met.

- The term “transitional independent living plan” is defined as the portion of a child’s case plan that describes the programs and services, including employment and savings, based on an assessment of the individual child’s skills and abilities, and that will help the child prepare for transition from foster care to independent living.

- The changes repeal many of the safeguards for protecting a foster child’s cash resources, personal property, and valuables, as previously set forth by section 87026, Title 22 of the CCR. Although new section 89226 requires that cash resources, personal property, and valuables of each children shall be kept separate and intact, and that the caregiver must maintain accurate records of accounts of cash resources, personal property, and valuables entrusted to his/her care, the changes repeal language that (1) prohibited licensees from making expenditures from children's cash resources for any basic services specified in applicable regulations, or for any basic services identified in the child’s admission agreement; language; (2) prohibited licensees from commingling cash resources, personal property and valuables of children with those of another community care facility regardless of joint ownership, or with the licensee’s funds or petty cash; (3) required that cash resources, personal property, and valuables of children be maintained free from any liability the licensee incurs; (4) required that—immediately upon admission of any child—the licensee deposit any of the child's cash resources entrusted to the licensee and not kept in the home, in any type of bank, savings and loan, or credit union account meeting specified requirements; (5) required that cash resources entrusted to the licensee and kept in the home be kept in a locked and secure location; and (6) required

that each licensee maintain a record of all monetary gifts and of any other gift exceeding an estimated value of \$100, provided by or on behalf of a child to the licensee.

- New section 89376 lists some of the personal rights afforded to each child in foster care, including—but not limited to—the right to be accorded safe, healthful and comfortable home accommodations, furnishings, and equipment that are appropriate to his/her needs; to be treated with respect and to be free from physical, sexual, emotional or other abuse; to be free from corporal or unusual punishment; to receive adequate clothing and personal items; to receive an allowance if living in a group home; to receive necessary medical, dental, vision, and mental health services; to be free of the administration of medication or chemical substances, unless authorized by a physician and, if required, by court order; to have social contacts with people outside of the foster care system; to contact family members, unless prohibited by court order; to visit and contact brothers and sisters, unless prohibited by court order; to contact social workers, attorneys, foster youth advocates and supporters, court appointed special advocates, and probation officers; to have visitors, provided the rights of others are not infringed upon; to contact DSS or the Foster Care Ombudsperson regarding violation of rights; to make and receive confidential telephone calls, and send and receive unopened mail, unless prohibited by court order; to be free to attend religious services and activities of his/her choice; to be accorded the independence appropriate to the child's age, maturity, and capability; to not be locked in any room, building, or family home; to not be placed in any restraining device; to be free to attend court hearings and speak to the judge; to contact his/her placing social workers to review his/her own case plan if he/she is over twelve years of age; to be accorded dignity in his/her personal relationships with other persons in the home; and to have all of his/her juvenile court records be confidential, consistent with existing law.

- The changes repeal (1) section 87022, which required each applicant to submit, at the time of application, a written, definitive plan of operation; (2) section 87023, which required each licensee to have and maintain on file a current, written disaster and mass casualty plan of action; (3) section 87025, which required all licensees who are entrusted to care for and control children's cash resources to file or have on file with DSS or the licensing agency, a bond in specified amounts, issued by a surety company to the State

of California as principal; (4) section 87030, which provided the licensing agency with authority to issue a provisional license under specified circumstances; (5) and section 87068, pertaining to admission agreements.

On June 28, 2002, DSS published notice of its intent to adopt these changes on a permanent basis. The Department held public hearings on the rulemaking package on August 12, 13, and 14, 2002. At this writing, the permanent changes await review and approval by OAL.

**Impact on Children:** According to the Youth Law Center (YLC), approximately 46% of California's 100,000 foster youth are living in relative foster care homes. In March 2002, a Los Angeles County study of 200 randomly selected foster homes involving relatives found that only 1% would meet the health and safety standards that the state imposes on nonrelative foster parents. According to the *Los Angeles Times*, the violations ranged from crowding to unsanitary or hazardous conditions. Weapons and ammunition were not secured in eight homes, and 25 relatives were not checked for criminal records or against the state's child abuse registry.

On October 24, 2002, YLC filed a lawsuit against DSS, challenging the agency's failure to enforce federal regulations requiring states to license foster homes of relatives that care for youth to ensure that the homes meet health and safety requirements. YLC alleged that some children are living in substandard and dangerous conditions because of DSS' failure to require counties to fully investigate relative homes and to provide assistance to relatives in meeting licensing requirements. Additionally, the federal government began to withhold over \$6 million per month in reimbursements because DSS had not demonstrated that relative homes meet the same standards as non-relative homes, as required by federal law. To date, California has lost over \$37 million in federal funding because of this noncompliance.

On the same day of its filing, YLC agreed to settle the suit in exchange for reforms. The settlement requires DSS to implement uniform, statewide standards for foster parents who are related to the children in their custody. It also calls for an immediate audit of 620 relative foster care placements, and requires counties to help unqualified relatives meet the standards, rather than simply not considering the relatives or taking the children away

from them.

According to YLC, the settlement is beneficial both to the state (as the federal government should stop withholding millions of dollars in reimbursements) and to the many foster children placed with relatives (as there will be more protections in place to ensure they are placed in safe homes).

## **[Update on Previous Rulemaking Packages](#)**

### **Foster Care Financial Audit Requirements**

Welfare and Institutions Code section 11466.21 requires all group home and foster family agencies to submit independent financial audits as a condition of receiving an annual rate. Because DSS determined that group home and foster family agency providers were vendors and not subrecipients of federal funds, DSS regulations require that the financial audit be conducted according to the Government Auditing Standards of the Comptroller General of the United States, commonly known as the Yellow Book. This audit standard is less stringent than the audit standard required for subrecipients expending combined federal funds of \$300,000 and greater.

However, in a letter dated April 3, 2001, the Department of Health and Human Services' Administration for Children and Families (ACF) notified DSS that group home and foster family agency providers are subrecipients of federal funds, not vendors. As subrecipients of federal funds, federal regulations require group home and foster family agency providers to comply with the federal OMB Circular A-133 audit requirements. In a letter dated April 19, 2001, ACF notified DSS that the type of audit California has required under section 11466.21 does not meet the federal audit standard as required under federal OMB Circular A-133.

On November 30, 2001, DSS published notice of its intent to amend sections 11-400, 11-402, 11-403, and 11-405 of the MPP. Among other things, the proposed changes would require all group home and foster family agency corporations which expend \$300,000 or more in combined federal funding in any year to adhere to the audit standards contained in OMB Circular A-133; require DSS to issue written management decisions regarding the findings in the providers' OMB Circular A-133 audit reports within six months of receipt of the audit reports; establish an appeal process for disputed management

decisions concerning disallowed costs; and create a rate reestablishment process for foster family agencies. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 23).

**Update:** On May 13, 2002, DSS issued Foster Care Audits Letter No. 2002-01 to all group home providers, all foster family agencies, all group home and foster family agency certified public accountants, all county welfare directors, all county chief probation officers, and all county mental health directors, advising of a delay in the implementation of the OMB Circular A-133 audit requirements. According to DSS, due to ongoing communications with the federal Department of Health and Human Services (DHHS) to clarify implementation issues, the proposed regulation package is being revised to reflect recent information received from DHHS. According to DSS, current financial audit requirements will remain in effect pending implementation of the A-133 regulations. At the time of its May 2002 letter, DSS estimated that the revised regulation package would re-noticed for additional public comment "in the next few weeks" and anticipated that the regulations would become effective in Fall 2002. As of October 31, 2002, however, DSS had yet to publish notice of the revised regulation package.

### **Child Abuse Reports Recordkeeping**

On May 11, 2001, the Department of Justice (DOJ) published notice of its intent to amend sections 900, 901, 902, 903, 904, 905, 906, and 907, Title 11 of the CCR, pertaining to child abuse reports recordkeeping. Penal Code section 11170(a) requires DOJ to maintain an index of all reports of child abuse submitted pursuant to Penal Code section 11169 and to continually update the index. DOJ currently maintains the Automated Child Abuse System (ACAS) as the index required to carry out provisions of the statute. Agencies receiving reports of child abuse and severe neglect are required to send a summary of their investigatory findings to DOJ, except for those cases determined to be unfounded. The summary report to DOJ is to be submitted on the Form SS 8583. The proposed changes relate to the policies and practices of DOJ with regard to Form SS 8583. Among other things, the regulatory proposed changes would delete the definition of the term Child Protective Agency and the acronym CPA from DOJ's regulations, and substitute appropriate wording (e.g., reporting agencies or investigating agencies). This change conforms DOJ's regulations to statutory law as amended by AB 1241 (Rod Pacheco)

(Chapter 916, Statutes of 2000), which eliminated the term Child Protective Agency from Penal Code section 11165.9. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 24.)

**Update:** The permanent regulatory changes were approved by OAL on April 22, 2002.

### **Transitional Shelter Care Regulations**

Currently, children in need of short-term care, removed from their homes or placed in community care facilities and awaiting subsequent placement in other community care facilities, are placed in licensed group homes or county operated emergency shelter care facilities. In 1985, the DSS Director exempted from group home licensure emergency shelter care facilities operated by counties, pursuant to Health and Safety Code section 1505(o). The lack of regulations addressing specific needs of these children in temporary care has led to overcrowding, improper placement of children, and mixing of populations, which has created a risk of harm to children in these facilities.

On December 28, 2001, DSS published notice of its intent to amend sections 84001, 84022, 84061, 84063, and 84065, renumber sections 84800–84807 (noninclusive) to 84300–84369 (non-inclusive) and make other amendments to those sections, and adopt new sections 84400, 84401, 84410, 84422, 84461, 84465, 84468.1, 84468.2, 84468.4, and 84478, Title 22 of the CCR, to address transitional shelter care facilities. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 25.)

**Update:** On January 17, 2002, DSS adopted these changes on an emergency basis. However, on April 19, 2002, DSS published notice of its decision not to proceed with this regulatory package.

## **JUVENILE JUSTICE**

### **Update on Previous Rulemaking Packages**

#### **Voluntary Psychotropic Medication to Minors**

On November 29, 2001, CYA adopted new section 4746.5, Title 15 of the CCR, on

an emergency basis, to provide wards under the age of 18 with access to timely medical intervention, including voluntary psychotropic medication, as determined by two physicians. The proposed regulation establishes procedures for review and concurrence by a psychiatrist and one other physician that the ward has been diagnosed with a mental health condition and is in need of psychotropic medication. The proposed regulation includes procedures for the immediate voluntary administration of psychotropic medication upon submission of the form Application for Order for Psychotropic Medication-Juvenile (Judicial Council Form JV 220 (1/1/01)) to the court of commitment, and also provides that in the event that the court does not authorize the administration of voluntary psychotropic medication, the medication shall be terminated in keeping with medical standards. On December 14, 2001, CYA published notice of its intent to permanently adopt section 4746.5. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 2 (2002) at 27.)

**Update:** CYA held a public hearing on the proposed section on January 29, 2002. On May 8, 2002, OAL approved CYA's permanent adoption of section 4746.5.

### **Mental Health Services/Standards for Medical and Dental Services**

In August 2000, CYA gave notice of its intent to add Article 1.5, sections 4742, 4743, 4744, 4745, 4746, and 4747 to the existing regulations within Title 15 of the CCR, in order to address the lack of regulatory standards for mental health services. Among other things, the provisions establish standards for mental health services, assessment, and referral, and for suicide prevention and response for CYA wards. In addition to adopting Article 1.5, CYA proposed amendments to sections 4730, 4732, 4733, 4734, 4735, 4736, 4737, 4739, and 4740, Title 15 of the CCR, to comply with Correctional Treatment Center regulations and licensure law. Following CYA's submission of these changes to OAL for review and approval, OAL notified CYA on August 29, 2001, of its disapproval of the proposed amendments. According to OAL, the rulemaking file failed to satisfy the necessity and clarity requirements of the Administrative Procedure Act. Also, the Youth Authority Global Assessment of Functioning (YA-GAF) screening form, incorporated by reference into the amendments, was not included in the rulemaking file, nor did the text of the regulation include the name and revision date of the form. CYA amended the rulemaking package in response to OAL's findings, and resubmitted the

package on December 12, 2001. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 3, No. 1 (2001) at 24 and Vol. 3, No. 2 (2002) at 29.)

**Update:** On January 8, 2002, OAL approved CYA's adoption of these regulatory provisions.

## **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](http://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](http://www.dds.ca.gov).

**California Department of Education and State Board of Education.** The

California State Board of Education (State Board) adopts regulations for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational 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](http://www.cde.ca.gov); the Board's website address is [www.cde.ca.gov/board](http://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](http://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](http://www.dmh.ca.gov).

**California Department of Social Services.** The California Department of Social Services (DSS) administers 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](http://www.dss.cahwnet.gov).

**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](http://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](http://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](http://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 Budget 2002–03* is currently available at [www.cachildlaw.org](http://www.cachildlaw.org).

## **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 15 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 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 30 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).

**USD LOGO (as on back of Vol. 3, No. 2)**

**School of Law**

**Children's Advocacy Institute**

**University of San Diego**

**School of Law**

5998 Alcalá Park

San Diego, CA 92110

(619) 260-4806

(619) 260-4753 (fax)

**Sacramento Office**

926 J Street, Suite 709

Sacramento, CA 95814

(916) 444-3875

(916) 444-6611 (fax)

[www.caichildlaw.org](http://www.caichildlaw.org)