

# Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 4, No. 2 (2003)

## HIGHLIGHTS

***Child Poverty:*** DSS Revises CalWORKs Regulations, Reducing Availability of Aid for Minors Parents Living with Adult Parents

***Health/Safety:*** DHS Increases Fee-for-Service Rates Paid for Most Hospital Outpatient Services

***Child Care:*** New Regulations Require a Child Care Licensee to Cease Operation or Remove an Individual from the Facility Pending DSS' Investigation of Arrest Information for Specified Crimes

***Education:*** Board of Education Implements Teacher Qualification Requirements Pursuant to Federal No Child Left Behind Act

***Foster Care:*** DSS Rulemaking Proposals Establish Guidelines for Emancipating Foster Youth Transitional Aid and Housing Programs



## KEY

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from November 1, 2002, through October 31, 2003; actions on those packages through October 31, 2003; and updates on previously-reported regulatory packages through October 31, 2003.

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 publications or agencies (described in more detail on pages 51-52):

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

## CHILDREN'S REGULATORY LAW REPORTER

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# Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 4, No. 2 (2003)

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## **PREFACE**

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

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

CAI represents children—and only children—in the California Legislature, in the courts, before administrative agencies, and through public education programs. CAI strives to educate policymakers about the needs of children—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.

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# **CHILD POVERTY**

## **New Rulemaking Packages**

### **CalWORKs Senior Parent/Minor Parent Cases: Income Availability Change**

**U**nder AB 908 (Chapter 307, Statutes of 1995), which created the Teen Pregnancy Disincentive policy, DSS required minor parents, with some exceptions, to live with a parent or adult relative, or in an adult-supervised group setting, as a condition of receiving CalWORKs aid. The CalWORKs program allowed an exception to guarantee a grant for at least one person (the minor parent's child) if the family's income would otherwise make the case ineligible for aid. This policy was called the senior parent deeming rule. More recently, however, AB 444 (Chapter 1022, Statutes of 2002) reversed that policy and requires that the treatment of income in senior parent/minor parent cases be consistent with other CalWORKs income determinations by eliminating the requirement that a senior parent's income cannot be deemed to the minor parent's children.

On March 31, 2003, DSS, on an emergency basis, amended sections 44-315 and 89-201 of the MPP to implement AB 444; the revised sections provide that a senior parent's income will be considered available to meet the needs of a minor parent's child or children. DSS first made these changes by All County Letter (ACL 02-94) effective October 1, 2002, when counties were directed to identify all cases affected by the change, recalculate the grant amount, and send notices to reduce or discontinue grants to affected families. The All County Letter also provided that affected families would have ten days prior to the effective date of the reduction/discontinuance to request a hearing, and the grant would continue at the same level until the hearing decision was rendered. In the event an overpayment was made during the hearing process, the county welfare department could collect those amounts.

On April 4, 2003, DSS published notice of its intent to adopt these changes on a permanent basis, and on May 21 held a public hearing on the regulatory package. (According to DSS, this regulatory package is exempt from OAL review pursuant to section 67.5 of AB 444.) On October 30, 2003, the changes were filed with the Secretary of State.

**IMPACT ON CHILDREN:** The theory behind the 1997 welfare changes was as follows: if government changed the rules and made it harder for individuals to receive cash benefits and required that individuals work in order to receive aid, behavior could be changed, decreasing the incidence of childbirth among welfare recipients. It was projected that the new system would promote the incidence of self-sufficient adults who are able to financially and emotionally support their offspring. Requiring minor parents to live with their parents in order to receive aid was meant to provide a means to ensure the minor teen had adequate supervision and to dis-

courage minor parents from viewing welfare as a means to set up a separate household if they had a baby.

Some of the goals of welfare change have been realized; others have not. As a recent report by the Annie E. Casey Foundation points out, although some indicators of child well-being have improved over the last ten years (*e.g.*, infant mortality rate fell 25%; child deaths fell 30%; teen birth rate fell 27%; child poverty fell 15%), other indicators show negative trends. For instance, there has been an increase in the number of babies born underweight and the percentage of families headed by a single parent has increased. Other reports show that severe poverty for children has increased while overall poverty rates have decreased. Alarming, these reports do not contain statistics for those who will fall off federal/state aid at the end of sixty months. The children of these individuals will be severely affected.

Recent data from UC Berkeley suggests that while welfare reform efforts may be somewhat successful in changing values and beliefs about responsible work and family decisions, actually fulfilling those aspirations is a problem for many in this population. Hence, welfare reform has had small effects on family structure. The results of studies such as these suggest that policies of persuasion (welfare reform) can influence family desires, but are not sufficient to induce large impacts on behavior.

The \$7 million in federal savings (from TANF) shows that by using the senior parent's income to determine the eligibility of a minor parent's benefit, much less aid is paid out when a minor parent live with her parent(s), increasing the young parent's dependency on her parent(s).

In theory, making young parents live at home and making senior parents (the baby's grandparents) pay without state help may discourage teen births. But that connection is attenuated and dubious. It again attempts to influence the behavior of an adolescent by imposing a future penalty on support for his/her child, or by persuading senior parents to control their teen's sexual activities because they will receive reduced safety net aid for their grandchild. It also may lead to greater hostility and teen refusal to live at home—thus sacrificing TANF safety net help for his/her child. If a young parent is allowed to live on her own, receives CalWORKs assistance, is trained in the workforce, and has child care provided, he or she is more likely to rise to self-sufficiency, as intended under the current welfare policies. However, if the young parent is unable to get child care because of extensive waiting lists and unavailability of spots in the current market, and is unable to get any education, training, or work to enhance income, then the parent may be worse off in the end, and stands to be pushed off welfare after sixty months without an adequate job, child care, or earning capacity.

The reality of the current welfare system is that in theory it could work, but because of lack of federal investment the program is not implemented as planned, and many end up at the end of their sixty-month period of aid, in as much

need as when they began, but now without help from the government and a minimal safety net for children. Under the current system, the impact on children may be more beneficial if the child is cared for by grandparents (senior parents), even if the minor parent receives no or reduced aid. Much of the impact on the child will be determined by the depth of poverty and extent of a support system to help care for and raise the child.

### Learning Disabilities Regulations

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

- ◆ “Learning Disabilities” are defined as a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual and presumed to be due to central nervous system dysfunction. Even though a learning disability may occur together with other handicapping conditions, or environmental retardation, social and/or emotional disturbance influences, it is not the direct result of those conditions or influences. For the purposes of the CalWORKs program, these disorders interfere with the participant’s ability to obtain or retain employment or to participate in welfare-to-work activities.

- ◆ The provisions set forth guidelines for counties to follow as to time periods for notifying participants, both verbally and in writing, about screening and evaluations for learning disabilities.

- ◆ Counties must screen and evaluate individuals who request it before assigning the person to another welfare-to-work activity.

- ◆ Counties must provide screening for learning disabilities by September 3, 2003, or earlier if a learning disability is suspected, the participant is in the good cause determination process for justifying non-compliance with a welfare-to-work plan, or the individual is failing to maintain satisfactory progress in his/her activities or employment.

- ◆ The provisions set forth general guidelines for counties to follow if they suspect a limited-English speaker CalWORKs recipient has a learning disability.

- ◆ Counties should discuss the indicators and facts about

learning disabilities, the areas that will be tested, who will perform the testing, how long the testing will last, and the types of reasonable accommodations available if a disability is found with each recipient before the screening and evaluation process takes place.

- ◆ The provisions set forth the consequences that a CalWORKs recipient will face if he/she refuses to be screened for learning disabilities, including not receiving any accommodations in current work and/or activities. Counties are prohibited from sanctioning individuals solely for refusal to be screened or evaluated. A recipient may also request a screening at a later time and the county must provide it.

- ◆ The provisions set forth the qualifications required for county testers and the parameters for testing by those individuals.

- ◆ The regulations indicate what must be included in the learning disabilities evaluation report and how counties must respond to reports.

- ◆ The provisions set forth the circumstances under which counties must retrospectively adjust the 18- and 24-month time clock for welfare-to-work participants who are found to have a learning disability.

On August 20, 2003, DSS held a public hearing on the regulatory package. At the time of this writing, OAL had not indicated whether the regulations were approved.

**IMPACT ON CHILDREN:** Six years after the implementation of the CalWORKs program, DSS released these proposed changes to implement its learning disability portion. In the interim, it is possible that individuals who had learning disabilities were not evaluated or offered appropriate benefits or services. Many of those individuals could have subsequently met their sixty-month time limit under CalWORKs. Where these individuals are now, or whether the system could have provided them with the necessary skills and earning capacity, will never be known.

Notwithstanding this fact, advocates are concerned that these regulations will result in disparities to certain populations, are inconsistent with existing law, and could be construed arbitrarily by counties if not corrected. For instance, the provisions addressing the screening process for limited-English proficient (LEP) participants are vague and inconsistent when compared to the provisions for non-LEP participants. The fear is that LEP participants will be denied assistance, and, in a worst-case scenario, be sanctioned for failing to comply with a welfare-to-work plan because a proper determination of the existence of a learning disability was not made. Further, the regulations do not specify who at the county level would be responsible for making such a critical determination and what guidelines must be followed. Advocates believe that the regulations should require individuals who make this decision to have the same level of credentials as are required for similar decisions in non-LEP cases.

Also, proposed section 42-722.33 states that if a participant declines a learning disabilities screening and/or eval-

uation, but later makes a request to go forward with the process, "the county must provide the screening and evaluation as soon as administratively possible." This time standard is extremely broad and vague, and could result in inconsistent county determinations regarding when a participant must be provided these services. Since most of the participants who request a screening at a later time are likely either being sanctioned or are failing to meet their plan requirements and in jeopardy of being sanctioned, it would seem the counties should provide this service as quickly as they are required to do under the initial offering of the screening process.

The regulations further specify that the county will make the determination regarding whether a learning disability contributed to a participant's failure to participate or sanction, instead of allowing the opinion of the evaluator to be binding, which would provide more credibility to this determination. This section could be applied arbitrarily by counties who may not want to provide the added services or return sanction monies due to financial reasons.

Finally, the regulations do not indicate how counties will ensure that reasonable accommodations are actually provided to participants found to have learning disabilities.

### **Definition of Entry Date for the Cash Assistance Program for Immigrants**

California's Cash Assistance Program for Immigrants (CAPI) provides cash assistance (state-only funds) to aged, blind, and disabled legal immigrants who are not citizens and who successfully complete the application process. The CAPI program is for non-citizens who are no longer eligible for SSI/SSP benefits solely because of their immigrant status after federal law changes. According to Welfare and Institutions Code sections 18938 and 18940, there are two components: basic and extended CAPI. A person who entered the U.S. on or after August 22, 1996 is only eligible for basic CAPI if he/she is sponsored and that sponsor is deceased or disabled, or the non-citizen is a victim of abuse by the sponsor or the sponsor's spouse. A person who entered the U.S. on or after August 22, 1996 who does not meet the sponsor restrictions for basic CAPI can be eligible for extended CAPI, but is subject to a 10-year sponsor deeming period. Sponsor deeming may reduce a person's CAPI benefit or make him/her ineligible to receive these benefits because the sponsor's income is considered to determine benefits for the immigrant. A person with an entry date prior to August 22, 1996 does not have to meet the sponsor restrictions of basic CAPI and may be subject to only a three-year sponsor deeming period.

On January 23, 2003, DSS, on an emergency basis, adopted section 49-020 of the Manual of Policies and Procedures (MPP) to clarify the meaning of "entry date" to the U.S. for purposes of determining CAPI eligibility. The term "entered the U.S." or "entry date" means the effective date of the non-citizen's current immigration status as

determined by the INS, except in either of two situations: (1) the non-citizen is a current CAPI recipient whose immigration status was adjusted after he/she began receiving benefits; in this situation, the same entry date that was used to determine initial eligibility will continue to be used for redetermination; or (2) the non-citizen, as of 8/22/96, had an immigration status that met the definition of "qualified alien," and has maintained continuous residence in the U.S. since 8/22/96; in this situation, the effective date of the "qualified alien" status held by the non-citizen on 8/22/96 will be deemed to be the "entry date" even if he/she later adjusts immigration status. These regulatory changes reflect the Department's policy on this issue since at least September 5, 2002, when the Director of DSS approved a decision reflecting this change.

On February 28, 2003, DSS published notice of its intent to adopt these changes on a permanent basis, and on April 16 held a public hearing. On June 16, 2003, OAL approved DSS' permanent adoption of these regulations.

**IMPACT ON CHILDREN:** A 1999 survey of a sample of female immigrants made the following findings regarding CalWORKs: (1) virtually all of these individuals wanted to work, but lacked the English or job skills for stable employment; (2) most of them used their children to translate; (3) they lacked secure child care; and (4) although most qualified, only 38% received any CalWORKs benefits. Welfare reform has had a severe impact on immigrants' ability to provide the basics for themselves and their children. Those immigrants who do not receive any government assistance are in particularly bad circumstances, while those who do receive some assistance, such as CAPI, use most of the amount on rent and utilities. One of the most concerning outcomes from federal welfare reform is that the children of immigrants are blocked from even basic assistance at a time when they are most in need.

### **Child Support: Review and Adjustment of Child Support Orders**

On May 5, 2003, DCSS adopted new sections 115500, 115510, and 115520, Title 22 of the CCR, and repealed sections 12-223.2 through 12-223.22 of the MPP, on an emergency basis, regarding the review and adjustment of child support orders. Among other things, the emergency regulations include the following provisions:

◆ Each local child support agency shall provide written notice, at least once every three years, of the right to request a review to seek an upward or downward adjustment of a child support order, or an adjustment to include a provision for medical support. Among other things, the notice shall inform parties of the right of the requesting party to file a motion for modification or order to show cause on his/her own if the local child support agency denies a request for review and adjustment. The notice shall inform the obligee/obligor of the option to obtain the assistance of the Family Law Facilitator and shall include

the address and telephone number for the Family Law Facilitator.

◆ Local child support agencies shall review cases to determine if a change in circumstances exists which could alter the amount of child support ordered by the court under the specified guidelines when the following conditions are met: (1) upon oral or written request of a party to a child support order with a current child support obligation; (2) the change in circumstances which could alter the amount of the child support is reasonably expected to last more than three months; and (3) the local child support agency is in receipt of either party's current income and expense information.

◆ Any changes in circumstances which would result in a change in the child support order, either upward or downward, by at least 20% or \$50, whichever is less, shall be considered cause to file a motion for modification or order to show cause to adjust the child support order. Among other things, such factors may include a change in the obligee or obligor's employment status or income; a change in parenting time or custody; a change in costs incurred related to things such as child care, health care, education, and travel expenses for visitation; a financial hardship that did not exist at the time the order was established or last adjusted; and the existence of additional child support orders for which the obligor is responsible, which were not taken into account when the order of issue was established or last adjusted.

◆ Within ten business days of receiving a request for review, the local child support agency shall notify the requesting party in writing that in order to proceed with the review the requesting party must provide specified income and expense information. As part of this notice, the local child support agency shall provide any mandatory Judicial Council forms that the requesting party will need to complete. The local child support agency shall inform the requestor that no action will be taken on the request until the income and expense information is returned to the local child support agency and that the effective date of the request will be the date the income and expense information is received by the local child support agency.

◆ Within ten business days of receipt of the necessary income and expense information, the local child support agency shall (1) calculate the guidelines amount to determine if a change in the amount of the support order would result in a 20% or \$50 change, whichever is less, either upward or downward; or (2) if the income and expense information from the requesting party is incomplete, notify the requesting party that complete income and expense information is required prior to the commencement of a review of the child support order.

◆ Within ten business days of the determination that a change in circumstances exists, as specified, the local child support agency shall file with the court a motion for modification or order to show cause. If the facts set forth in the review and the income and expense information do not

indicate that a change in circumstances exists, as specified, the local child support agency shall send written notice, including specified information, to the requesting party within ten business days of such determination.

On August 1, 2003, DCSS published notice of its intent to adopt these provisions on a permanent basis; the public comment period ended on September 15. DCSS must transmit a certificate of compliance to OAL by November 3, 2003, or the emergency language will be repealed by operation of law on the following day.

### **Child Support: Compromise of Arrearages**

On November 25, 2002, DCSS adopted, on an emergency basis, sections 119015, 119019, 119045, 119069, 119076, and 119191, Title 22 of the CCR, to implement Family Code section 17550, which allows local child support agencies to compromise arrearages and interest owed for reimbursement for certain public assistance payments paid for children placed in foster care or with a relative caretaker or a guardian according to specified criteria. Family Code section 17550 authorizes local child support agencies to settle overdue support owed in cases where separation or desertion of a parent results in aid being granted to a child and later the child is returned to the parent. Under these regulations, the obligor parent must have an income less than 250% of the current federal poverty level, and the local agency must determine that the settlement is necessary for the child's support.

This regulatory package further requires local child support agencies to temporarily suspend enforcement and collection of amounts owed when the compromise application is pending; describes the process and procedures for determining eligibility and implementing the compromise; and incorporates by reference six separate forms to be used in the compromise application and process. The goal of this regulatory action is to decrease the debt and financial obligations of a parent who has reunified with his/her child, so that the parent can adequately provide for the care and well-being of the child, and avoid situations involving further neglect or abuse of the child.

On May 9, 2003, DCSS published notice of its intent to adopt these changes on a permanent basis. Effective May 12, 2003, DCSS readopted these emergency regulations. DCSS must transmit a certificate of compliance to OAL by November 20, 2003, or the emergency language will be repealed by operation of law on the following day.

**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** **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. 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, the Department’s regulations do not specify how to calculate safety net benefits. Since recipients who have been continuously on aid since the time limits were established reached their sixty-month limit on January 1, 2003, regulatory changes were 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. 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. (For background information on this rule-making package, see *Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 3.)

**Update:** On April 9, 2003, OAL approved DSS’ permanent adoption of these regulatory changes.

## **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. Among other things, this regulatory action will

- ◆ allow 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;
- ◆ 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; and

- ◆ clarify existing language and correct erroneous cross-references contained in current Welfare-to-Work regulations. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 4.)

**Update:** On August 1, 2002, OAL approved DSS’ adoption of these regulatory changes.

## **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. According to DSS, these regulatory changes ensure that services necessary for family reunification will be available to eligible parents. On August 30, 2002, DSS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 5.)

**Update:** On January 28, 2003, DSS readopted these changes on an emergency basis. On May 27, 2003, DSS released a modified version of this regulatory proposal. In accordance with previous comments by advocates, the changes provide that a county *shall* (instead of “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, and the county child welfare services agency determines that such services are necessary for family reunification. The revisions also now provide the following example of a “good cause” extension of the 180-day family reunification plan: “A family consists of a parent and two children. The children are removed by the county child welfare services agency on June 14, 2003. The parent has completed all of the requirements of the Family Reunification Plan by February 1, 2004. However, the social worker in the case recommends to the court, and the court agrees, that the parent needs an additional six-months of services. A six-month extension is ordered by the court and the parent receives an extension of CalWORKs services which ends on July 31, 2004.”

On July 29, 2003, DSS again readopted the emergency regulations. However, because the APA requires agencies

to complete the rulemaking process within one year of commencement, DSS filed notice on August 29, 2003, that it was not proceeding with the permanent rulemaking proposal that it had commenced on August 30, 2002. Also on August 29, 2003, DSS published a new notice of proposed rulemaking, containing the same proposed language as was contained in its May 27, 2003 modified version. The Department held a public hearing on the new rulemaking package on October 15, 2003, in Sacramento; at this writing, the permanent provisions still await review and approval by OAL.

### **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. DSS' discussions with county staff indicated that overpayments were not being collected by County B on behalf of County A. The proposed amendments would allow County B to retain any monies collected and any resulting incentive funds. Such a change would serve as an incentive for counties to collect overpayments originated in another county, thereby increasing collections and reducing grant costs. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 6.)

**Update:** On March 27, 2003, OAL approved DSS' adoption of these regulatory changes.

### **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 section 12-225.3 of the MPP. 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. 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" and a "Notice of Important Information"—to each custodial party who is a recipient of child support services. On July 5, 2002, 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. 4, No. 1 (2003) at 7.)

**Update:** On December 3, 2002, OAL approved DCSS' permanent adoption of these regulatory changes.

### **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. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 7.)

**Update:** On December 9, 2002, OAL approved DCSS' permanent adoption of these regulatory changes.

### **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 case closure of child support service cases. These sections 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. On May 10, 2002, DCSS published notice of its intent to adopt these provisions on a permanent basis; on August 22, 2002, DCSS readopted the changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 7.)

**Update:** On March 24, 2003, OAL approved DCSS' permanent adoption of these regulatory changes.

### **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. On June 14, 2002, 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. 4, No. 1 (2003) at 8.)

**Update:** On December 2, 2002, OAL approved DCSS' permanent adoption of these regulatory changes.

### **Child Support: 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. Among other things, the new provision states that the director must 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. On October 4, 2002, DCSS published notice of its intent to adopt this section on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 9.)

**Update:** On February 3, 2003, OAL approved DCSS' permanent adoption of section 111560.

### **Child Support: 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. Among other things, the new provisions 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 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 arrearages to credit reporting agencies. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 9.)

**Update:** On March 21, 2003, DCSS published notice of its intent to adopt these changes on a permanent basis. On April 3, 2003, DCSS readopted these provisions on an emergency basis. However, because DCSS did not transmit a certificate of compliance to OAL by October 20, 2003, the emergency language was to be repealed by operation of law on the following day.

### **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 child support collection. 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.) On March 19, 2002, DCSS readopted these regulations on an emergency basis.

**Update:** On October 28, 2002, OAL approved DCSS' permanent adoption of these regulations.

# **NUTRITION**

## **New Rulemaking Packages**

### **Food Stamp Reauthorization Act of 2002**

#### **(Part I)**

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 made changes to the Food Stamp Act of 1977. Most of the mandatory provisions were implemented on October 1, 2002; federal law requires the regulatory changes made in this rulemaking package be completed by April 1, 2003.

On April 1, 2003, DSS amended, on an emergency basis, section 63-405 of the Manual of Policies and Procedures (MPP) to restore federal eligibility for the Food Stamp Program for legal non-citizens who have been in the country for five years. Amended section 63-405 clarifies the starting date for the five-year period as "the date the immigrant obtains status as a qualified non-citizen through the INS." In cases where the INS grants qualified status retroactively, the Department must use the date that INS grants qualified status (*e.g.*, a non-citizen enters the U.S. on January 1, 1996; INS does not complete the paperwork until January 1, 1997, and grants qualified status effective the date of entry, January 1, 1996; DSS will begin counting the five-year period on January 1, 1996).

On April 4, 2003, 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 May 21. On September 8, 2003, OAL approved DSS' permanent adoption of the changes.

### **Food Stamp Reauthorization Act of 2002:**

#### **Non-Citizen Children (Part II)**

On October 1, 2003, DSS amended, on an emergency basis, section 63-405 of the MPP to restore federal eligibility for the Food Stamp Program for legal non-citizens under the age of 18 regardless of date of entry into the U.S. The effect of this regulatory change will make legal non-citizen children who are currently receiving state-funded food stamp assistance eligible for federally-funded food stamp assistance.

On April 25, 2003, DSS published notice of its intent to adopt these changes on a permanent basis; the Department held a public hearing on June 11. Based upon testimony received, the Department made minor technical changes to the regulations, including an amendment to section 63-503 of the MPP stating that non-citizen children are no longer subject to sponsor deeming, and re-noticed the regulatory package for 15 days. The Department received no public comment during the fifteen-day re-notice period. OAL approved DSS' permanent changes on September 11, 2003.

**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 require-

ments 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. These changes will also save local agencies over \$13 million in the current budget year because the federal government will cover the costs, whereas before this change in law, local agencies were largely responsible for feeding hungry, non-citizen children in California.

### **ABAWD, Food Stamp Voluntary Quit, and FSET Emergency Regulations**

On August 8, 2003, DSS amended, on an emergency basis, sections 63-300, 63-407, 63-408, 63-410, 63-411, 63-503, and 63-505 of the MPP to bring California's Food Stamp Program regulations concerning penalties for voluntarily quitting a job and reducing work hours below certain thresholds into compliance with Federal Food Stamp Employment and Training (FSET) regulations, the federal able-bodied adult without dependents (ABAWD) regulations, and the Food Stamp Reauthorization Act of 2002. ABAWD regulations provide that individuals between 18 and 50 years of age, who do not receive CalWORKs benefits, but are economically deprived and meet the work requirements of the program, may be eligible for food stamps. The FSET is the employment and training program for food stamp recipients in California that do not otherwise receive state assistance, *e.g.*, CalWORKs.

Regulatory changes include the following:

- ◆ Individuals who are disqualified from the Food Stamp Program for voluntarily quitting a job or reducing the number of hours worked per week to less than 30, may begin to participate in the Food Stamp Program if they apply after the end of either a one-, three-, or six-month disqualification period (instead of the previous 90-day automatic disqualification period), are otherwise eligible, and are deemed by the county welfare department to be in compliance with registration requirements.

- ◆ Individuals no longer have to comply with a violation in order to technically "end" their food stamp disqualification period. Following the minimum disqualification period, individuals may be approved to receive food stamps if otherwise eligible and if they are in compliance with work requirements of the Food Stamp Program.

- ◆ The \$25 cap for reimbursement of FSET transportation and collateral costs by Program users is repealed.

- ◆ Food stamp applicants who reduce their work hours to less than 30 per week within the 60 days before applying for assistance are subject to the same penalties as applicants who voluntarily quit their job.

- ◆ Individuals who are disqualified for voluntarily quitting their job or reducing their work hours below the threshold, who become exempt during the period of disqualification, may become eligible to receive food stamps without having to reapply.

◆ Restores federal food stamp benefits to those immigrants who become legal non-citizens.

◆ In order to remain eligible, an ABAWD participant must always meet the full 80-hour monthly work requirement or participate in workfare unless the individual qualifies for an exemption from this work requirement. Exemptions include unfitness, pregnancy, residing in a food stamp household that includes a dependent child, and residing in a county with an approved federal waiver of the work requirement.

◆ The ABAWD work requirement is considered satisfied for a month in which an individual had good cause for temporarily missing work in a job of at least 80 hours per month.

◆ A pro rata share of the income of a discontinued ABAWD member will be counted as income to remaining members within the household for food stamp purposes.

On August 1, 2003, 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 September 17. At this writing, the permanent adoption of these sections await review and approval by OAL.

**IMPACT ON CHILDREN:** The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which fundamentally changed the nation's welfare system by creating work requirements in exchange for receipt of welfare benefits, including food stamps, also created the federal programs (ABAWD and FSET) that are set forth in part above. As with most government benefits, there are severe penalties for failure to work, or not working enough hours, attached to these programs. Many times individuals lose benefits not just for the period of time they are in noncompliance, but also for some set extension of that time for punitive purposes. The effectiveness of programs like this, which in theory promote self-sufficiency, remains inconclusive. Specifically, these regulations increase some work requirements, while at the same time loosening some of the barriers to re-entry to the Food Stamp Program. Over 70% of food stamp recipients are children; thus, these regulations (to the extent they will affect parents of children receiving food stamp benefits) will impact hungry children.

### **CalWORKs/Food Stamps Intercept Program**

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

On August 1, 2003, DSS published notice of its intent to permanently adopt amendments to sections 20-400, 20-

401, 20-402, 20-403, 20-404, 20-405, 20-406, and 20-409 of MPP to implement recent changes to this federal law and California's implementation of the Welfare Intercept System (WIS) Enhancement Project, which allows counties to establish, increase, decrease, or delete accounts as appropriate throughout the year, instead of on an annual basis. Existing regulations required counties to submit delinquent accounts by May 1 of each year for intercept the following tax season. After these changes, WIS will be updated weekly with information provided by counties, the Franchise Tax Board, and the IRS. DSS states that moving to a continuous system will allow counties to keep account information more current and accurate.

The Department held a public hearing on September 17, 2003. At this writing, the permanent adoption of these regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** In June 2003, the federal government fined California \$62.5 million for making too many mistakes in handling and dispensing federal food stamps during 2002. This sanction is in addition to the record \$114 million fine the state received for the same problems in 2001. According to the U.S. Agriculture Department, California's error rate is 14.8%, almost double the national average. Mistakes in arithmetic and complicated and burdensome eligibility rules resulted in overpayments of \$172 million in 2002, and underpayments of \$79.5 million. The most dire consequence of underpayment is the number of poor households (estimated at between 66,000 and 165,000) that do not receive the food stamp benefits they are entitled to and go hungry instead. Hunger can have a serious impact on the health and mental well-being of children, and hunger issues are well documented throughout the nation. The federal government offered to settle the \$62.5 million penalty if California agrees to invest half of the latest penalty to improve the process over the next two years.

The above regulations focus on overpayment issues (instead of the more severe underpayment issue) and will have a negative impact on poor households that through no fault of their own may receive over-issuances of food stamps from the county/state, only to be referred to state and federal tax agencies which will automatically offset the amount over-issued from vital cash benefits. Since many recipients of food stamps do not speak English, they may have additional problems rectifying any errors. The Department is required to send a pre-offset warning notice at least 30 days prior to referring the CalWORKs/Food Stamp recipient to the Franchise Tax Board, and at least 60 days prior to referring the recipient to the IRS. This does not leave much time for affected food stamp recipients to resolve problems with these large bureaucracies. The Department and the IRS can also charge the recipient for the administrative cost of collection of the claim amount (apparently even if the over-issuance was due to DSS error and the recipient does not immediately repay the amount), which is automatically deducted from the intercepted

amount. There are no limitations in the proposed regulations on what amount of charges may be imposed, which is extremely problematic for individuals who may have received over-issuances due to DSS error, without realizing they are receiving a windfall.

### **Budgeting of the Food Stamp Program Standard Utility Allowance**

On August 29, 2003, DSS published notice of its intent to permanently adopt amendments to section 63-502 of the MPP to align state regulations with federal regulations regarding budgeting of the Standard Utility Allowance (SUA). The federal government released notice in February 2002, which provided that states do not have the option to prorate the SUA when household members share utility expenses (heating or cooling) with excluded individuals, *e.g.*, ineligible non-citizens. These regulations follow a DSS All County Letter issued in July 2002, stating that effective October 1, 2002, the procedures for budgeting of the SUA would be updated to allow a household with an excluded member to claim the full SUA. One other technical amendment, changing the word "alien" to "non-citizen" throughout section 63-502, was also made by this regulation.

The Department held a public hearing on October 15, 2003. At this writing, the permanent adoption of these sections await review and approval by OAL.

**IMPACT ON CHILDREN:** This federal change will make it easier for states to calculate what allowance a household should receive for utilities (without having to determine a pro rata amount) and could possibly cut down on California's 14.8% error rate. If the error rate is decreased, and more children of families who should be receiving food stamp benefits are, that should cut down on the rate of hunger at least to some small extent.

For the period of October 1, 2003 through September 30, 2004, the maximum Food Stamp allotment for a family of four is \$471 per month, which works out to be approximately \$15 per day to provide three meals for four people.

Recent studies focused on measuring child-specific hunger and the factors influencing hunger concluded that among school-aged children (average 10 years of age) 50% experienced moderate hunger and 16% severe hunger. Those figures show that current federal and state efforts to feed children in low income households need to be improved in order to have a positive impact on children. Easing the burdens on the system, as this regulation does, may assist in those efforts.

### **Anticipating Income and Changes in the Food Stamp Program**

Effective November 1, 2003, DSS amended, on an emergency basis, sections 63-503, 63-504, and 63-505 of the MPP to implement recent federal regulations by the

U.S. Department of Agriculture as follows: (1) the current regulation that households report a change of more than \$25 in monthly gross income is increased to more than \$50 in unearned income and to more than \$100 in earned income; and (2) a technical amendment addressing procedures for the handling of certain recurring income in a retrospective budgeting system. Final federal rules were issued on April 29, 2003, requiring all states to implement these changes by November 1, 2003.

On October 31, 2003, DSS published notice of its intent to adopt these changes on a permanent basis; on December 17 a public hearing will be held. At this writing, the permanent adoption of these regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** This regulatory change should again make it easier for states to determine income eligibility for households by requiring less frequent reporting of changes to income levels. Again, if the error rate is decreased, and more children of families who should be receiving food stamp benefits are, that should cut down on the rate of hunger to a small degree. The underpayment statistics in California are more important to correct than the overpayment amounts, since there are already mechanisms in place for the state/counties to recover their monies upon overpayment. Unfortunately, there are not similar mechanisms in place for families and children to recover their benefits upon underpayment.

In January 2003, state auditors released a report finding that California has spent tens of millions of dollars for a fingerprint imaging system to cut down on public aid fraud; however, the state cannot demonstrate that the system is worth the money based upon the 0.2% fraud rate detected by the system between March 2000 and September 2002 (45 incidents of fraud found among over 18,000 fingerprints matched by the system). Advocates also fear that legal immigrants will not obtain benefits, to which they are legally entitled, for fear of consequences.

As exemplified here again, sometimes the cost of simply providing benefits to those in need (assuming there will always be some minimum level of abuse of a public welfare system) would be the more efficient method of carrying out the intent of the law, instead of establishing costly programs to deter fraud that does not exist to any significant extent. Since non-citizen children and adults are now entitled to food stamps under federal law, the state should instead redirect these resources to reach out to families in need.

### **Update on Previous Rulemaking Packages Food Stamp Reauthorization**

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 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. On October 4, 2002, DSS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 11.)

**Update:** On March 10, 2003, OAL approved DSS' permanent adoption of these regulations.

## **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 devices utilizing a reusable plastic card. On May 1, 2002, 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. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 11.)

**Update:** On February 13, 2003, OAL approved DSS' permanent adoption of these regulations.

**(2) EBT Benefit Adjustments.** On August 1, 2002, DSS adopted, on an emergency basis, section 16-705 of the MPP, regarding benefit adjustments for EBT system errors. On August 9, 2002, DSS published notice of its intent to adopt section 16-705 on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 12.)

**Update:** On January 14, 2003, OAL approved DSS' permanent adoption of these regulations.

## **Noncitizen Eligibility Certification Provision Amendments**

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 changes

to the Food Stamp Program specifically related to noncitizen eligibility certification provisions. On April 5, 2002, DSS published notice of its intent to make these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 12.)

**Update:** On August 6, 2002, OAL approved DSS' permanent adoption of these regulations.

## **California Food Assistance Program**

On March 1, 2002, DSS published notice of its intent to amend section 63-403 of the MPP, to permanently restore California Food Assistance Program (CFAP) eligibility to certain legal noncitizens who entered the U.S. on or after August 22, 1996. On March 6, 2002, DSS adopted these changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 13.)

**Update:** On July 26, 2002, OAL approved DSS' permanent adoption of these revisions.

# **HEALTH / SAFETY**

## **New Rulemaking Packages**

### **Special Claims Review Appeals**

Section 1902(a)(30)(A) of the federal Social Security Act requires all state Medicaid agencies to include in their state plans methods and procedures that will be used to safeguard against unnecessary utilization of care and services by providers and patients. California Welfare and Institutions Code section 14133(b) implements this federal mandate by establishing a post-service, pre-payment audit, which is a review that takes place after Medi-Cal services have been rendered, but before payment is made to the provider by the Department of Health Services (DHS). Payment may be withheld or reduced by DHS if the service rendered was not a covered benefit, was not medically necessary, or was inappropriate.

Pursuant to section 51460, Title 22 of the CCR, a Special Claims Review (SCR) may be initiated by DHS once it determines that the provider has submitted improper claims, including claims that incorrectly identify or code services. The SCR process allows Medi-Cal providers to continue receiving payments for services rendered, but only if the provider submits additional, specified documentation supporting the services provided, thus providing an additional level of scrutiny for claims submitted before payment by DHS becomes due. DHS evaluates providers on SCR status at nine-month intervals to determine whether to continue, modify, or discontinue the use of the review process. Removal from SCR is based upon com-

pliance with the SCR and other Medi-Cal billing requirements.

On December 6, 2002, DHS published notice of its intent to repeal section 51015.1, Title 22 of the CCR, which allows providers placed on SCR status to appeal the action in writing to DHS. The effect of this regulation is that providers can no longer appeal their SCR status, however, DSS states that providers still have a right to appeal the processing or payment of claims for services under Medi-Cal, fulfilling providers' constitutional right to due process. DHS claims the regulation will result in cost and time savings to providers by removing "an unnecessary administrative obstacle and eliminating those costs incurred by Medi-Cal providers for legal fees and other expenses resulting from appealing a SCR...[p]roviders will be able to redirect their resources to efforts in maintaining records and documentation to support services rendered and claimed for Medi-Cal beneficiaries." Further, DHS claims that repealing the SCR appeal process will allow DHS staff "to focus on other anti-fraud activities mandated by law."

The 45-day written public comment period ended January 21, 2003. On June 24, 2003, OAL approved the permanent repeal of section 51015.1, effective July 24, 2003.

**IMPACT ON CHILDREN:** The SCR process creates an additional burden, albeit legally justified in some portion of cases, on those providers identified by DHS to be potentially untrustworthy when it comes to Medi-Cal billing. However, if DHS errs and places a provider on SCR when no fraud or improper conduct has really occurred, that provider has to wait a minimum of nine months in order for DHS to realize its error; in the meantime, that provider has been forced to submit additional paperwork for each Medi-Cal patient for whom he/she has provided services for that same time period. Recent literature on this subject concludes that one of the reasons that providers do not want to accept Medi-Cal patients is because of the increasingly burdensome amount of paperwork that goes along with treating children who are insured under public health programs. See, e.g., Steve Berman, M.D., "*Factors That Influence the Willingness of Private Primary Care Pediatricians to Accept More Medicaid Patients*" Pediatrics (August 2002). And yet the process DHS has created to enforce its anti-fraud measures imposes additional paperwork requirements on certain individuals, potentially leading some providers to stop treating Medi-Cal patients altogether.

DHS states that "[s]ince March 2001, 98% of the SCR actions under appeal have been upheld by the Department." However, this statistic merely illustrates that DHS, which made the initial determination to place the provider on SCR, usually agrees with itself that the provider should have been placed on SCR status. There is no independent check within the system, which makes the ability to appeal at the initial placement of the provider on SCR that much more crucial and necessary as a due process protection. DHS claims that the SCR process is similar to requiring

providers to obtain prior authorization (PA) before treatment of a patient; according to DHS, since the PA requirement has no appeal process at initiation, the SCR similarly should not have an appeal process at initiation. However, PAs are true utilization controls that purportedly cut down on costs by requiring medical justification before treatment. In contrast, SCR status is punitive, and results from DHS' conclusive finding that the provider has engaged in improper billing conduct; those factors necessitate that there be some type of check on the system. Since there is no stated cost savings to DHS, and the Department has not indicated that it does not have the resources to continue responding to these appeals, it is unclear why DHS is eliminating this due process check—especially when such an action might impair poor children's access to health care providers.

During economic downturns—when both the state and its citizens have difficulty making ends meet—lawmakers tend not to focus on increasing access and eligibility for those in need, but instead on fighting perceived fraud in the system. Governor Davis' initial budget proposal for 2002–03 sought to increase DHS funding in order to add positions to conduct more fraud detection. Instead, money spent within the system should be spent providing health care services to those in need, especially children—which is exactly what could occur if a true presumptive eligibility program were put in place for California's children.

For years, child 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. The result of our current system is the creation of barriers to keep children out of public health programs intended for them by Congress. California's current system of fragmented, confusing, and expensive "systems" of health care are not providing the actual coverage that children in this state need. The goal of providing health care coverage to all eligible children would be better met by providing universal coverage to all children with post hoc billing of ineligible individuals. For further discussion of this proposal, see the Children's Advocacy Institute's *California Children's Budget 2002–03* (San Diego, CA; June 2002) at 4-72 (available at [www.caichildlaw.org](http://www.caichildlaw.org)).

### **Drug Medi-Cal Rates**

On January 21, 2003, DHS amended, on an emergency basis, section 51516.1, Title 22 of the CCR, to update Medi-Cal reimbursement rates for substance abuse services for fiscal year 2001–02. Welfare and Institutions Code sections 14021.5, 14021.6, and 14105, and Health and Safety Code section 11785.42 require the Department of Alcohol and Drug Programs, in consultation with DHS, to establish rates for Drug Medi-Cal services, including perinatal residential treatment services for pregnant women and women in the postpartum period, Naltrexone (drug and



alcohol addiction) treatment, and day care habilitative (rehabilitative/ambulatory intensive outpatient) services; establish a dosing fee for use of two specific narcotic replacement drugs; and to establish a uniform statewide monthly reimbursement rate for narcotic treatment programs.

DHS is adopting these regulations, rather than the Department of Alcohol and Drug Program (ADP), because DHS is the single state agency authorized by federal law to administer the Medicaid program in California. ADP has been paying these increased rates for services provided on or after July 1, 2001, the effective date of the original emergency rulemaking package.

Pursuant to section 51516.1, Title 22 of the CCR, reimbursement for the above-identified services are based on the lowest of the following three options: (1) the provider's usual and customary charge to the public for similar services; (2) the provider's allowable cost of rendering services; or (3) the statewide maximum allowances (SMAs) for the fiscal year, which ADP establishes in accordance with the Welfare and Institutions Code section 14021.6. The SMAs are set by determining aggregated, median rates for each treatment/service from data reported by county-operated providers, county contract providers, and the Department of Alcohol and Drug Programs' direct contract providers, which is presented in the form of year-end cost reports. The fiscal year 2001-02 SMAs, amended herein, are based on cost report data from fiscal year 1999-00, which is the most recent data available.

Based upon the increases to several services, which is offset by a few decreases, there is a combined state-federal (50/50) fiscal impact of over \$1 million in additional reimbursement rates for substance abuse treatment. More specific examples of the methodology used to come up with the amended reimbursement rates is contained in DHS' rulemaking file in a document titled "Drug Medi-Cal Rate Setting Methodology, Fiscal Year 2001-2002."

On February 7, 2003, DHS published notice of its intent to adopt the changes on a permanent basis. DHS held a public hearing on these proposed regulations on April 2, 2003. After receiving no public comment, on June 17, 2003, OAL approved DHS' permanent adoption of these changes.

**IMPACT ON CHILDREN:** Unlike rates paid to providers under Medi-Cal, the rates paid for drugs, including substance abuse treatment, which are based upon aggregated median costs, are set to keep pace with the rising cost of health care services and products, in particular the cost of drugs and other prescription medications. Although DHS is approximately two years behind in its rulemaking (the effective date of these "emergency" regulations is July 1, 2001, and the rates are effective through June 30, 2002), at least there is a system in place to reevaluate the costs of substance abuse services on an annual basis.

Unfortunately, the reliance by the Department on drug pricing data provided by the drug manufacturers has resulted in substantial losses for the Medi-Cal program, and the

method of determining reimbursement rates may soon change. In January 2003, the State Attorney General filed a false claims act lawsuit against two major drug companies, Abbott Laboratories and Wyeth, for hiding the true costs of their drugs so that Medi-Cal reimbursements would be artificially inflated. The AG stated that some drug prices had been inflated by up to 1,198% and contributed to soaring health care costs for Californians. The AG believes the two drug companies subject to this lawsuit are not alone and expects to file similar lawsuits against other pharmaceutical companies. While drug manufacturers' costs doubled (resulting in company profits through the over-billing of the Medi-Cal program), the number of Medi-Cal patients declined by 15% from 1997 through 2001.

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; and the previous issue of the Children's Advocacy Institute's *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 13, both available at [www.caichildlaw.org](http://www.caichildlaw.org).

### Long-Term Care Rates

Welfare and Institutions Code section 14105(a) authorizes the Department of Health Services 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. Welfare and Institutions Code section 14126.25 requires DHS to establish reimbursement rates for long-term care facilities on August 1 of each year. The rates are to be based on cost data submitted by facilities in accordance with California's state Medicaid plan. Section 14105(a) provides for emergency adoption of regulations in order to respond to legislative budgeting decisions, and further requires DHS to adopt such regulations within one month after enactment of the Budget Act or any other appropriation that changes the level of funding for Medi-Cal services.

On January 27, 2003, DHS, on an emergency basis, made the following rate adjustments to various sections of Title 22 of the CCR (the changes below are averages, weighted by actual patient days, for all facility categories in the regulation section):

- ◆ Section 51510(3) "Nursing Facility Level A Services": 0.082% change;
- ◆ Section 51510.1(d) "Intermediate Care Services for the Developmentally Disabled": 0.635% change;
- ◆ Section 51510.2(a) "Intermediate Care Services for the Developmentally Disabled- Habilitative": 4.052% change;
- ◆ Section 51510.3(a) "Intermediate Care Services for the Developmentally Disabled - Nursing": 0.725% change;
- ◆ Section 51511(a) "Nursing Facility Level B Services": 2.486% change;
- ◆ Section 51511.5 "Nursing Facility Services Subacute Care Reimbursement": 2.493% change;

◆ Section 51511.6 “Nursing Facility Services Pediatric Subacute Care Reimbursement”: 1.788% change;

◆ Section 51532.3(a) “EPSDT Supplemental Services Provider Pediatric Day Health Care Facility Reimbursement”: 10.0% change (this change implements a section that was left out of the long-term care rate regulation package for 2000, thus, there is no fiscal impact);

◆ Section 51535(d) “Leave of Absence”: 1.464% change;

◆ Section 51535.1(d) “Bed Hold for Acute Hospitalization”: 1.464% change;

◆ Section 51544(h) “Hospice Care-NF-A”: 0.531% change;

◆ Section 51544(h) “Hospice Care-NF-B”: 2.405% change;

◆ Section 54501(b) “Adult Day Health Care Services”: 0.045% change (change due in part to the settlement agreement in *California Association for Adult Day Services v. Department of Health Services*, San Francisco County Superior Court Case Number 944047 (January 12, 1994).

DHS has been paying long-term care facilities at these increased rates for services provided on or after August 1, 2001. In order to set prospective rates for long-term care facilities (except Pediatric Subacute facilities), DHS divides the facilities into peer groups by assessing licensing status, level of care provided, and geographic placement and/or bedsize of the facility. Rates for each of these categories are determined by analyzing data submitted by each facility in their annual cost reports. The reports relied upon by DHS are identified in the rulemaking file and are approximately two years old, but represent the most current and reliable cost data available to DHS. These reports are audited by DHS and adjustments are made based upon cost reviews, new program requirement costs (these are new costs mandated by state or federal law and/or extraordinary circumstances affecting the industry), and provider input from industry representatives and advocates.

DHS reviews the following cost components in order to project costs of the facilities for the upcoming year: (1) fixed costs, including interest, depreciation, leasehold improvements, and rent; (2) property tax; (3) labor expenses; and (4) all other costs. The rate-setting methodology for some facilities also includes the use of established economic indicators, for instance the Consumer Price Index for food costs, to predict future year costs. All of these cost adjustments are then used to project the costs of each facility for the upcoming year. The rate-setting process begins at base zero each year, meaning that the rates are reassessed each year using the above methodology, and not by projecting percentages from the prior year to the current year.

Because DHS has no prior cost data for Pediatric Subacute reimbursement, these facilities’ rates are based upon a model, which is an estimate of expected costs based upon level of care and services provided. These rates are also updated each year based upon projected costs of running the facility and by considering the costs as specified in the methodology above.

On February 7, 2003, DHS published notice of its intent to adopt the changes on a permanent basis. DHS held a public hearing on these proposed regulations on April 2, 2003. DHS readopted these emergency regulations effective May 22, 2003. On October 16, 2003, OAL approved DHS’ adoption of the changes on a permanent basis.

**IMPACT ON CHILDREN:** Again, unlike the fee-for-service rates paid to providers under Medi-Cal, the rates paid to long-term care facilities are set to keep pace with inflation and the actual cost of providing health care services and products. DHS is approximately two years behind in its rulemaking (the effective date of these “emergency” regulations is August 1, 2001), however, at least there is a system in place to evaluate the costs of providing these services on a yearly basis, notwithstanding the additional impact on the state budget of particular importance because of California’s recent \$38 billion budget deficit.

This type of analysis should be conducted by DHS for every provider who treats Medi-Cal patients to ensure that access to health care meets the federal requirement. Federal Medicaid law mandates that each state plan must “assure that payments [to providers]...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.*” 42 U.S.C. section 1396a(a)(30)(A) (emphasis added). This section is often referred to as the “equal access” standard. In essence, it means that patients covered by Medicaid are entitled to the same quality of care and access to care as are individuals covered by other insurance, including private health care insurance and Medicare (federal insurance of the elderly and disabled). California is responsible for complying with this federal mandate by adequately setting provider fee-for-service rates for Medi-Cal services.

Recent reports and studies have shown there is growing concern that the Medi-Cal provider rates are dangerously low in California, adversely affecting children’s health and access to necessary medical care. Recent findings include the following:

◆ A May 2003 report issued by the Medi-Cal Policy Institute entitled “*Physician Participation in Medi-Cal, 2001*” found that nearly half of all physicians in California’s urban counties are not willing to take Medi-Cal patients and even fewer physicians were willing to accept new Medi-Cal patients into their practices. For example, “48% of medical specialists, and 43% of surgical specialists who were accepting any new patients said that they were open to new Medi-Cal patients.” The study found notwithstanding efforts to increase participation by doctors in the Medi-Cal program, including the expansion of Medi-Cal managed care and a slight increase in provider rates, “there was no measurable increase in physicians’ participation in the program between 1996 and 2001.” In addition, the supply of physicians available to Medi-Cal patients is significantly less than that available to the gen-

eral population. Specifically, “the number of medical specialists available to Medi-Cal beneficiaries was more than one-half less than it was for the general population, and the number of surgical specialists was two-thirds less.”

◆ A study measuring children’s access to orthopedic care 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. The study design included 50 randomly chosen offices of orthopedic surgeons who were telephoned with the following scenario: “My 10-year-old son broke his arm last week during a vacation” followed by a request for an appointment that week. Each office was called twice with an identical script except for insurance status: once with Medi-Cal and once with private insurance. All 50 offices offered an appointment to see the child with private insurance within 7 days. Only 1 out of the same 50 offices offered an appointment to see the child with Medi-Cal within 7 days. Of the offices that would not see a child with Medi-Cal, 87% were unable to recommend an orthopedic office that accepted Medi-Cal. The study further suggests that the federal guidelines for Medicaid regarding equal access are not being followed in California. The study design has been replicated in other pediatric fields and on a nationwide basis with similar findings.

◆ An American Academy of Pediatrics’ Medicaid Reimbursement Survey, published in 2001, found that under Medicare, a doctor treating an elderly patient would receive \$203.15 for an initial inpatient consultation of high complexity. Under Medi-Cal, the same doctor treating a child would receive only \$82.25 for the same service. The figures reflected in this study 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.

◆ A 2001 Legislative Analyst’s Office (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 Medicare and private insurers. LAO found that the Medi-Cal program has not met state and federal requirements for setting rates ensuring reasonable access to health care; and 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 there is great disparity between medical services for the elderly, usually covered by Medicare, and health care for poor and disabled children, usually covered by Medi-Cal. The following facts high-

light the foolishness of a national agenda which prioritizes care of the elderly over care for the young: (1) children incur less than one-fifth the per capita medical costs of the elderly; (2) 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; (3) the state has available funds to cover almost all of the state’s children at a one-third state match, but sent over \$700 million back to Washington and failed to cover most of those who were intended for coverage; and (4) the child poverty rate remains at well over twice that of seniors (who are covered by social security). Proposed new public investment on the national level remains focused on additional prescription drug benefits for seniors under Medicare when pharmaceuticals are the fastest rising sector of health care costs and many of the most expensive prescription drugs have been found to have no additional health benefits compared to lower priced drugs already on the market.

Notwithstanding the abundant evidence supporting the increase of Medi-Cal provider rates in California, former Governor Davis proposed 15% provider rate cuts in order to balance the 2003–04 budget. His proposal was in direct contradiction to a statement he made less than one year before upon signing AB 3006 (Chapter 1164, Statutes of 2002), repealing provisions in AB 442 (AB 1161, Statutes of 2002) that decreased provider rates by 15%. At the time, Davis stated:

Before I took office, California had nearly the lowest reimbursement rate for physicians in the Medi-Cal system of any state in the country. These low reimbursement rates reduced access to medical care by reducing the number of physicians willing to serve Medi-Cal patients. In the last three years, we’ve made substantial efforts to improve reimbursement rates, expand eligibility, and increase the number of people with health coverage... In this difficult budget year, the Administration and legislative leaders discussed rolling back some of the rate increases approved in recent years. However, any savings that might accrue by signing AB 442, the omnibus health budget trailer bill, and rolling back rates to pre-August 2000 levels would be offset by costs associated with increases in emergency room visits, administrative costs of implementing the rate reductions, and the loss of physicians who would surely leave the Medi-Cal program.

The 2003–04 Budget Act signed by Davis reduced provider rates at a compromised 5%.

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; and the previous issue of the Children’s Advocacy Institute’s *Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 13, both available at [www.caichildlaw.org](http://www.caichildlaw.org).

## Established Place of Business

In yet another effort to curb perceived Medi-Cal fraud and abuse, the Legislature passed AB 1107 (Chapter 146, Statutes of 1999) and AB 1098 (Chapter 322, Statutes of 2000), adding several provisions to the Welfare and Institutions Code, including 14043 through 14043.75. These bills brought California into compliance with federal Medicaid laws regarding detection and prosecution of fraud and abuse by giving DHS broad discretion to establish additional requirements for applicants, and requiring all providers to re-enroll and provide additional proof regarding their place of business. DHS has found "providers who cannot demonstrate they are operating an established place of business are more likely to commit Medi-Cal fraud." Therefore, providers will now be required to show they are operating an "established place of business" and must follow standard business practices, like carrying several types of insurance. DHS may deny approval to providers who fail to meet the new standards set forth in this regulation.

On February 3, 2003, DHS amended, on an emergency basis, sections 51000.4, 51000.30, 51000.45, 51000.50, 51000.55, 51200, 51200.01, and 51451, Title 22 of the CCR, in order to reflect changes made in AB 1107 and AB 1098. On February 21, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. Specific provisions of DHS' proposed rulemaking include the following:

- ◆ A cellular phone may not be used as the primary business telephone provided on the application for DHS approval.

- ◆ Physicians must disclose to DHS information related to their hospital privileges; show evidence of Worker's Compensation insurance (as required by state law); show evidence of comprehensive liability insurance; show evidence of professional liability insurance (for specified providers); and follow specified procedures when specific changes in their businesses occur. Physicians who fail to follow these rules may be temporarily suspended from Medi-Cal.

- ◆ Providers/applicants must meet additional criteria upon review of their participation in the Medi-Cal Program. For instance, providers/applicants must have paid all fines and debts due to government health care programs; must disclose any involvement in investigations or convictions regarding fraud and abuse; must correct any discrepancies in background checks or on-site visits; must meet all new requirements for establishing a place of business; must submit requested information within a specified time period or re-start the application process; and are prevented from re-enrolling in Medi-Cal for certain reasons and for certain periods of time.

- ◆ All providers must re-enroll if the Department finds it necessary in order to protect public funds, to protect funds used to run the Medi-Cal program, or to prevent harm to Medi-Cal patients.

- ◆ All providers must meet the following criteria in order to show DHS they have an established place of business: be in operation at the time the application is submitted; have sufficient start-up capital and income to sustain a business; own the building or sign a lease agreement for space; have adequate stock and office equipment appropriate to the business; have regular and posted business hours; be readily identifiable as a health care business; obtain and maintain insurance in specified minimum amounts; and be open to the public, as applicable to the type of business.

- ◆ Providers who have applied for continuing enrollment after having their application denied by DHS are prohibited from participating in Medi-Cal.

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

To support these changes, DHS provides several examples of their findings upon investigation of sites, for instance, no office at the location provided, no equipment or facilities needed to provide services identified in the application, no licensed practitioners at the facility identified and providing services where a licensed provider is necessary, and facilities (usually durable medical equipment suppliers) closed during "business hours" and with inadequate stock or inventory to fill prescriptions. DHS states that these regulations will provide additional protections for Medi-Cal beneficiaries.

DHS closed the written public comment period on April 7, 2003 with no public hearing. DHS re-adopted the emergency regulations effective August 5, 2003, and must transmit a certificate of compliance to OAL by February 2, 2004, or the emergency language will be repealed by operation of law on the following day.

**IMPACT ON CHILDREN:** The theory behind these regulations is that if a provider is committing fraud and not operating a legitimate health care business, he/she will not expend money in order to come into compliance with these regulations, and therefore, fraudulent or abusive Medi-Cal

providers will be run out of business at the re-enrollment period, or deterred from starting a business and engaging in any fraud or abuse in the first place. The problem is that these regulations will negatively impact providers who run honest businesses treating poor and disabled children. For instance, many rural providers might not carry a comprehensive general liability policy at their place of business; they are not otherwise required to do so under the law. DHS states this could cost less than \$1,000 per year for a non-licensed provider with no employees, but DHS fails to identify whether they have measured the impact on doctors who may leave the system based upon these additional and burdensome requirements. The regulations will likely affect rural providers disproportionately because they frequently treat at community clinics and in very poor areas, unlike providers who treat in urban areas, where typically a hospital or managed care facility would provide this type of overhead.

Although decreasing fraud and abuse in the Medi-Cal system is important, treating children who need medical assistance should be the Department's top priority. The changes made by this regulation—particularly requiring every physician who treats Medi-Cal patients to carry not only errors and omissions insurance, but a comprehensive commercial general liability policy—place a burden greater than is placed on any other physicians in California. These changes will likely end up costing Medi-Cal physicians more money (while their provider rates are already some of the lowest in the nation), and those providers may decide to stop treating Medi-Cal patients altogether. If that is the case and access to physicians is further compromised, DHS will have failed in its mandate to provide care for children.

DHS does not show any data on the average cost to a pediatric physician practicing in a rural area to purchase all three types of insurance and what impact that will have on their continued ability to treat Medi-Cal patients, who are primarily children. DHS does not disclose the rate or prevalence of fraud by Medi-Cal providers, nor does it show that money lost to existing fraud and abuse is high enough to warrant imposing these additional burdens and costs on providers who run legitimate businesses. In fact, an article in the *Los Angeles Times* on June 26, 2003, stated that lawmakers overestimated by \$100 million the amount the state would collect from its efforts to combat Medi-Cal fraud. DHS claims that protection of "vulnerable" Medi-Cal beneficiaries is a concern, yet there is already a minimum \$25,000 mandatory bond procedure that is available to DHS pursuant to Welfare and Institutions Code section 14100.75, providing some protection to patients subject to fraudulent activities of health care providers. DHS should focus on maximizing financial return from existing anti-fraud measures that have recently been implemented, rather than placing additional burdens on providers without any data or evidence to show that these increased efforts benefit Medi-Cal beneficiaries.

Malpractice insurance is a good protection from a consumer standpoint. However, in California only cosmetic surgeons are required to carry malpractice insurance (the Medical Board of California recently passed regulations to require this). If the increased cost of purchasing this insurance in order to treat Medi-Cal patients results in additional physicians leaving the system or worse, leaving the State, then the goal of fraud-prevention has gone too far. DHS may be driving providers out at a time when children's access to health care under the Medi-Cal program is already in a severe crisis.

Finally, DHS makes no statement regarding the added costs and resources that it will need to expend in order to ensure that these regulations are fulfilled. Especially in light of impending severe budget cuts to administrative staff of many public agencies, it is unclear how DHS can conclude that the implementation of these regulations will cost the state nothing.

### **Upper Billing Limit**

After the passage of AB 1107 (Chapter 146, Statutes of 1999) and AB 1098 (Chapter 322, Statutes of 2000), which were enacted to address fraud and abuse within Medi-Cal, investigators discovered that certain providers were acquiring specified medical products and devices at very low or no cost and then requesting maximum reimbursement rates through Medi-Cal. Prior to this regulatory action, DHS had assumed that providers were operating under market conditions by acquiring medical products in the open market through legitimate distribution channels, which is not always the case. Prior regulations allowed providers to mark-up the product by up to 100% based upon the estimated acquisition cost or the weighted average of the negotiated contract price, as opposed to the actual purchase price, when requesting reimbursement through Medi-Cal. This practice resulted in a windfall to providers and a loss to the state.

Welfare and Institutions Code section 14043.1(a) defines "abuse" as "practices that are inconsistent with sound fiscal or business practices and result in unnecessary cost to the federal Medicaid and Medicare programs, the Medi-Cal program, another state's Medicaid program, or other health care programs operated or financed, in whole or in part, by the federal government or any state or local agency in this state or any other state." In order to protect the fiscal integrity of the Medi-Cal system, DHS claims the proposed regulations must be established so that the amount providers may bill DHS for specified products is tied to the net purchase price of the product.

On March 1, 2003, DHS adopted new section 51008.1 and amended sections 51104, 51515, 51520, and 51521, Title 22 of the CCR, on an emergency basis, in order to immediately curb the practice of providers inappropriately charging the Medi-Cal program for supplies and devices that the provider acquired at low or no cost. As a result of

these changes, the net purchase price plus up to a 100% mark-up establishes the upper billing limit for providers of these products. Providers who pay nothing to acquire specified products will receive no reimbursement through Medi-Cal, while providers who acquire products through normal market channels will receive the same reimbursement under Medi-Cal, as their net purchase price equals or exceeds the estimated acquisition cost or the weighted average of the negotiated contract price.

On March 14, 2003, DHS published notice of its intent to adopt these changes on a permanent basis as follows:

◆ Section 51008.1 is adopted to read: “(a) Bills submitted pursuant to Section 51008, for durable medical equipment as defined in Section 51160, prosthetic and orthotic appliances identified with a single asterisk in Section 51515, medical supplies authorized pursuant to Section 51320, or incontinence medical supplies listed in Section 51526(c) shall not exceed an amount that is the lesser of: (1) The usual charges made to the general public, or (2) The net purchase price of the item, which shall be documented in the provider’s books and records, plus no more than a 100 percent mark-up. Documentation shall include, but not be limited to, evidence of purchase such as invoices or receipts. (b) Providers shall not submit bills pursuant to (a) for items obtained at no cost.”

◆ The phrase in Section 51008.1 above, “charges made to the general public,” means the retail amount charged to individual purchasers either found on the package of the product or included in a provider’s price list.

◆ The phrase in Section 51008.1(a)(2), “net purchase price” means the amount actually paid for an item after discounts or rebates are applied.

DHS closed the written public comment period on May 1, 2003 with no public hearing. DHS re-adopted the emergency regulations effective August 28, 2003, and must transmit a certificate of compliance to OAL by February 24, 2004, or the emergency language will be repealed by operation of law on the following day.

**IMPACT ON CHILDREN:** The end result of these regulations is equitable: if you pay nothing for a product, you make no money from it, and the state does not pay you money for something that you did not buy. This type of anti-fraud measure, which does not cost providers who play by the rules additional money (compared to the “Established Place of Business” regulations above) is more in line with the purpose of anti-fraud and abuse measures. To the extent these regulations save the state money to be used for other, legitimate purposes—like treating children who need medical care—child advocates support DHS’ efforts.

State Auditor Elaine Howle released a report on her audit of the Medi-Cal system in December 2002, and found DHS could have “saved the state millions of dollars” if it had “shopped around” for the lowest prices on medical equipment and supplies for beneficiaries. DHS is supposed to survey the market for products every sixty days and set

price caps based on the lowest prices. However, the audit found that DHS “has not updated the prices for many of its medical supplies for more than fifteen years” and is “paying whatever price the seller is charging.” This audit undoubtedly played a role in DHS’ current spate of additional anti-fraud and abuse proposals.

In April 2003, Shield-California Health Care Center filed a petition for repeal of these regulations based upon several arguments including (1) the regulations are not reasonably necessary to prevent fraud and abuse in the Medi-Cal system; (2) DHS incorrectly determined that the regulations will not have a statewide adverse impact on business; and (3) the regulations “would reduce overall provider returns more than necessary to achieve the purposes of the Medi-Cal reimbursement limitations of producing ordinary rather than excessive reimbursements in violation of due process requirements.” DHS denied the petition on each count.

## Annual Healthcare Common Procedure Coding System (HCPCS) Update

The Healthcare Common Procedure Coding System (HCPCS) was developed by the federal government to meet the operational needs of the Medicare and Medicaid fee-for-service reimbursement programs and to allow communication between the programs by creating a single national reimbursement coding system (that primarily comes into play when there is an overlap of the Medicare and Medicaid programs for certain beneficiaries, so called “dual eligibles”). The HCPCS is based upon the American Medical Association’s CPT-4 coding system, with additional codes and modifiers developed by other professionals, insurers, state agencies, and Medicare contractors, in order to meet their needs for reporting and claims processing. Each state must still define its own Medicaid coverage, reimbursement, and utilization levels, and states may still limit or deny payment for certain services for which a code is provided through the HCPCS. The HCPCS was intended to provide a framework that can be expanded upon to meet the needs of all individuals and entities of the health care industry. In addition to improving communication across the health care industry, the coding system also provides “specificity and uniformity which allows [insurance] carriers to establish controls to prevent escalation of program payments and permit uniform application of HCFA coverage and reimbursement policies.”

Welfare and Institutions Code section 14105 requires DHS to implement and annually update the federally published HCPCS by emergency regulation. In 1985, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration), required that all states with Medicaid agencies operating a Medicaid Management Information System convert and use a new, exclusive, and universal system of coding, the HCPCS. According to federal law,

failure to implement the new coding system would result in loss of approval of the state's Medicaid information system and a reduction of federal financial participation from 75% to 50%. California subsequently converted its system in 1992, and is required to annually update the system in accordance with federal notice.

CMS sent notice to the states in October 2001 making the updated HCPCS file available for dates of service on or after January 2, 2002. On April 4, 2003, DHS amended, on an emergency basis, sections 51319(c), 51507.2, 51515(c) and (e), 51517, 51521(i), Title 22 of the CCR, to change (effective for dates of service on or after December 2, 2002) the procedure codes, descriptions, and prices for items and services billed by providers to the Medi-Cal Program in accordance with the federal HCPCS codes and descriptors for hearing aids, speech therapy and audiology services, orthotics and prosthetics, and durable medical equipment. The regulations also add a prior authorization requirement for hearing aid supplies (a decision made by DHS and not required by federal law), in order to eliminate payment by DHS for items not directly related to the operation and/or use of a hearing aid.

On April 18, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. DHS closed the written public comment period on June 2, 2003 with no public hearing. On September 4, 2003, OAL approved DHS' adoption of the changes on a permanent basis.

**IMPACT ON CHILDREN:** The intended result of these regulatory changes is to contain costs in the health care industry. However, California's system of coding is confusing: it incorporates the federal requirements for certain health care products, but also has a separate system for determining provider rates, which advocates argue is not in compliance with federal law (see above). The federal government's efforts to keep health care costs down through public health programs such as Medicare, has proven at least somewhat effective in recent years. Reports show that private health insurance premiums have been rising at an average rate of 13% per year, a fiscally unsustainable rate of growth compared to Medicare.

Many lawmakers and advocates believe implementing a single-payer health care system, like those operating in Canada and Britain, would be the most efficient way to extend health care to everyone. Recent estimates of the number of uninsured in the U.S. vary from 41 to 75 million, and research shows that the cost to the system of maintaining an uninsured population (costing between \$65 and \$130 billion) is much greater than the cost of implementing a single-payer system (estimated between \$34 and \$69 billion). Not surprisingly, there is strong opposition by the pharmaceutical industry and others in the health care industry based upon their current profit margin. It remains to be seen how the federal government will determine who should win out: the special interests or consumers in need of basic health care services.

California is tinkering with the move to universal care via the recent passage of SB 2 (Burton) (which requires employers of specified sizes to either provide health care for their employees or pay into a state fund that will pay for health insurance for the uninsured). Counties are also taking the lead in the push toward universal coverage for children by setting up all-inclusive health care programs for children of certain ages by directly drawing down federal CHIP funds at a 2-to-1 match with private foundation and/or tobacco settlement monies. However, with the current squeeze on counties' budgets, it remains to be seen whether counties can maintain and expand these programs as planned.

### **Medi-Cal Subacute Contracts**

Subacute care is the level of care needed for patients who do not require hospital acute care, but need more intensive nursing services than are typically provided in skilled nursing facilities. Medically fragile patients require subacute care for services such as inhalation therapy, tracheostomy care, intravenous tube feeding, and complex wound management care. Welfare and Institutions Code section 14132.25 requires DHS to establish a subacute care program in health care facilities. In order to implement this program, DHS enters into contracts with licensed health care facilities to provide subacute care services to both adult and pediatric Medi-Cal beneficiaries. DHS reimburses health facilities which provide subacute care to Medi-Cal beneficiaries at a higher rate than is paid for skilled nursing care.

Under current regulations, DHS cannot contract or renew a contract with a health care facility for subacute services unless the facility can prove that it has not received any notices of deficiencies in patient care, as evidenced by a Class AA or Class A citation received from the Department's Licensing and Certification program, within the prior year. However, some citations or deficiencies have nothing to do with subacute care services or patients receiving those services. The current regulations do not afford the Department any discretion to continue contracts with facilities based upon review of the merits, particularly in cases where the citation or deficiency is not indicative of the facility's ability to provide continued subacute services, or where the deficiency has been corrected or dismissed. The current regulation deters health care facilities willing to contract with DHS for subacute services.

On April 1, 2003, DHS amended, on an emergency basis, section 51215.6, Title 22 of the CCR, to remove the systematic non-renewal of a subacute contract between DHS and licensed health care facilities who receive a citation or deficiency. In order to maintain patient protection and safety, section 51215.6 was amended to specify that all citations will be evaluated by DHS for their impact on patient care, patient safety, fraud, and for facility noncompliance. According to DHS, this regulatory change is nec-

essary to alleviate the shortage of beds in facilities that provide subacute services, and will provide more options when transferring patients from one subacute facility to another.

On April 18, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. DHS closed the written public comment period on June 2, 2003 with no public hearing. On August 18, 2003, OAL approved the Department's adoption of the changes on a permanent basis.

**IMPACT ON CHILDREN:** Normally, a skilled nursing facility that receives a citation from DHS is allowed to continue to operate without affecting the receipt of Medi-Cal reimbursement funds under state licensing laws. With subacute services, the facilities are contracting separately with DHS for Medi-Cal services; thus, DHS' policy of not renewing or contracting with a facility if there was an outstanding citation was initially intended to keep facilities up to par. However, over the years, the number of citations issued has increased due to greater focus on enforcement by DHS. DHS was left without enough beds to cover the need for subacute care services. Arguably, if the purpose of the citation has nothing to do with subacute patient care and/or there is no risk to patient safety, there does not appear to be any reason DHS should be restricted in sending patients to such a facility.

Currently, DHS contracts with 94 separate facilities for these services, out of which only nine provide specialized services to pediatric Medi-Cal patients—making the need to ensure available pediatric beds even more imperative. Although the number of subacute beds exceeds 2,000 in California, the majority of the contractors are located in the Los Angeles area. The Department's ability to maintain contracts notwithstanding outstanding citations or deficiencies, where patient safety is not in jeopardy, will broaden placement options outside of Los Angeles. It seems especially important that children who receive subacute services be close enough to home to have visits from family and friends during their stay.

### **Rate Increase for Hospital Outpatient Departments**

On April 10, 2003, DHS amended, on an emergency basis, section 51509, Title 22 of the CCR, to increase the fee-for-service rates paid by DHS for most hospital outpatient services by 30% for services provided on or after July 1, 2001, and to increase those rates by 3.3% beginning July 1 for each of the three subsequent fiscal years (2002–03, 2003–04, and 2004–05). Hospital outpatient services include those provided to Medi-Cal beneficiaries under 18 years of age, including the California Children's Services Program (CCS), the Child Health and Disability Prevention Program (CHDP), and the Early Periodic Screening, Diagnosis, and Treatment Program (EPSDT), as well as perinatal services.

There are several exceptions to the rate increases as follows: (1) rate increases will not be paid on claims for serv-

ices that are based upon cost, including, for instance, rates paid for medical items and equipment that are paid a rate equal to or greater than a provider's acquisition cost or the manufacturer's suggested retail price, or federally qualified health center services; (2) rate increases will not be paid for any portion of a claim for drugs or medical supplies dispensed to outpatients in accordance with sections 51513 and 51520, Title 22 of the CCR; and (3) rate increases for reimbursement for clinical diagnostic laboratory tests will be based upon amounts set forth in the Medicare Part B program for such services (see generally 42 U.S.C. section 1395l(h)). DHS also added language to section 51509(a), Title 22 of the CCR, "to clarify long-standing policy that Medi-Cal pays a provider's usual charge to the general public, not to exceed the maximum reimbursement rates contained in regulation." DHS claims this change is non-substantive.

The purpose of these regulations is to bring the Department into compliance with the following orders and judgments issued in 2002 against DHS in which plaintiffs contended the rates paid for these services violated federal law: *San Bernardino County, et al. v. State Dept. of Health Services*, Los Angeles County Superior Court, Case No. C753710; *Barlow Respiratory Hospital, et al. v. State Dept. of Health Services*, Sacramento County Superior Court, Case No. 530182; *Orthopaedic Hospital and the California Assn. Of Hospitals and Health Systems v. Kizer*, U.S. District Court, Central District, Case No. 90-4209 SVW; *Orthopaedic Hospital and the California Assn. Of Hospitals and Health Systems v. Belshe*, U.S. District Court, Central District, Case No. CV 94-4764 SVW; *Orthopaedic Hospital and the California Assn. Of Hospitals and Health Systems v. Belshe*, U.S. District Court, Central District, Case No. CV 94-4825 SVW.

On April 25, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. DHS closed the public comment period on June 13, 2003 after holding a public hearing on June 11, 2003. On September 15, 2003, OAL approved the Department's adoption of the changes on a permanent basis.

**IMPACT ON CHILDREN:** In 1992, the federal district court in *Orthopaedic Hospital, et al. v. Kizer* held that DHS acted "arbitrarily and capriciously" in setting six Medi-Cal reimbursement rates for outpatient services at inadequate levels. Ten years later, DHS settled this and other related cases in the manner set forth above. In its Initial Statement of Reasons supporting these rate increases, DHS states that the increases are supported by three things: (1) there have been relatively few increases in Medi-Cal rates for hospital outpatient services in the prior fifteen-year period, or since August 1985; (2) *the increases to fee-for-service rates are consistent with policy objectives to maintain sufficient levels of providers so that Medi-Cal beneficiaries have adequate access to outpatient services*; and (3) these increases comply with the upper spending limit contained in federal law. Although the specific services effected by this settlement will be reimbursed at higher rates, an across the board



rate increase is necessary to preserve and enhance access to health care services for children in this state (see discussion of provider rates above).

### **Authorization of Prosthetic and Orthotic Appliances**

Federal law requires state Medicaid plans to include procedures intended to safeguard the system from unnecessary use of care and services. On July 17, 2003, DHS amended, on an emergency basis, sections 51315 and 51515, Title 22 of the CCR, to impose a prior authorization requirement on prosthetic and orthotic appliances and to impose a restriction on which providers may prescribe specified appliances to Medi-Cal beneficiaries. By tracking the billing practices of providers, DHS determined that billing thresholds under Medi-Cal have been implemented in such a way to allow numerous appliances to be provided and paid for under Medi-Cal when they were not necessary. These regulations are necessary to ensure adequate utilization review while ensuring appropriate access to prosthetic and orthotic appliances and to prevent over-billing for unnecessary appliances.

On August 8, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. DHS closed the written public comment period on September 22, 2003 with no public hearing. At the time of writing, there was no indication as to whether OAL approved the final regulatory changes.

**IMPACT ON CHILDREN:** To the extent that these regulations save the state money that can be used for other legitimate purposes— like treating children who need medical care— advocates support DHS' efforts to reduce over-use and abuse of the Medi-Cal system. However, tracking measures should be adopted by the Department to ensure that abuse is actually curtailed by these changes and that those who genuinely need orthotic and prosthetic devices in order to attend to daily activities are receiving services and are able to find providers who can prescribe these devices. Estimating from the proposed state/federal cost savings of \$3.7 million in 2002–03 and over \$22 million in the following years, these utilization controls will cut down significantly on the use of prosthetic devices, perhaps to the detriment of children and families requiring such devices.

### **Acute Inpatient Intensive Rehabilitation/Manual of Criteria**

Federal law requires state Medicaid plans to include procedures intended to safeguard the system from unnecessary utilization of care and services. Prior authorization of services may be imposed by DHS. However, Welfare and Institutions Code section 14133.9 establishes requirements that must be met by the Department if prior authorization is used. For example, for major categories of treatment, like acute inpatient intensive rehabilitation, DHS must publi-

cize and continually develop a list of objective criteria to indicate when authorization will be granted. The Department is currently expanding and updating its Manual of Criteria for Medi-Cal Authorization, which is incorporated by reference into Title 22 of the CCR, due to the outcome of a lawsuit, *Fresno Community Hospital and Medical Center v. State of California, et al.*, Fresno County Superior Court Case No. 555694-9 (1996).

On August 22, 2003, DHS published notice of its intent to permanently adopt changes to section 51003, Title 22 of the CCR, to change the date of the proposed revision of the Manual of Criteria to May 28, 2003, and to expand and adopt criteria for inclusion in the Manual for acute inpatient intensive rehabilitation. If Medi-Cal beneficiaries under the age of 21 are referred to the California Children's Services Program for these services, CCS will make the determination regarding eligibility, rather than DHS.

DHS closed the written public comment period on October 7, 2003 with no public hearing. At the time of writing, there was no indication as to whether OAL approved the final regulatory changes.

**IMPACT ON CHILDREN:** Again, to the extent that these regulations save the state money that can be used for other legitimate purposes, advocates support DHS' efforts to reduce over-use and abuse of Medi-Cal services. However, follow-up measures should be adopted by the Department to ensure that the current regulations adequately capture the balance between unnecessary and necessary use, especially for children in need of services through CCS and other programs.

### **Healthy Families Program: Budget Trailer Bill Regulations on Enrollment Procedures**

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

Recent budget trailer bill legislation requires both DHS and MRMIB to establish streamlined enrollment procedures into HFP and Medi-Cal programs from the Child Health and Disability Prevention Program (CHDP). The CHDP Gateway will be administered by DHS to provide full-scope benefits under Medi-Cal's no-cost, fee-for-service program for a two month period. The goal of the CHDP Gateway is to increase children's access to comprehensive health care, including dental and vision care. Effective July 1, 2003, CHDP will conduct eligibility reviews at the conclusion of the two month service period, and automati-

cally screen children into either Medi-Cal or the Healthy Families programs, depending on parent income eligibility. Parents will then have to apply for continued coverage for their child (twelve months of eligibility) under either Medi-Cal or Healthy Families by mailing in a single application.

On July 31, 2003, MRMIB adopted, on an emergency basis, sections 2699.6612 and 2699.6827, and amended sections 2699.6500, 2699.6600, 2699.6607, 2699.6611, 2699.6705, 2699.6715, 2699.6717, 2699.6725, 2699.6813, 2699.6815, and 2699.6819 of Title 10 of the CCR, in order to reflect changes made in AB 442 and other recent federal requirements. On August 22, 2003, MRMIB published notice of its intent to adopt these changes on a permanent basis. MRMIB's proposed rulemaking will:

- ◆ Eliminate retroactive disenrollment when families are disenrolled due to non-payment to conform with AB 442. Current regulations mandate that MRMIB disenroll a family retroactively after two consecutive months of non-payment of premiums, thus, the child's coverage will be terminated retroactively back to the last month that premiums were paid. The state remains obligated to pay the health care plan for services during the first month, and plans are allowed to collect costs from the family for the second month. This practice is eliminated by these regulations to provide for continuous coverage for referrals from the CHDP Gateway program.

- ◆ Impose a requirement that applicants pay arrears for health coverage provided within the prior twelve month period upon re-enrollment in the program. Essentially, MRMIB will allow children to receive services under the Healthy Families Program for the continuous twelve month period, but can collect unpaid premiums from the family for the twelve month period prior to re-enrollment. The collection period is limited to twelve months because the Legislature determined that if a family is out of HFP for twelve months, they have disconnected from services and are disenrolled.

- ◆ Change family contribution sponsor language so that a sponsor may pay monthly premiums for HFP coverage for a family for any twelve months of coverage, allowing more families to access continued health care coverage.

- ◆ Eliminate the six-month waiting period for families that disenroll for non-payment or other reasons, to allow for more seamless entry from the CHDP Gateway into HFP. The original intent of the six-month rule was to encourage families to stay enrolled and receive continuous preventive health care services, rather than enrolling in the program only when services were needed. Since most families continue their coverage for the full twelve months of eligibility, this prohibition is no longer necessary.

- ◆ Require continued enrollment in HFP program during the review of an appeal regarding coverage, in accordance with recent federal regulations.

- ◆ Require that abortions that are not the result of incest or rape and are not necessary to save the life of the mother

are to be paid for only with state funds, in accordance with recent federal law.

MRMIB held a public hearing on these proposed changes on October 8, 2003. At this writing, there was no indication as to whether OAL approved the final regulatory changes.

**IMPACT ON CHILDREN:** 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. Under the federal law, states have three years to use federal CHIP funds appropriated for a given year. If they do not spend the money within that time, the federal government redistributes a portion of the unused money to states that exhausted their initial funding. Although Congress has proposed legislation that may allow some states to use part of the money that was returned, states still must spend the money on providing health care to children. California, thusfar, has not been effective in spending this money on children's health care, despite great need for children's coverage.

While continuity of care between the various programs discussed above (CHDP Gateway, Medi-Cal and Healthy Families) may be important for many reasons, the Administration's proposal continues the "patchwork quilt" approach to health coverage. Even if more seamless movement between the various programs is accomplished, the fact remains that 1-1.5 million income-eligible California children remaining uncovered, notwithstanding available federal funds at a 2-to-1 match sufficient to accomplish full coverage.

The Administration boasts that HFP enrollment has drastically increased. However, a January 2003 report by the 100% Campaign regarding the Healthy Families Program found that about 40%, or 171,000 children, enrolled in HFP lost their coverage after a year, between June 2001 and May 2002. Of those, 73% probably still were eligible for the program. The report cited the drop in program participation was due to complicated insurance coverage renewal procedures, failure to pay monthly premiums, and mismanagement of paperwork, resulting in compromised quality and access to health care for children. Although the above regulations briefly address some of the problems with the system, other problems are inherent in programs (like HFP and Medi-Cal) set up to restrict access to care. The potential success of HFP is overshadowed by accessibility problems that should be addressed by the Administration and Legislature by implementing true presumptive eligibility for all children in this state, as proposed above.

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

## **Managed Risk Medical Insurance Program: AB 1401 Emergency Regulations**

California Insurance Code section 12700 *et seq.*, established the Major Risk Medical Insurance Program (MRMIP) in 1991, under the direction of the Managed Risk Medical Insurance Board (MRMIB), which also directs the Healthy Families and AIM programs. MRMIP provides access to health insurance for individuals who are denied coverage or offered excessive premiums due to pre-existing medical conditions. The Board contracts with several health insurers and HMOs from which the MRMIP member selects. The state subsidizes part of the cost of monthly premiums, which tend to be 25–35% higher than premiums for a healthy person, from the Prop 99 Cigarette and Tobacco Products Surtax Fund. The capped appropriation for MRMIP is currently \$40 million per fiscal year. Due to fiscal constraints of the program, there are long waiting lists for individuals seeking to enroll in this program. Efforts have been made to restructure the program to serve the needs of more individuals, while fulfilling the purpose of the program.

On August 4, 2003, MRMIB adopted and amended, on an emergency basis, various sections of Chapter 5.5, Title 10 of the CCR, to implement recent legislation, AB 1401 (Chapter 794, Statutes of 2002), which established a four-year pilot project allowing for only 36 months of eligibility for individuals enrolled in MRMIP and a guarantee to MRMIP graduates that they will be covered in the individual insurance market. More specifically, these regulations implement the processes for disenrolling MRMIP members who have had 36 months of consecutive coverage in MRMIP; establish MRMIB's duties for implementing guaranteed access to health plans and insurers in the individual market; and the procedures, timelines, and formulas for payment to health plans and insurers for the continuing subsidy for MRMIP graduates. These regulations also clarify that dependents of graduates are eligible for their own 36 consecutive month enrollment in the program.

With implementation of these regulations, the program will be able to accommodate more applicants and alleviate some of the public costs by transferring costs to the private health care market. AB 1401 and these regulations also establish the standards for the benefits package that must be offered by qualifying health plans and insurers to the graduates of MRMIP, and the premium the insurers may charge must be no higher than a 110% multiplier of MRMIP's prices. The Board will continue to subsidize the cost of graduates' premiums, but under these new limitations on the insurers, MRMIP will spend approximately half the amount of the current subsidy. The private industry will be forced to absorb the remaining subsidy (costs of the graduates' health care premiums). Authority over health plans and insurers under the AB 1401 pilot project will rest with the Department of Managed Care and the Department of Insurance.

On September 12, 2003, MRMIB published notice of its

intent to adopt these changes on a permanent basis. MRMIB held a public hearing on October 29, 2003. At the time of writing, there was no indication as to whether OAL approved the final regulatory changes.

**IMPACT ON CHILDREN:** MRMIP is yet another example of California's fragmented effort to provide health care to those individuals who are "hard to insure," a problem that would be easily remedied by providing universal coverage to all people within the state, as AB 921 seeks to do, or by providing true presumptive eligibility for all children, as other advocates propose. Although AB 921 will continue through the Legislature this year and will undoubtedly be a topic for heated debate, perhaps starting on a smaller, more manageable population first would provide the insight and answers to provide this type of coverage. At the very least, the agencies would save time and resources by not conducting extended rulemaking on eligibility and application procedures for each of these separate and distinct programs.

Although these regulations attempt to keep dependent children on coverage when their parents are terminated due to the 36-month deadline, it is uncertain that a parent will manage to find and keep themselves enrolled in another health care plan, while their child retains coverage under MRMIP.

## **Update on Previous Rulemaking Packages Medi-Cal Provider Rates**

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 in AB 1740 for selected physician and related health care services. DHS has been paying these increased rates for services provided on or after August 1, 2000, the effective date of this emergency rulemaking. On July 26, 2002, DHS published notice of its intent to adopt the changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 13.)

**Update:** On December 24, 2002, OAL approved DHS' permanent adoption of these revisions.

## **Newborn Screening Program**

On June 28, 2002, DHS 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. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 15.)

**Update:** On December 2, 2002, OAL approved DHS' permanent adoption of these revisions.

## **Access for Infants and Mothers (AIM) Program**

The Access for Infants and Mothers (AIM) Program, established under the Managed Risk Medical Insurance Board (MRMIB), provides health insurance to low and moderate income pregnant women and infants born during the covered pregnancy. 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, 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. (For background information on this rule-making package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 15.)

**Update:** On May 20, 2003, OAL approved MRMIB's changes on a permanent basis.

## **Healthy Families Program Parental Extension**

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, 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. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 16.)

**Update:** According to MRMIB, these regulations, which establish the eligibility, benefit, premium, and co-pay standards for the Parental Coverage Expansion in Healthy Families, were approved by OAL and became effective on December 12, 2002. However, due to the state's fiscal difficulties, the Parental Coverage Expansion has not been implemented.

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

On May 3, 2002, the Occupational Safety and Health Standards Board (OSB) published notice of its intent to adopt Permanent Amusement Ride Safety Orders, sections 3195.1–3195.14, Title 8 of the CCR. (For background information on this rulemaking package, see *Children's*

*Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 18, and Vol. 3, No. 2 (2002) at 13.)

**Update:** In response to public comments and further Board consideration, OSB modified its proposal and released the revised language on February 18, 2003, for an additional fifteen-day public comment period. Among other things, OSB revised the definition of the term “amusement ride incident” contained in section 3195.2(b) to delete language that would have required the incident to be of a type that could occur in connection with rides of the same design. Also, OSB modified proposed section 3195.3(a)(4)(D) to more clearly address the issue of patron safety issues that relate to age and size of the patron.

On June 12, 2003, OAL approved OSB's permanent adoption of these provisions.

## **Varicella (Chickenpox) Immunization**

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 (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 October 24, 2002, DHS 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. 4, No. 1 (2003) at 19.)

**Update:** On February 27, 2003, OAL approved DHS' permanent adoption of these changes.

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

On October 25, 2002, the Air Resources Board (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 exhaust particulate matter (diesel PM) and other toxic air contaminants by limiting the unnecessary idling of specific vehicles. The regulation focuses on reducing schoolage children's exposure at and around schools and while riding school buses and other types of school transportation. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 20.)

**Update:** On March 10, 2003, ARB released a modified version of proposed section 2480 for an additional fifteen-day public comment period. Among other things, the changes delete references to heavy duty vehicles, instead referencing commercial motor vehicles, defined as any vehicle or combination of vehicles defined in Vehicle Code section 15210(b), and any other motor truck with a gross

vehicle weight rating of 10,001 pounds or more, with the following exceptions: (A) a zero emission vehicle; or (B) a pickup truck defined in Vehicle Code Section 471. Also, the original proposal included several exemptions, such as idling which is necessary to accomplish work for which the vehicle was designed, other than transporting passengers; the modified proposal adds the example of collection of solid waste or recyclable material by an entity authorized by contract, license, or permit by a school or local government. Other changes clarify that the exemption for idling to operate defrosters, heaters, air conditioners, or other equipment is to ensure the safety or health of the driver or passengers, or as otherwise required by federal motor carrier safety regulations.

On June 16, 2003, OAL approved ARB's permanent adoption of this regulation.

## **SPECIAL NEEDS**

### **Update on Previous 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 program 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. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 21.)

**Update:** On February 13, 2003, OAL approved DDS' permanent adoption of these regulatory changes.

#### **Children with Disabilities**

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 to, among other things, address confidentiality of information about individuals with exceptional needs and 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. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 22.)

**Update:** At this writing, it appears that the Board will be taking no further action on this rulemaking proposal.

## **CHILD CARE / CHILD DEVELOPMENT**

### **New Rulemaking Packages**

#### **Centralized Eligibility Lists (CELs)**

##### **Regulations**

Education Code section 8203 requires the Superintendent of Public Instruction to develop standards for the implementation of quality programs for specified child care and development programs. Education Code sections 8261 and 8263 require the Superintendent to adopt regulations on eligibility, enrollment, and priority of services for child care and development programs operated by contractors with the California Department of Education, Child Development Division.

On January 3, 2003, the Superintendent published notice of his intent to amend section 18106(e), Title 5 of the CCR, which requires contractors to maintain a waiting list in accordance with certain admission priorities, and to contact applicants in order of priority from the waiting list as vacancies occur. The proposed regulatory change provides that contractors may satisfy the requirement for maintaining a waiting list for their programs by participating in a county child care centralized eligibility list, established pursuant to the state-funded Centralized Eligibility List Pilot Project. A centralized eligibility list (CEL) is a system that combines separate lists, eliminates duplicates, and allows providers in the system to access children that are eligible for their programs.

The Superintendent held a public hearing on February 18, 2003, and subsequently submitted its proposal to OAL. On April 15, 2003, OAL approved the amendments.

**IMPACT ON CHILDREN:** Nine counties (Butte, Fresno, Glenn, Kern, Los Angeles, San Francisco, San Mateo, Solano, and Ventura) are participating in the CEL pilot project. Prior to establishment of CELs, and currently in counties lacking CELs, families in need of subsidized child care and development services must place their names on individual lists maintained by each agency contracted with the Child Development Division to provide such services. According to CDE, this system produces overlapping waiting lists, duplication of agency personnel time and effort, and frustration as families who may have language, transportation, or other challenges must go from program to program to put their children's names on multiple waiting lists. In addition, a family may not receive information about programs appropriate for their children and might therefore not be on the list for the programs that best meet their needs.

The use of CELs offers the opportunity to realize six primary benefits across multiple stakeholders:

- ◆ Increased efficiency and ease of applying for child care subsidies by parents who can become eligible for all available slots by placing their name on a single eligibility list.

◆ Increased parent choice among child care settings and providers as a result of the ability to match priority households to a wider variety of available providers that meet specified parent preferences (*e.g.*, geographic location, provider type).

◆ Increased equity in allocating limited child care resources to needy households since a centralized system can provide a single ranking of priorities across target groups, such as children of families with very low incomes and children with special needs.

◆ Increased efficiency and ease of filling open child care slots by providers who can reduce the administrative burden associated with intake, verification, and enrollment processes.

◆ Improved information about county-level supply and demand for child care, particularly for different types of care such as infant/toddler care and after-school care.

◆ Improved information about the extent to which the state is succeeding in meeting the need for subsidized child care for different subgroups of low-income working parents.

Despite the potential benefits of CELs, some contractors have expressed confusion and misunderstanding regarding their utilization. Because prior regulations required contractors to maintain waiting lists for their programs, contractors participating in CEL Pilots were at risk of audit exceptions and withholding of apportionments if they participate in the CEL instead of maintaining their own list. This regulatory change will encourage the utilization of CELs by clarifying that contractors may satisfy the current regulatory requirement for maintaining a waiting list by participating in their county's CEL.

### **Appeal and Dispute Resolution Procedures- Child Care Development Programs**

Section 18301, Title 5 of the CCR, sets forth the appeal and dispute resolution procedures that are available to any child development contractor whose contract is terminated or suspended, or whose total reimbursable contract amount is reduced by 4% or \$25,000, whichever is less. Currently, section 18301 provides that termination or suspension of a contract during the contract period may occur when (1) a contractor fails to correct items of fiscal or programmatic noncompliance within six months of receiving a conditional contract which includes an addendum stating the specific items of noncompliance and the corrective actions necessary to come into compliance; or (2) a contractor engages in serious misconduct posing an immediate threat to health and safety or to state funds, as specified.

On October 21, 2002, the Superintendent of Public Instruction amended, on an emergency basis, section 18301 to add the following two additional bases for termination or suspension of a contract during the contract period:

◆ a contractor fails or refuses to make available for examination or copying by an authorized employee of CDE

any records or documents that the contractor is required to retain, upon request;

◆ a contractor refuses to permit an authorized employee of CDE to enter a facility operated by the contractor during the periods of operation on file with CDE, for the purpose of reviewing administrative operations of the contractor or for observing child care and development services provided by the contractor.

On November 22, 2002, the Superintendent published notice of his intent to amend section 18301 on a permanent basis; a public hearing on these changes was held on January 8, 2003. On February 24, 2003, OAL approved the permanent revision of section 18301.

**IMPACT ON CHILDREN:** In order to uphold its responsibility to monitor performance of contractors and ensure that deficiencies are corrected, CDE must have access to family files maintained by child development contractors, and access to the programs operated by contractors. Adding the denial of access to records or programs as good cause for suspension or termination of a child development contract will help CDE ensure that its contractors are complying with all applicable laws and regulations implemented to protect children in these facilities.

### **Child Care Intercounty Transfers**

On September 26, 2003, DSS published notice of its intent to amend sections 47-110 and 47-310 of the MPP, to address child care intercounty transfers under CalWORKs. Among other things, the changes specify the responsibility of the first county to inform the client to apply for child care in the new county; require the second county to establish a child care case during the cash aid transfer period when the client applies for and meets child care eligibility requirements; provide standards for which county has payment responsibility when a client moves to a new county; and specify reasonable time periods for both counties to ensure that current and former CalWORKs clients receive Stage One child care services without delay when transferring from one county to another.

DSS is scheduled to hold a public hearing on these proposed changes on November 12, 2003, in Sacramento.

**IMPACT ON CHILDREN:** These changes are expected to minimize the disruption of Stage One child care services for current recipients when transferring from one county to another, and will assure consistency in the regulations during those time periods of an intercounty transfer when Stage One child care must be provided.

### **Interim Closure or Removal Pending Arrest Investigation**

Approximately 420,000 individuals statewide have received caregiver background checks and are associated with licensed child care facilities. Each month, DSS receives subsequent arrest information for approximately twenty such individuals, involving a crime for which, if

convicted, the individual would not be eligible by law to receive an exemption to work in a child care facility.

On July 24, 2003, DSS amended, on an emergency basis, sections 101170 and 102370, Title 22 of the CCR, to set forth the procedure DSS may follow to require a licensee to cease operation or remove an individual from the facility for up to thirty days pending DSS' investigation into the facts underlying the arrest. For example, if the arrested individual is a licensee, DSS may notify the licensee, by telephone or in writing, to immediately cease operation for up to thirty days. If the individual is not a licensee, DSS may notify the licensee and the individual associated with the facility, by telephone or in writing, that the individual may not be present in the facility for up to thirty days.

After DSS notifies the licensee or the individual, that person may present a written appeal that (1) he/she is not the individual who was arrested; (2) he/she has not been arrested for a crime that by law an individual is not eligible to receive an exemption; or (3) he/she was arrested for a crime that by law an individual is not eligible to receive an exemption, but the charges have been dropped or reduced to a crime that by law an individual would be eligible to receive an exemption. The appeal shall contain the licensee's or individual's current address and telephone number. After DSS receives the appeal and any supporting documentation, it shall review the appeal and notify the licensee or individual of its decision within five working days.

On August 29, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. DSS must transmit a certificate of compliance to OAL by November 13, 2003, or the emergency language will be repealed by operation of law on the following day.

**IMPACT ON CHILDREN:** According to DSS, these changes will protect the health and safety of children in licensed child care by requiring that the licensee cease operation or that the individual not be present in the facility for up to thirty days pending the investigation into the facts of an arrest for any one of approximately fifty crimes such as murder/attempted murder, kidnapping, sexual battery, rape, aggravated assault of a child, willful cruelty to a child, and sexual abuse. However, child advocates expressed various concerns regarding the proposed regulations as drafted by DSS. For example, it appears that DSS is relying on the arrested individual to self-report within 48 hours of the arrest. However, if the arrested individual is an employee of the facility, or even the licensee, there is no incentive to self-report if that could mean loss of a job or revenue.

Additionally, the proposed regulations indicate the process that DSS "may" follow in such circumstances. This appears to provide DSS with discretion not to follow this process, but no criteria was provided to indicate upon what basis DSS could exercise such discretion. Child advocates contend that there should be no room for discretion once DSS is made aware of such an arrest, to ensure the safety of children present at that facility.

In June 2003, the *Los Angeles Times* reported that about 30,000 workers who care for children, seniors, and people with disabilities at state-licensed facilities had been arrested for various offenses since January, causing a backlog of arrest reports to be investigated. This report, and the result of allowing children to be under the care and supervision of criminals in those facilities, likely led to these proposed regulations. If an arrested caretaker can be removed from the facility for thirty days, that lessens the exposure for children. However, due to the reported backlog of cases to investigate, it is unclear how DSS will timely investigate all of these cases.

### **Criminal Record Exemption Regulations**

On July 16, 2003, on an emergency basis, DSS adopted new section 102416.1 and amended sections 80001, 80019, 80019.1, 80019.2, 80054, 80061, 80065, 80066, 87101, 87219, 87219.1, 87454, 87565, 87566, 87801, 87819, 87819.1, 87861, 87865, 87866, 101152, 101170, 101170.1, 101170.2, 101195, 101212, 101216, 101217, 102352, 102370, 102370.1, 102370.2, 102395, 102416, 102417, and 102419, Title 22 of the CCR, regarding the requirements and procedures for criminal background checks, including fingerprinting, and criminal background check exemptions for persons who work or are present in licensed facilities that provide care to children and dependent adults.

Among other things, the emergency regulations state that it shall be conclusive evidence that an individual is not of good character to justify issuance of an exemption if the individual is on probation or parole, or if he/she makes a knowingly false or misleading statement regarding (1) material relevant to their application for a criminal record clearance or exemption; (2) his/her criminal record clearance or exemption status to obtain employment or permission to be present in a licensed facility, after DSS has ordered that they be excluded from any or all licensed facilities; or (3) his/her criminal record clearance or exemption status in order to obtain a position with duties that are prohibited to him/her by a conditional exemption.

The regulations provide that DSS shall consider granting a criminal record exemption if the individual provides DSS with substantial and convincing evidence of good character, and his/her criminal history meets the following criteria:

- ◆ The individual has been convicted of one nonviolent misdemeanor, and one year has lapsed since completing the most recent period of incarceration or probation.
- ◆ The individual has been convicted of two or more nonviolent misdemeanors and four consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.
- ◆ The individual has been convicted of one or more violent misdemeanors and 15 consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

◆ The individual has been convicted of one nonviolent felony and four consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

◆ The individual has been convicted of two or more nonviolent felonies and ten consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

◆ The individual has not been convicted of a violent felony.

◆ If the individual is currently on probation, and provides sufficient proof that the probationary period(s) is informal, unsupervised and no probation officer is assigned, the period of lapsed time as specified above shall begin from the last date of conviction(s).

On August 29, 2003, DSS published notice of its intent to adopt these provisions on a permanent basis. DSS must transmit a Certificate of Compliance to OAL by November 13, 2003, or the emergency language will be repealed by operation of law on the following day.

**IMPACT ON CHILDREN:** This rulemaking package clarifies and standardizes many procedural requirements relevant to the criminal record exemption, thus providing a framework for its consistent application. By setting forth the eligibility requirements for this exemption, and by mandating parental notification of specified events, these provisions help promote the safety and well-being of children in licensed child care facilities.

### **Regional Market Rate: Child Care and Development Programs**

The 2003–04 Budget Act directed the California Department of Education to promulgate emergency regulations governing the use of the Regional Market Rate (RMR) to provide consistency statewide, as well as clarify the appropriate rate of reimbursement for child care services.

On September 4, 2003, the Superintendent of Public Instruction adopted, on an emergency basis, new sections 18074, 18074.1, 18074.2, 18074.3, 18075, 18075.1, 18075.2, 17076, 18076.1, and 18076.2, amended sections 18413 and 18428, and repealed section 18021, Title 5 of the CCR. As required by the Budget Act, the emergency regulations change the definitions of certain rate categories and provide conditions and limitations on the use of certain rates and adjustment factors.

On September 26, 2003, the Superintendent published notice of his intent to adopt these changes on a permanent basis. Among other things, the changes include the following provisions:

◆ Providers of child care and development services to eligible families shall provide documentation to the contractor of the rate(s) they charge. When a provider has not established a rate that corresponds to the certified need of the family, the contractor shall establish the appropriate rate, as specified;

◆ The regulations place limitations on the uses of hourly and daily rates, and define part-time and full-time rates.

◆ Providers may be reimbursed for some child absences and some paid holidays as defined, if the provider charges nonsubsidized families for these absences or holidays.

◆ When child care and development services are provided to a child with exceptional needs, the contractor shall multiply the provider rate by 1.2 (when the child has exceptional needs as defined in Education Code section 8208(l)) or 1.5 (when the child is severely disabled as defined in Education Code section 8208(x)). Contractors shall apply this rate adjustment only when there is documentation that additional services and/or accommodations for that particular child are being provided, and such services and/or accommodations result in an on-going financial impact on the provider.

◆ A family may choose a child care provider who charges a higher fee than the contractor's maximum payment rate. In such cases, the family shall be responsible for the difference between the rate charged by the provider and the contractor's maximum payment rate.

◆ Reimbursable hours of care shall include work hours, commute hours, participation in county-approved activities, and other eligible hours as approved by the contractor.

The Superintendent held a public hearing on these proposed changes on November 18, 2003 in Sacramento.

**IMPACT ON CHILDREN:** As part of the 2003–04 budget, policymakers cut millions from child care funding by reducing the amount that child care providers can be reimbursed to the 85th percentile of the RMR (along with additional rate simplifications). The reduction in the market rate ceiling to the 85th percentile of the survey will undoubtedly result in new or increased co-payments for families whose providers currently have rates exceeding the 85th percentile.

### **Retroactive Child Care Payment Limits**

On July 1, 2003, DSS adopted, on an emergency basis, new sections 47-120 and 47-430 and amendments to sections 40-107.16, 40-131.3, 40-181.1, 42-711.522, 42-711.6, and 47-301 of the MPP, regarding child care payment limits. AB 444 (Committee on Budget) (Chapter 1022, Statutes of 2002) limited retroactive child care payments in the CalWORKs Stage One child care program to thirty days. This regulatory action requires that CalWORKs applicants and recipients be provided with a written notice that informs them of the availability of subsidized child care both at the time of application and when an original or amended welfare-to-work plan is signed. When this notice is provided, child care payment would be limited to services provided no more than thirty days prior to the applicant's/recipient's request for child care.

On July 4, 2003, DSS published notice of its intent to adopt these changes on a permanent basis; the deadline for



public comment was August 20, 2003. DSS subsequently made minor modifications to the proposal, and released it for an additional fifteen-day public comment period. At this writing, the permanent changes await review and approval by OAL.

**IMPACT ON CHILDREN:** The goal of this regulatory change is to ensure that CalWORKs applicants and recipients are promptly notified of and periodically reminded about the availability of subsidized child care and the conditions under which they can claim reimbursement for child care services. However, some advocates—such as Legal Services of Northern California and the Child Care Law Center—expressed concern that DSS’ modified proposal will prevent that goal from being fully realized. For example, these advocates expressed the need to have regulatory language providing that counties inform those seeking child care reimbursement if further information is needed and to extend the time to provide that information. The advocates expressed concern that the limit on retroactive payment of child care subsidies will significantly impact Limited English Proficient recipients and former recipients who are not adequately informed of the limits because of lack of language access; those seeking child care reimbursement may not be aware that failure to provide the informing notice information in the correct language is a basis for appealing a denial.

Also, DSS changed the time for counties to process a child care request from five to ten days; the advocates contend that this is not consistent with Welfare and Institutions Code section 11323.3, which requires that child care providers be promptly paid for their services to eligible families. The advocates requested DSS to add a provision indicating that counties develop an expedited process to issue payment to those at risk of losing a child care slot or facing an interruption or cessation in participation in their work or training activity if the child care is not paid within five working days.

### **Update on Previous 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. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 22.)

**Update:** On December 4, 2003, DSS re-adopted these amendments on an emergency basis. On May 12, 2003,

OAL approved DSS’ permanent adoption of these amendments.

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

On March 15, 2002, CDE published notice of its 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, CDE seeks to combine contract compliance monitoring and program quality into one review process using standardized procedures, measures, and instruments. Following an April 29, 2002 public hearing, CDE modified its proposal and released it for an additional fifteen-day public comment period. 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. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 23.)

**Update:** CDE made several revisions to the rulemaking package and released the modified package on November 18, 2002, for an additional fifteen-day public comment period. CDE submitted the package to OAL for review and approval on March 12, 2003; however, OAL disapproved the rulemaking package on April 24, 2003. According to OAL, the regulatory action was disapproved for incorrect procedure, as the rulemaking file did not include a Standard Form 399 (“STD 399”) that indicates concurrence from the Department of Finance. CDE modified the rulemaking package and resubmitted it to OAL on September 2, 2003. At this writing, the package awaits review and approval by OAL.

## **EDUCATION**

### **New Rulemaking Packages**

#### **California High School Exit Examination**

On July 25, 2003, the Board published notice of its intent to amend sections 1200, 1203, 1204, 1204.5, 1205, 1206, 1207, 1207.5, 1208, 1209, 1210, 1211, 1211.5, 1215, 1215.5, 1216, 1217, 1218, 1218.5, 1219, 1219.5, 1220, and 1225, Title 5 of the CCR, regarding the administration of the California high school exit examination (CAHSEE), which each pupil completing grade twelve or each adult school student must successfully pass as a condition of graduation. The purpose of the proposed revisions is to guide districts and schools in the administration of the high school exit examination, including but not limited to definitions, data requirements, test security, and apportionment. Among other things, the revisions would:

- ◆ clarify that the test administrators are to be responsible for the accurate identification of the pupils;
- ◆ clarify that all tenth graders are to take the test once in tenth grade;
- ◆ clarify that pupils in grades 11 and 12 should be provided up to two opportunities per year to take the examination, and should not be tested in successive administrations;
- ◆ clarify what data must be collected and maintained by the districts;
- ◆ clarify the responsibilities for the district test coordinator and the test site coordinator; and
- ◆ specify when variations, accommodations, and modifications can be used while taking the examination.

The Board held a public hearing on the proposed changes on September 9, 2003, in Sacramento. On September 16, 2003, the Board made minor changes to its proposal and released the modified package for an additional fifteen-day public comment period. At this writing, the changes await review and approval by OAL.

**IMPACT ON CHILDREN:** The CAHSEE will be given in February 2004 to all current 10th graders. This year's 10th graders are members of the class of 2006, which is now the first class that must pass the exit exam as a requirement of graduation. At its July 2003 meeting, the Board delayed the CAHSEE as a requirement of graduation for two years. As a result of that action, students in the classes of 2004 and 2005 are no longer required to pass the exit exam as a condition of earning a high school diploma.

Advocacy groups such as Californians for Justice (CFJ) have objected to the CAHSEE on several grounds. For example, CFJ argues that the exam (1) punishes students for the state's failure to provide a high quality education; (2) will raise the dropout rate (as it has in other states); and (3) and puts English learners, learning disabled students, and special education students at a severe disadvantage. CFJ would like to see the state provide qualified teachers, up-to-date textbooks, and clean schools before it requires students to pass the high school exit exam. However, CFJ regards the two-year delay as a significant victory, as it provides officials and advocates with time to address some of the issues raised.

### **Standardized Testing and Reporting Program**

On September 26, 2003, the Board published notice of its intent to amend sections 850, 852, 853, and 859, and adopt new section 853.5, Title 5 of the CCR, to expand and clarify regulations related to ensuring the security and integrity of test and assessment questions and materials used in the state's Standardized Testing and Reporting (STAR) Program. Among other things, the Board's proposed changes would modify the definitions used for the Program to conform to changes made in the materials and terms used in the Program, and to add additional terms that

require definitions; modify pupil exemptions to conform to recent legislative changes; enhance security for the Program by specifying who may administer the tests; incorporate Board policy for out-of-level testing; clarify testing variations, accommodations, and modifications that may be used on the tests and by which students; and add language to the STAR Test Security Agreement to enhance the security of the tests used in the Program.

Many of the proposed changes pertain to the California Alternate Performance Assessment (CAPA), an individually-administered performance assessment developed to assess students' achievement on a subset of California's Academic Content Standards. The CAPA, which is administered to students receiving special education services who are significantly cognitively disabled, includes administration manuals, administrative materials, and documents on which the examiner records the student's responses.

Other changes pertain to out-of-level testing, defined as administering a test that is below the grade level of the pupil being tested. For the 2003-04 school year only, pupils with individualized education programs (IEPs) in grades 5-11 may be tested one or two grades below their enrollment grade. The test level must be specified in the student's IEP. Out-of-level testing shall be used only if the student is not receiving grade-level instruction. Students tested out-of-level must complete all tests required for the grade at which they are tested and shall be administered only one level of the tests. Out-of-level testing is not allowed for pupils in grades 2, 3, and 4. No out-of-level testing shall be allowed at any grade beginning with the 2004-05 school year.

Proposed new section 853.5 provides for the use of variations, accommodations, and modifications for the standards-based achievement test and the CAPA. Among other things, the section states that school districts may provide all pupils the following testing variations if regularly used in classroom: (1) test directions that are simplified or clarified; (2) special or adaptive furniture; (3) special lighting or acoustics; (4) an individual carrel or study enclosure; (5) test individually in a separate room provided that an employee of the school, district, or non-public school, who has signed the STAR Test Security Affidavit, directly supervises the pupil; and (6) markers, masks, or other means to maintain visual attention to the examination or test items. The section also sets for variations, accommodations, and modifications for eligible pupils with disabilities who have IEPs, students with Section 504 plans, and English learner pupils.

Finally, these regulatory changes seek to enhance the security of tests used in the standardized testing programs. For example, the amendments modify the STAR Test Security Agreement, which must be signed by all STAR program district and test site coordinators before receiving any STAR tests or test materials, to state that the coordinator will not copy any part of the test or test materials without written permission from the Department to do so, and that the coordinator will not review test questions, develop

any scoring keys, or review or score any pupil responses except as required by the contractor's manuals.

The Board is scheduled to hold a public hearing on these proposed changes on November 10, 2003, in Sacramento.

**IMPACT ON CHILDREN:** Beginning in the 2002–03 school year, the CAPA is California's alternate assessment for the STAR Program. All students enrolled in grades 2–11 are expected to participate in California's state assessment program by either taking the standard assessment or the alternate assessment (CAPA). Most special education students participate in the STAR program according to requirements in their individualized education programs (IEPs). The IEP may call for certain accommodations based on a student's disability, such as the use of a large-print version or oral presentation of math problems. Students with severe disabilities who are unable to participate in the STAR program, even with accommodations, will be tested with the CAPA.

To the extent that these regulatory amendments set forth the use of variations, accommodations, and modifications for students taking these standardized tests, and seek to enhance the security of tests used in the various programs, they will help promote uniformity and fairness in the administration and testing process.

### **No Child Left Behind Teacher Requirements**

The federal No Child Left Behind Act (NCLB) requires that all teachers of core academic subjects meet the federal definition of "highly qualified teacher" no later than the end of the 2005–06 school year. Schools that receive Title I funds are currently required to hire only teachers that meet the federal definition of "highly qualified teacher." Core academic subjects include English, reading, language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography. While federal law defines the requirements for "highly qualified teacher," some details regarding how the definition is applied in each state must also be determined.

At its May 29–30, 2002 meeting, during a discussion of the consolidated state application for NCLB Act implementation, the Board adopted a definition of the term "highly qualified teacher." That definition, which was not adopted pursuant to the formal rulemaking process mandated by the Administrative Procedure Act (APA), did not specify that full state certification is a minimum requirement — a requirement that the federal law imposes.

In January 2003, Californians for Justice and the California Association for Community Organizations for Reform Now (Petitioners), represented by Public Advocates, filed a petition for writ of mandate and complaint for declaratory relief in San Francisco Superior Court against the Board of Education and Department of Education (Respondents), seeking an order requiring

Respondents to follow the notice and public comment requirements of the APA in adopting a definition for the term "highly qualified teacher," as that term is used in the NCLB. Petitioners also contended that the definition for the term "highly qualified teacher" adopted by the Board in May 2002 did not comply with the substantive mandates imposed by the NCLB.

However, on April 4, 2003, the court denied Petitioners' motion for writ of mandate. Although the court based its ruling on its finding that Respondents were "not enforcing the draft definition of 'highly qualified teachers' that was enunciated in May 2002," it also opined that, "[t]o clear up any confusion, however, Respondents may want to formally advise the school districts that the May 2002 draft definition has been rescinded and is not being enforced." Petitioners have appealed the trial court's decision to the First District Court of Appeal.

On July 25, 2003, the Board published notice of its intent to adopt sections 6100, 6101, 6102, 6103, 6104, 6110, 6111, 6112, 6115, 6120, and 6125, Title 5 of the CCR, which set forth the state's definition of "highly qualified teachers." The proposed regulations also define several key phrases to assist school districts in complying with the federal law.

Following a public hearing on September 9, 2003, the Board revised its proposed regulations. The modified proposal, which was released for an additional fifteen-day public comment on September 16, 2003, includes the following provisions:

- ◆ The proposed regulations do not identify one particular test that will be considered California's rigorous state test, nor do they limit it to one exam. The proposed regulations clarify that the Commission on Teacher Credentialing will certify the test(s) in order to conform the NCLB teacher requirements with California's credentialing requirements.

- ◆ A teacher who meets the NCLB requirements and is new to the profession at the elementary level, in addition to having at least a bachelor's degree and either being currently enrolled in an approved intern program for less than three years or holding a credential, must have passed a validated statewide subject matter examination certified by the Commission on Teacher Credentialing.

- ◆ A teacher who meets NCLB requirements and is not new to the profession at the elementary level, in addition to having at least a bachelor's degree and either being currently enrolled in an approved intern program for less than three years or holding a credential, must have completed one of the following: (1) a validated statewide subject matter examination certified by the Commission on Teacher Credentialing or (2) a high objective uniform state standard evaluation conducted as specified to determine the teacher's subject matter competence in each of the academic subjects taught by the teacher.

- ◆ A teacher who meets NCLB requirements and is new

to the profession at the middle and high school levels, in addition to having at least a bachelor's degree and either being currently enrolled in an approved intern program for less than three years or holding a credential in the subject taught, must have passed or completed one of the following for every core subject currently assigned: (1) a validated statewide subject matter examination certified by the Commission on Teacher Credentialing; (2) university subject matter program approved by the Commission on Teacher Credentialing; (3) undergraduate major in the subject taught; (4) graduate degree in the subject taught; or (5) coursework equivalent to undergrad major.

◆ A teacher who meets NCLB requirements and is not new to the profession at the middle and high school levels, in addition to having at least a bachelor's degree and either being currently enrolled in an approved intern program for less than three years or holding a credential, must have passed or completed one of the following for every core subject currently assigned: (1) a validated statewide subject matter examination certified by the Commission on Teacher Credentialing; (2) university subject matter program approved by the Commission on Teacher Credentialing; (3) undergraduate major in the subject taught; (4) graduate degree in the subject taught; (5) coursework equivalent to undergrad major; (6) advanced certification or credentialing (National Board Certification); or (7) the high objective uniform state standard evaluation.

◆ A teacher does not meet the NCLB teacher requirements for the core academic subject taught if: (1) teaching with an Emergency Permit; (2) teaching with a supplemental authorization (except where the supplemental authorization is based on a major in the subject taught) or a local authorization for the subject taught; (3) teaching with state or local waivers for the grade or subject taught; or (4) teaching as a pre-intern.

◆ Teachers who have been found to meet subject matter competency requirements of NCLB outside of California shall also be considered to have met those requirements for that particular subject and/or grade span in California. California's credentialing reciprocity is not affected by the requirements of NCLB.

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

**IMPACT ON CHILDREN:** Approximately one in seven of California's teachers do not have a preliminary teaching credential. These under-qualified teachers are disproportionately distributed in low-performing schools, predominantly serving children of color and low-income children. The Board's rulemaking proposal discussed above provides that interns who have not yet received a teaching credential may still be considered "highly qualified" in compliance with the No Child Left Behind Act. Although the Board's legal counsel has opined that federal rules permit interns to be included, many child advocates contend that this provision will in fact leave many children behind — specifically disadvantaged children who are most in need of highly qualified teachers.

## Administration of Medication to Pupils at School

Education Code section 49423.6, enacted as part of AB 1549 (Poochigian) (Chapter 281, Statutes of 2000), provided that, on or before June 15, 2001, the State Department of Education shall develop and recommend to the State Board of Education, and the Board shall adopt, regulations regarding the administration of medication in public schools. These regulations were to be developed in consultation with parents, representatives of the medical and nursing professions, and other individuals jointly designated by the Superintendent of Public Instruction, the Advisory Commission on Special Education, and the Department of Health Services. Any regulations adopted pursuant to section 49423.6 must be limited to addressing a situation where a pupil's parent or legal guardian has initiated a request to have a local educational agency dispense medicine to a pupil, based on the written consent of the pupil's parent or legal guardian, for a specified medicine with a specified dosage, for a specified period of time, as prescribed by a physician or other authorized medical personnel.

On December 6, 2002, the Board published notice of its intent to adopt new sections 600–612, Title 5 of the CCR. The proposed regulations, as originally drafted, included the following provisions:

◆ A pupil may receive medication during the regular school day when a written statement from the pupil's authorized health care provider has been received by the schoolsite administrator, and a written statement of consent from the pupil's parent/guardian has been received by the schoolsite administrator.

◆ The written statement from the pupil's authorized health care provider must include the pupil's name and date of birth; the name of the medication to be administered and reason for administration; the dose of the medication; the method of medication administration, including whether the medication requires intravenous administration, or a nursing assessment or dosage adjustment prior to administration; the time the medication is to be administered during the regular school day; possible side effects, including side effects that may impact student learning or behavior; for medication prescribed on an as needed basis, the symptoms that make administration necessary and the allowable frequency of administration; for medication that is to be self-administered by the pupil, a statement that, in the opinion of the authorized health care provider, the pupil is competent to safely self-administer the medication as directed by the authorized health care provider; the name, address, telephone number, and signature of the authorized health care provider; and if the authorized health care provider is a nurse practitioner, nurse midwife, or physician assistant, the written statement shall also include the authorized health care provider's furnishing number and name of supervising physician.

◆ The pupil's parent/guardian is responsible for obtaining and providing the school with the authorized health care provider's written statement.

◆ Before medication may be administered to a pupil during the regular school day by designated school personnel, the pupil's parent/guardian must provide the local education agency, through the schoolsite, a written statement of consent to the administration of medication as described in the authorized health care provider's written statement. When necessary, reasonable accommodations are to be provided to a parent/guardian who has insufficient English language proficiency to produce a written statement or who has a disability that makes it difficult to produce a written statement.

◆ The statement of consent by the parent/guardian must include approval of communication between the schoolsite administrator or his or her designee and the authorized health care provider with regard to the authorized health care provider's written statement.

◆ Medication may be administered during the regular school day by designated school personnel. Under specified conditions, the pupil's parent/guardian or his/her designee may administer medication to the pupil during the regular school day, and pupils may self-administer medications during the regular school day, pursuant to the authorized health care provider's written statement, and with the consent of the pupil's parent/guardian.

◆ The local education agency must ensure that specified procedures are followed regarding the delivery and storage of medication during the regular school day, and regarding the documentation of medication administration in school.

◆ Any material or significant deviation from the authorized health care provider's written statement, such as the administration of the wrong medication or the failure to administer medication, must be reported as quickly as possible upon discovery to the schoolsite administrator or his or her designee and to the parent/guardian. If it is determined to be necessary, the schoolsite administrator or his or her designee will notify the authorized health care provider.

◆ Regarding documentation of medication administration in school, the local education agency must, at a minimum, ensure pupil confidentiality; maintain an individual medication log, as defined, for each pupil for each medication administered; and record in the pupil's medication log the date and time of each administration of medication, signed by the designated school personnel administering the medication.

On February 6, 2003, the Board held a public hearing on this proposed language. On February 14, 2003, the Board released a modified version of this package for an additional fifteen-day public comment period. Among other things, the changes provide that, consistent with the authorized health care provider's written statement, and, if applicable, subject to specified training, designated school personnel may administer medication during the regular school day. Other changes specify that if the individual the parent/guardian desires to designate to administer medications is an employee of the local education agency, the designation shall be subject to approval by the schoolsite

administrator prior to becoming effective. Local education agencies shall adopt policies on employees serving as parent/guardian designees in order to guide schoolsite administrators' decisions.

However, on March 25, 2003, the Board issued notice of its decision not to proceed with this regulatory proposal, based on comments received. The Board withdrew its proposed action for further consideration, indicating that it would initiate, at a later date, a new proposal to adopt regulations pertaining to the same or similar subject matter.

On June 20, 2003, the Board published notice of its intent to adopt a revised version of new sections 600–612, Title 5 of the CCR. This modified proposal addressed some of the concerns advocates had expressed about the initial version, although new concerns surfaced (see below). At its September 10–11, 2003 meeting, the Board adopted the proposed regulations and directed staff to complete the rulemaking file (including any necessary changes in light of public comments). At this writing, the provisions await review and approval by OAL.

**IMPACT ON CHILDREN:** Supporters of AB 1593 contend that prior law was unclear to many service providers regarding schools' responsibilities to administer medication to pupils during the school day as requested by the pupil's parent or guardian. Although federal case law requires districts to accept responsibility to administer necessary medications, the bill's author asserted that some districts "required parents to sign illegitimate blanket waivers that sign away their children's right to medical treatment at school as a condition of enrollment or attendance. In these instances, parents have been forced to take time off work to go to school and deliver the medications."

Despite AB 1593's clear mandate compelling the Board to adopt regulations regarding the administration of medication in public schools, to date the Board has failed to do so. The Board's initial regulatory package was met with a variety of concerns by child advocates and other interested groups, eventually leading to the Board's withdrawal of the package. Among other things, child advocates expressed concern that the Board's definition of the term "parent/guardian" was too restrictive and would leave a population of children, namely foster children who often do not have a parent or legal guardian caring for them, without a method for receiving medication at school, and that a child's right to privacy to his/her medical information may be compromised by the application of proposed section 602(a)(2), which requires that the written statement from the child's health care provider include the name of the medication and the "reason for administration." Others expressed concern that the regulations might not be consistent with professional licensing laws and might impose a state-mandated program for which there is no funding.

In its revised regulatory proposal released on June 20, 2003, the Board broadened its definition of the term "parent or legal guardian" to mean "the individual recognized by the local education agency as having authority to make medical decisions for the pupil." The Board also deleted

the requirement that the “reason for administration” of medication be listed in the child’s school records. However, child advocates raised two other concerns regarding the Board’s revised package.

First, in its Notice of Proposed Rulemaking, the Board acknowledged that “[t]here is no specific statutory authority...upon which to base regulations for the administration of non-prescribed over-the-counter medications, and therefore these proposed regulations do not cover non-prescribed over-the-counter.” However, proposed section 601(b) provides that the term medication “may include not only a substance dispensed in the United States by prescription, but also a substance that does not require a prescription, such as over-the-counter remedies, nutritional supplements, and herbal remedies.” Child advocates noted that such a definition is inconsistent with the Board’s statutory authority and its implementation would potentially be problematic for schools, students, and parents.

Second, child advocates noted that CDE’s revised regulations indicate an intent to shift responsibility for implementing rules and regulations regarding administration of medication at schools to local educational agencies (LEAs). CDE’s discretionary language allows (but does not mandate) LEAs to implement rules regarding virtually every component of administering medications at school, including what should be contained in written statements by authorized health care providers and parents and/or legal guardians, how and to what extent self-administration of medication will be allowed, how to properly deliver and store medication, and how to properly document medications administered to students. CDE’s documentation accompanying its proposed regulations does not provide any explanation as to why such a shift in responsibility has occurred or how it can justify the current regulations in light of the specific legislative mandate contained in Education Code section 49423.6(a) for CDE to develop and adopt regulations for administration of medications at school.

### **Supplemental Services**

Federal law requires that certain local education agencies contract with providers of supplemental educational services for eligible students; these services are primarily tutoring for eligible disadvantaged school children, occurring before or after school, or during inter-session periods. Parents may select a provider from an approved list, and providers must have a demonstrated record of effectiveness.

On June 20, 2003, the Board adopted, on an emergency basis, section 13075, Title 5 of the CCR, to define the term “demonstrated record of effectiveness” for providers of supplemental services who are approved by the Board. On July 4, 2003, the Board published notice of its intent to adopt section 13075 on a permanent basis. Among other things, section 13075 provides that a provisionally-approved provider of supplemental educational services has a demonstrated record of effectiveness when the

provider demonstrates the ability to provide effective services by meeting all of the federal requirements, as specified, and, by the end of the second year of provisional approval, ninety-five percent of eligible students receiving services have made increases in academic proficiency at a level articulated in the supplemental educational services contract and as measured by the STAR. Among the federal requirements that must be satisfied are to ensure that programs offered are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children on specified assessment instruments and attain proficiency in meeting the state’s academic achievement standards; ensure that all instruction and content are secular, neutral, and non-ideological; provide evidence of recent (within the past two years) successful experience in improving student achievement; be financially sound; and guarantee that all staff working with students and their parents undergo and pass background checks as required by the local contracting school district.

The Board held a public hearing on this provision on August 20, 2003, in Sacramento. On October 29, 2003, OAL approved the Board’s permanent adoption of the provision.

**IMPACT ON CHILDREN:** Supplemental educational services are additional academic instruction, such as tutoring and after-school services, designed to increase the academic achievement of students in schools that have not met state targets for increasing student achievement (adequate yearly progress) for three or more years. Supplemental services may be offered through public- or private-sector providers that are approved by the state, such as public schools, public charter schools, local education agencies, educational service agencies, and faith-based organizations. Private-sector providers may be either nonprofit or for-profit entities. States are required to maintain a list of approved providers across the state organized by the school district or districts they serve, from which parents may select. States must also promote maximum participation by supplemental educational service providers to ensure that parents have as many choices as possible. Students from low-income families who remain in Title I schools that fail to meet state standards for at least three years are eligible to receive supplemental educational services.

To the extent that this rulemaking action will ensure that supplemental educational services are only offered by qualified, effective providers, it will benefit eligible students and their parents.

### **Alternative Schools Accountability Model**

The Public Schools Accountability Act of 1999 requires that all schools be held accountable through the state’s accountability system. The Alternative Schools Accountability Model (ASAM) provides a measure of accountability for alternative schools with insufficient data to be held accountable under California’s primary accountability system. To be fully functional, the ASAM requires its schools

to be able to measure student performance using pre-post assessment instruments.

On July 21, 2003, the Board adopted, on an emergency basis, new sections 1068, 1069, 1070, 1071, 1072, 1073, and 1074, Title 5 of the CCR, to establish the requirements for administering, scoring, and reporting locally adopted pre-post assessments for use as indicators of achievement by schools registered in the ASAM. On July 25, 2003, the Board published notice of its intent to adopt these provisions on a permanent basis. Among other things, the regulations define the term "pre-test" as an initial assessment given no later than twenty instructional days following the pupil's first day of enrollment in the ASAM school, and define the term "post-test" as an assessment given after a minimum of thirty days of instruction following the administration of the pre-test. Also, in order to yield reliable and valid results, each pre-post assessment instrument shall be administered in accordance with directions provided in the publisher's assessment administration manual; the school's ASAM test site coordinator shall oversee the administration of all pre-post assessment instruments to ensure adherence to the directions provided in the publisher's assessment administration manual.

The Board held a public hearing on these proposed regulations on September 9, 2003, in Sacramento. The Board must transmit a certificate of compliance to OAL by November 18, 2003, or the emergency language will be repealed by operation of law on the following day.

**IMPACT ON CHILDREN:** According to the Board, more than 1,100 alternative schools currently participate in the ASAM. This figure includes continuation schools, community day schools, county juvenile court schools, county community schools, California Youth Authority schools, and opportunity schools, as well as other alternative schools. Schools in the ASAM enroll high-risk students at the elementary, middle, and high school levels. Accountability that accurately reflects the growth of students enrolled in these schools must be based on multiple indicators of progress reflecting academic performance, as well as other aspects. Moreover, accountability must be based on data for students enrolled for a minimum period required for consistent delivery of instruction and must reflect the progress of those students during the time they are enrolled in the school.

Students in ASAM schools typically function far below grade-level standards. They also show extremely high levels of mobility, moving in and out of programs and schools on a routine basis. Pre-post assessment instruments are viewed by many as extremely valuable indicators of academic growth for these students because they can be sensitive to gains during short enrollment periods.

### **Enhancing Education Through Technology**

On April 3, 2003, the Superintendent of Public Instruction adopted, on an emergency basis, new sections 11971, 11972, 11973, 11974, 11975, 11976, 11977, 11978,

11979 and 11979.5, Title 5 of the CCR, to address the Enhancing Education Through Technology (EETT) competitive grant program, established as part of the federal No Child Left Behind Act. Eligibility to receive grant funding is limited to districts serving students in grades 4–8 that are among the school districts in the state with the highest number or percentage of children from families with an income below the federal poverty line, and that meet either of the following criteria: (a) the district operates one or more schools identified under Section 1116 of the federal No Child Left Behind Act of 2001 (Public Law 107-110); or (b) the district has a substantial need for assistance in acquiring and using technology as defined. Districts serving other populations (*i.e.*, K–8, or K–12) may apply for the grant, but funds will only be awarded for students in grades 4–8.

A minimum of 25% of the grant must be used to provide sustained, intensive, high-quality professional development based on a review of relevant research in the integration of advanced technologies, including emerging technologies, into curricula and instruction and in using those technologies to create new learning environments. Remaining funds are to be utilized to implement and support the comprehensive program described in the application in a manner consistent with the federal Education Department Guidelines Administrative Regulations.

On May 2, 2003, the Superintendent published notice of his intent to adopt these provisions on a permanent basis, and held a public hearing on the proposal on June 17, 2003. On August 26, 2003, OAL approved the permanent adoption of these provisions.

**IMPACT ON CHILDREN:** Approximately \$84 million in federal funding was provided to California through the No Child Left Behind Act for educational technology to enhance teaching and learning. According to federal guidelines, the funds are to be divided, with 50% of the funds disseminated through formula-funded grants and 50% disseminated through competitive grants. These regulations apply to the competitive grants, through which over \$40 million will be distributed to local educational agencies and eligible local partnerships.

Among other things, local applications for these competitive grants must address strategies for using technology to improve academic achievement and teacher effectiveness; goals aligned with challenging state standards for using advanced technology to improve student academic achievement; steps the applicant will take to ensure that all students and teachers have increased access to technology and to help ensure that teachers are prepared to integrate technology effectively into curricula and instruction; a description of the type and costs of technology to be acquired with Ed Tech funds, including provisions for interoperability of components; a description of how the applicant will integrate technology into curricula and instruction, and a timeline for this integration; a description of how the applicant will use technology effectively to promote parental involvement and increase communication

with parents; collaboration with adult literacy service providers; a description of the process and accountability measures that the applicant will use to evaluate the extent to which activities funded under the program are effective in integrating technology into curricula and instruction, increasing the ability of teachers to teach, and enabling students to reach challenging state academic standards; and a description of the supporting resources, such as services, software, other electronically delivered learning materials, and print resources, that will be acquired to ensure successful and effective uses of technology.

### **California English Language Development Test**

On December 20, 2002, the Board published notice of its intent to amend sections 11510, 11512.5, and 11517, Title 5 of the CCR, to clarify what is required of school districts in order to administer the assessment of English language development required by Education Code section 313. The assessment is referred to in the existing regulations as the California English Language Development Test (CELDT). According to CDE, the regulatory changes would clarify that the "home language survey" is administered by school districts and is not a form prepared by school districts; remove a requirement that test proctors be trained, thereby reducing the potential burden on districts of administering the test; align CELDT regulations more closely to the requirements of the Standardized Testing and Reporting (STAR) program administered by CDE; and bring the apportionment reporting period into agreement with the fiscal year and be aligned more closely with the traditional school year.

The Board held a public hearing on these proposed changes on February 6, 2003; following the hearing, the Board adopted the amendments. On April 14, 2003, OAL approved the regulatory changes.

**IMPACT ON CHILDREN:** The CELDT has consequences for individual students, schools, and school districts. Identification of a student's English language proficiency level may affect the instructional program. Identification of students as English learners affects district funding. Apportionments for school districts are calculated, based on pupil participation in the assessment. According to CDE, the regulatory changes are designed to assure that the test is administered in a consistent, reliable, valid, and fair manner statewide.

### **Regular Average Daily Attendance for Charter Schools**

On January 31, 2003, the Board of Education published notice of its intent to amend section 11960, Title 5 of the CCR, to clarify the requirements for individuals to be eligible for claiming as K-12 average daily attendance when the individuals are over the age of 19. Pursuant to Education Code section 47612(b), in order to remain eligible for gen-

erating charter school apportionments, a pupil over 19 years of age must be continuously enrolled in public school and make satisfactory progress toward the award of a high school diploma. The Board's proposed amendments to section 11960 would implement section 47612(b) by providing that a pupil who is over the age of 19 years may generate attendance for apportionment purposes in a charter school only if the pupil was enrolled in a public school in pursuit of a high school diploma (or, if a student in special education, an individualized education program) while 19 years of age and, without a break in public school enrollment since that time, is enrolled in the charter school and is making satisfactory progress towards award of a high school diploma (or, if a student in special education, satisfactory progress in keeping with an individualized education program) consistent with the definition of satisfactory progress set forth in Education Code section 11965(b). Section 11960 would also provide that no individual who is ineligible to generate attendance for apportionment purposes in a charter school may be claimed as regular attendance for apportionment purposes by a local education agency that is authorized by law to grant charters.

Following an April 9, 2003, public hearing, the Board modified its proposal to limit eligibility to pupils who are under the age of 22. On April 21, 2003, the Board released its modified proposal for an additional fifteen-day public comment period, which ended on May 6, 2003. At this writing, the regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** According to the Board, some charter schools are enrolling adult pupils and providing adult education courses, without providing a comprehensive high school program to these pupils. However, the intent of charter schools was to serve K-12 students. This regulatory change will permit fewer pupils over the age of 22 to be claimed for apportionment purposes than was previously the case. To the extent that this regulatory change preserves K-12 funding for K-12 programs, students in the appropriate school programs will benefit.

### **Reading First Program**

The federal Reading First Program is a competitive grant program that supports scientifically research-based K-3 programs in schools serving high poverty, low reading ability students. California has been approved for participation in the federal program. However, because federal funding must be spent by September 30, 2004, the Board determined that participating schools must be funded in May 2003, and the program implemented and grant funds expended in the 2003-04 school year. Accordingly, on April 21, 2003, the Board adopted section 11990, Title 5 of the CCR, on an emergency basis in order to set forth how it would calculate the amount for each approved Reading First subgrant application. Specifically, section 11990 provides that the funding level be determined by multiplying the per classroom amount by the number of K-3 class-



rooms that agreed to implement the full English language arts program as provided in the adopted instructional materials in English for one hour in Kindergarten and 2.5 hours in grades 1–3 each day.

The Board held a public hearing on this proposed section on June 12, 2003. The Board was required to transmit a certificate of compliance to OAL on or by August 19, 2003, or the emergency language would be repealed by operation of law on the following day. The Board did not meet that deadline, and the emergency regulations were repealed on August 20, 2003.

**IMPACT ON CHILDREN:** As part of the No Child Left Behind program, the purpose of the Reading First Program is to ensure that all students in the program read well by the end of the third grade. The U.S. Department of Education estimates that California's participation in the program will provide the state with \$871 million over six years, subject to congressional appropriations and successful implementation. State Board-adopted English language arts content standards, newly-adopted instructional materials for reading, and new professional development programs for teachers and principals are all centered around scientific research on how children learn to read.

However, the State Board's implementation of this program has generated significant criticism from parents and bilingual advocates. Prior to the adoption of this emergency regulation, the Board was enforcing this provision by means of an underground regulation. Specifically, a "frequently asked question" on the Board's website asked whether Proposition 227 waiver classrooms were prohibited from receiving Reading First funding. The Board's online response indicated that the above instructional time requirements for reading in English must be met in order for a classroom to be eligible. Because this rule of general application had not been adopted pursuant to the formal rulemaking requirements of the California Administrative Procedure Act (APA), parents and bilingual advocacy organizations commenced litigation against the Board. In March 2003, San Francisco County Superior Court Judge Ronald Evans Quidachay agreed that this provision meets the legal definition of a regulation, and thus may not be enforced until and unless it is adopted pursuant to the APA.

In addition to the procedural failings of the Board, bilingual advocates object to the requirement itself. The eligibility criteria set forth by the Board prohibits alternative bilingual classrooms (implemented pursuant to waiver provisions of Proposition 227) from participation unless their curriculum includes 2.5 hours of an English-only reading/language arts program designed for native English speakers. While all alternative classrooms provide English Language Development instruction and teach children English, alternative programs generally teach children technical reading and writing skills in their primary language and transition them into an English only reading/lan-

guage arts program upon a demonstrated level of proficiency in English.

### **Instructional Materials Funding Realignment Program**

AB 1781 (Hertzberg) (Chapter 802, Statutes of 2002) created the Instructional Materials Funding Realignment Program (IMFRP), consolidating three existing categorical programs (K–8 Instructional Materials Fund, 9–12 Instructional Materials Fund, and the K–4 Classroom Library Materials Program) into a new block grant that took effect January 1, 2003. The main purpose of the IMFRP is to provide a source of funding for the purchase of standards-aligned materials in the core subject areas of English language arts, mathematics, history-social science, and science. Districts are to use funding in the following manner:

- ◆ First priority is the purchase of standards-aligned materials in (1) English language arts, (2) mathematics, and (3) reading intervention programs for English language learners in grade 4 through 8 or students reading two or more years below grade level.

- ◆ Second priority is the purchase of standards-aligned materials in history/social science and science.

- ◆ Third priority is the purchase of other instructional materials for areas such as visual and performing arts, foreign language, health materials, supplementary materials, tests, technology-based materials, and classroom library materials for grades K-4. However, before they may purchase materials from the third category listed above, the governing board of a district is statutorily required to certify that every pupil will be provided with standards-aligned materials in the four core curriculum areas.

On January 16, 2003, the Board adopted, on an emergency basis, new sections 9531 and 9532, Title 5 of the CCR, to implement the IMFRP. New section 9531 clarifies the priorities for the purchase of instructional materials and defines the percentages that are authorized for specific purposes. New section 9532 clarifies the requirements for a school district or charter school in its first year of operation or of expanding grade levels at a school site, to be eligible to receive funding based on enrollment estimates provided to the Department by the school district or charter school.

On January 31, 2003, the Board published notice of its intent to adopt these sections on a permanent basis. The Board held a public hearing on April 9, 2003 on the regulatory provisions. On June 16, 2003, OAL approved the Board's permanent adoption of these provisions.

**IMPACT ON CHILDREN:** California began moving to a standards-based educational system in 1995 when AB 265 (Alpert) (Chapter 975, Statutes of 1995) required the creation of the Commission for the Establishment of Academic Content and Performance Standards. The Commission was required to develop academically rigor-

ous content and performance standards in the core curriculum subject areas for grades K–12. In 1998, academic content standards were developed for English language arts, mathematics, history-social science, and science. Recognizing the necessity of providing pupils with standards-aligned materials, the Legislature passed AB 2519 (Poochigian) (Chapter 481, Statutes of 1998), directing the Board to conduct a special interim adoption of basic and partial programs in English language arts and mathematics prior to 2001. These materials were required to cover a course of study, or a substantial portion of a course of study, essential to meeting adopted academic content standards. These materials were adopted in 1999 and remain in effect until June 30, 2005 for English language arts, and June 30, 2003 for mathematics. In addition, the Legislature enacted AB 2041 (Bustamante) (Chapter 312, Statutes of 1998), the Schiff-Bustamante Standards-Based Instructional Materials program, which appropriated \$1 billion over a four-year period for school districts to purchase instructional materials that were aligned with state content standards. Between 1999 and 2001, many school districts purchased such materials with their share of the \$1 billion in Schiff-Bustamante funds.

In developing the new IMFRP regulations, the Board concluded that the English language arts and mathematics materials adopted in the interim adoption under Chapter 481, did not qualify as being standards-aligned because they were not adopted using the existing standards-aligned "framework." Essentially, the English language arts content standards designate what to teach at specific grade levels. The framework provides guidelines and selected approaches for implementing instruction to help pupils in meeting the standards. For districts that purchased interim adopted materials and who wished to access the IMFRP funding, this decision in effect requires them to reinvest in new English language arts and mathematics instructional materials even though they are not significantly different from the interim materials. The Board also requires school districts to purchase new materials if they want to participate in and receive state funding for the Reading First Program, the Mathematics and Reading Professional Development initiative, the Principal Training program, or the High Priority Schools Grant Program.

According to the Legislative Analyst's Office (LAO), the Legislature has historically been committed to ensuring that pupils are provided with standards-aligned instructional materials and providing school districts with funding to make the investment in these materials. Consistent with this commitment, LAO is currently recommending that the Legislature pass legislation to allow materials adopted in the interim adoptions required under Chapter 481 to be recognized as standards-aligned materials. In adopting this recommendation, the Legislature would be: (1) recognizing the \$1 billion investment in Schiff-Bustamante Standards-Based Instructional Materials funding that districts have made; (2) providing districts with greater flexibility in which to utilize IMFRP funding to purchase other instruc-

tional materials that will best meet their district needs; and (3) allowing districts using interim adopted materials to participate in new school reform programs.

### **Update on Previous Rulemaking Packages Mathematics and Reading Professional Development Program**

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." (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 25.)

**Update:** On December 10, 2002, OAL approved the Board's permanent adoption of section 11983.5.

### **California High School Exit Exam**

On March 11, 2002, CDE published notice of its intent to amend sections 1200, 1204, 1209, 1211, 1212, and 1220, Title 5 of the CCR, to provide guidance on administration of the state's high school exit exam. On September 23, 2002, CDE amended its proposal and released the modified version for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 26.)

**Update:** On May 1, 2003, OAL approved these regulatory changes. (See "California High School Exit Examination", *supra*, for a subsequent Board rulemaking proposal regarding the high school exit exam.)

### **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.

On June 11, 2002, the Board released a modified version of the regulations for a fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 27.)

**Update:** The Board did not submit a certificate of com-

pliance to OAL within the prescribed time period. On September 12, 2002, the emergency provisions contained in Article 1.5 were repealed by operation of law. However, the Board has since continued its effort to adopt these provisions on a permanent basis, and submitted the package to OAL for review and approval on March 21, 2003. According to the Board, OAL disapproved the regulatory package on May 5, 2003, finding that the rulemaking file had technical deficiencies and certain documentation should have been made available during the public review period. On June 23, 2003, the Board corrected the technical deficiencies and directed staff to release the necessary documentation for a fifteen-day public comment period.

On September 4, 2003, the Board requested that OAL extend the Board's time to resubmit its rulemaking file; on September 8, 2003, OAL approved the request, ordering that the rulemaking file must be resubmitted on or before November 11, 2003. On September 10, 2003, the Board adopted the modified rulemaking proposal, which now awaits review and approval by OAL.

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

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. Although OAL approved the regulations on August 13, 2002, it 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, OAL's approval and filing of these regulations was premature. Thus, on September 11, 2002, OAL rescinded its action of August 13, 2002, and returned the regulations to the Board. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 28.)

**Update:** On November 25, 2002, the Board released a modified version of this rulemaking package for an additional fifteen-day public comment period. Although the Board was scheduled to discuss the adoption of these regulatory proposals at its December 2002 meeting, it withdrew the item from its agenda and has not taken the matter up since.

### **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.) The Board held a public hearing on January 10, 2002, and has since modified the proposed regulations four times. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 30.)

**Update:** On January 8, 2003, OAL approved this rulemaking package.

## **CHILD PROTECTION**

### **New Rulemaking Packages**

#### **Independent Living Program**

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

**O**n October 31, 2003, on an emergency basis, DSS amended sections 11-400, 11-410, 31-002, and 31-206, adopted new sections 30-501, 30-502, 30-503, 30-504, 30-505, 30-506, 30-507, 30-900, 30-901, 30-902, 30-903, 30-904, 30-905, 30-906, 30-907, 30-908, 30-909, 30-910, 30-911, 30-912, 30-913, 30-914, 30-915, 30-916, 30-917, 30-918, 30-919, 30-920, and 31-236, and repealed and adopted section 31-525 of the MPP, addressing four separate but related elements: the Independent Living Program (ILP), the Transitional Independent Living Plan (TILP), the Transitional Housing Placement Program (THPP), and the Transitional Housing Program-Plus (THP-Plus).

All eligible foster care youth are permitted but not required to participate in the ILP, which provides services, programs, and activities to assist eligible foster youth to make the transition from foster care to independent living. All foster youth 16 years of age and older must have a TILP whether or not they are participating in the ILP. The TILP is a federally-mandated written plan developed by the counties in collaboration with each youth and included in the case plan. The THPP is a program under which supervised youth live independently while attending high school and learning the skills of daily living. The THP-Plus originated as a housing program for young adults who have emancipated and are receiving financial assistance through the Supportive Transition Emancipation Program (STEP).

Among other things, the regulations provide that youth shall be eligible for ILP services up to their 21st birthday provided one of the following criteria is met:

(1) The youth was/is in foster care at any time from their 16th to their 19th birthday (this does not include youth placed in detention facilities, locked facilities, forestry camps, training schools, facilities that are primarily for the detention of youth who are adjudicated delinquent, medical and psychiatric facilities, voluntary placements, wrap-around program participants, youth placed pursuant to an individualized education program and guardianship placements in which the youth is not a dependent or ward of the court).

(2) The youth was/is 16 years of age up to 18 years of age and in receipt of the Kinship Guardianship Assistance Payment Program (KinGap) assistance.

(3) Eligible youth younger than 16 years of age may participate in an ILP for younger youth if the county of jurisdiction has a county plan that includes such a program. Youth under 16 years of age placed outside their county of jurisdiction may participate in an ILP only with prior approval of the county of jurisdiction. Participation in an ILP for younger youth under age 16 does not qualify a youth for ILP eligibility.

For each youth in placement between 15\_ and 16 years of age, the social worker/probation officer of the county of jurisdiction must ensure that the youth will actively participate in the development of the TILP. The TILP sets forth the youth's current level of functioning; emancipation goals; progress towards achieving the TILP goals; programs and services needed; and the individuals assisting the youth. The TILP must be reviewed, updated, approved, and signed by the social worker/probation officer and the youth every six months.

The regulations provide that THP-Plus tenants are young adults who are former foster/probation youth who have emancipated from a county that has elected to participate in THP-Plus. THP-Plus tenants shall be at least 18 years of age and not yet 21 years of age, and must be pursuing county-approved goals utilizing his/her TILP. Tenants may remain in THP-Plus for a maximum of twenty-four cumulative months. THP-Plus programs shall be designed to provide a safe and adequate residence and allow participants a maximum amount of independence and self-sufficiency. Acceptable residential units include apartments, single family dwellings, condominiums, college dormitories, and host family models. Publicly supervised or privately operated shelters, or other living situations including those with friends, family members and others that provide temporary accommodation are not acceptable placements under THP-Plus. Public or private places not ordinarily used as a regular sleeping area are not acceptable, and group homes and other types of licensed residential facilities may not be utilized by a THP-Plus provider as accommodations for emancipated foster youth.

On October 31, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. The Department is scheduled to hold a public hearing on the proposal on December 17, 2003, in Sacramento.

**IMPACT ON CHILDREN:** Although CAI supports the continuation of independent living and related housing programs for both emancipated and current foster youth, these programs must be implemented in a fair and equitable manner in order to comply with federal law. In consideration of this need, the Legislature passed AB 1979 (Chapter 271, Statutes of 2002), which clarified that statewide standards established by DSS via regulation set minimum program requirements, and not merely aspirational guidelines for counties. DSS has largely fulfilled the purpose of AB 1979 by using mandatory language throughout the proposed regulations, however, child advocates argue the regulations need additional clarification.

Additionally, the current system needs accountability and outcome measures to ensure that foster youth are actually receiving the services that federal and state law requires they receive. Child advocates know from the legislative record of AB 1979 and other reports that there is wide variation in the level and quality of ILP services offered by counties; that at times youth are denied ILP services or their entry is delayed; and access to ILP services is particularly difficult for youth placed out of their home county. On a fundamental level, the premise of the proposed regulations is incorrect. The funding for ILP services must follow the foster youth to the county where they reside in order to be effective. Under the current funding system, the county where court jurisdiction is (or was) established is where the funding for the child is sent. When a child moves or is placed outside that county, the money may or may not find the child, and services may or may not be provided, which raises issues of the State's compliance with the federal Foster Care Independence Act of 1999. Once this funding mechanism is corrected (as DSS has the authority and power to do), true statewide standards will be met, and the outcomes for foster youth will improve dramatically. Unfortunately, this rulemaking package does not correct this basic deficiency.

### **Transitional Housing Placement Programs**

On September 26, 2003, DSS published notice of its intent to adopt new sections 86000-86087.1, and amend section 86088, Title 22 of the CCR, to implement the provisions of AB 427 (Hertzberg) (Chapter 125, Statutes of 2001). That measure expanded the age of youth served in licensed transitional housing placement programs (THPPs) to persons who are at least 16 years of age and not more than 18 years of age, except as specified, and creates a separate, license-exempt, county-optional, certified THPP-Plus program for youth 19 to 21 years of age.

Among other things, the regulations provide that each THPP must have a plan of operation that sets forth the street address and mailing address, if different, for the administrative office and sub-administrative office; street address for the THPP staff residential unit(s), if applicable, and the THPP participant living units; the business tele-

phone number and the 24-hour emergency telephone number of the THPP licensee or designee; complete job descriptions of all THPP employees, including number of staff, classification, qualifications, and duties; information regarding lines of authority and staff responsibilities; procedures for the development, review, implementation and modification of the needs and services plan for participants placed in the THPP; and a comprehensive program statement including the goals of the THPP, a description of the youth to be served, admission criteria for THPP participants, as specified in Welfare and Institutions Code section 16522.1(a), a staff training plan, a detailed plan for monitoring the THPP participants, procedures for responding to complaints and emergencies on a 24-hour basis, the contract to be used between the THPP and the THPP participant (including the rights and responsibilities of each party), the procedures for determining the amount of allowance provided to each THPP participant, and the schedule for disbursement; procedures for payment or monitoring of utilities, telephone, and rent, program policies, as specified in Welfare and Institutions Code section 16522.1(h), a description of proposed THPP participant living unit furnishings, and the policy regarding disposition of furnishings when the THPP participant completes the program; procedures for evaluating the THPP participant's progress, and a description of linkages with Job Training Partnership Act programs.

The regulations provide that all THPP licensees shall have an administrator who meets specified educational and experience requirements, who shall be responsible for the operation of the THPP. The administrator shall be present in the THPP at least twenty hours per week during business hours. At all times when the administrator is absent from the THPP, there shall be coverage by the administrator's designee. If the designee does not meet the administrator qualifications there shall be immediate access to the administrator or one who meets the administrator requirements. The administrator's designee shall have knowledge of the THPP operations; training in programs provided by the THPP; and the authority to correct deficiencies that constitute immediate threats to the health and safety of children in the THPP.

At the time of placement, the THPP social work personnel—in consultation with the authorized representative—shall complete a needs and services plan for each participant. The needs and services plan is to include the participant's name; age; physical limitations; history of infections or contagious diseases; history of other medical, emotional, behavioral and physical problems; ability of participant to manage his/her own cash resources; visitation, including limitations on visits to the family residence and other visits inside and outside the transitional housing unit; limitations on written and telephonic communication; current service needs; planned length of placement; any applicable collateral needs appraisals or individualized program plans completed by the placement agency or consultant; plans for providing services to meet the individual needs identified

above; the signature of the participant's authorized representative; and the signature of the participant.

Each THPP participant shall have personal rights as set forth in Welfare and Institutions Code section 16001.9, which include the right to be accorded the greatest level of independence consistent with safety and the participant's ability and maturity level as outlined in the participant's Needs and Services Plan or TILP. Some of the enumerated rights are as follows: 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, infliction of pain, humiliation, intimidation, ridicule, coercion, threat, mental abuse, or other actions of a punitive nature, including but not limited to, interference with the daily living functions of eating, sleeping, or toileting, or withholding of shelter, clothing, or aids to physical functioning; to receive necessary medical, dental, vision, and mental health services; to contact DSS' Community Care Licensing Division regarding violations of rights; to speak to representatives of the CCL office confidentially and to be free from threats or punishments for making complaints; to have social contacts with people outside of the foster care system, such as teachers, church members, mentors, and friends; 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 (CASA), and probation officers; to have visitors, provided the rights of others are not infringed upon; to attend religious services and activities of his/her choice; to be free to attend court hearings and speak to the judge; to have all his/her juvenile court records be confidential, consistent with existing law; to be accorded dignity in his/her personal relationships with other persons in the home; to be free from unreasonable searches of person; to be free from unreasonable searches of personal belongings; to have visitors as specified by the licensee's policies, in accordance with Welfare and Institutions Code Section 16522.1(h); to possess and control his/her own cash resources unless otherwise agreed to in the participant's needs and services or TILP and by the participant's placing agency and authorized representative; to possess and use his/her own personal possessions, including toilet articles; to have access to a telephone to make and receive confidential calls; and to send and receive unopened correspondence.

On October 27, 2003, DSS adopted these provisions on an emergency basis. Pursuant to AB 427, this regulatory action and its first readoption are deemed to be an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare, exempt from review by OAL, and remain in effect for 180 days. DSS must transmit a Certificate of Compliance to OAL by April 26, 2004, or the emergency language will be repealed by operation of law on the following day.

**IMPACT ON CHILDREN:** Although most child advocates support the creation of Transitional Housing Placement Programs for emancipated and current foster youth between ages 16 and 21 (or even older, in certain circumstances), the regulations proposed by DSS to implement AB 427 were met with several concerns. For example, AB 427 required that the THPP regulations be age-appropriate and recognize that youth who are about to emancipate from the foster care system should be subject to fewer restrictions than those who are younger. At a minimum, the regulations require programs that serve youth who are both in and out of the foster care system to have separate rules and program design, as appropriate, for these two groups of youth, and allow youth who have emancipated from the foster care system to have the greatest amount of freedom possible in order to prepare them for self-sufficiency. However, DSS' proposed regulations do not appear to implement these legislative requirements.

AB 427 also specified that youth who are wards of the court under Welfare and Institutions Code section 602 and youth receiving psychotropic medications are eligible for THPP and shall not automatically be excluded due to these factors. However, there is no reference to these protections in the Department's proposed regulations for THPP.

Further, the provisions do not set forth any clear indication of what time commitment must be made by the social worker to each of his/her THPP participants. Although a ratio of 25 participants to each full-time social worker is required, the regulations do not expressly require the social worker be on premises full-time during normal working hours, nor do they limit social workers to working at one THPP facility at a time.

### **Foster Youth Personal Rights**

On August 1, 2003, DSS published notice of its intent to amend sections 80072, 83072, 84072, 84172, and 84272, Title 22 of the CCR, to set forth the foster youth personal rights enumerated in AB 899 (Liu) (Chapter 683, Statutes of 2001). Among other things, the changes provide that each facility must provide each school age child and his/her authorized representative, who is placed in foster care, with an age and developmentally appropriate orientation that includes an explanation of the rights of the child. The child must be allowed to possess and control his/her own cash resources and maintain an emancipation bank account, consistent with the child's age and developmental level, unless otherwise agreed to in the child's needs and services plan and by the child's authorized representative; to be accorded dignity in his/her personal relationships with staff and other persons; to live in a safe, healthy, and comfortable home where he or she is treated with respect; to be free of physical, sexual, emotional, or other abuse, or corporal punishment; to receive adequate and healthy food, and adequate clothing; to receive medical, dental, vision, and mental health services; to be free of the administration of med-

ication or chemical substances, unless authorized by a physician; to contact family members (including brothers and sisters), unless prohibited by court order, and social workers, attorneys, foster youth advocates and supporters, Court Appointed Special Advocates (CASA), and probation officers; to contact DSS' Community Care Licensing Division or the State Foster Care Ombudsperson regarding violations of rights; to speak to representatives of these offices confidentially, and to be free from threats or punishment for making complaints; to be informed, and to have his or her authorized representative informed by the licensee of the provisions of law regarding complaints including, but not limited to, the address and telephone number of the complaint receiving unit of the licensing agency, and of information regarding confidentiality; to be free to attend religious services or activities of his/her choice and to have visits from the spiritual advisor of his/her choice; to not be locked in any room, building, or facility premises at any time; to attend school and participate in extracurricular, cultural, and personal enrichment activities, consistent with the child's age and developmental level; to work and develop job skills at an age-appropriate level that is consistent with state law; to leave or depart the facility at any time (except that the licensee shall not be prohibited by this provision from setting curfews or other house rules for the protection of clients, and this provision shall not apply to minors for whom a guardian, conservator, or other legal authority has been appointed); to have social contacts with people outside of the foster care system, such as teachers, church members, mentors, and friends; to attend Independent Living Program classes and activities if he/she meets age requirements; to attend court hearings and speak to the judge; to review his/her own case plan if he or she is over 12 years of age and to receive information about his or her out-of-home placement and case plan, including being told of changes to the plan; to be free from unreasonable searches of personal belongings; to confidentiality of all juvenile court records consistent with existing law; and not to be placed in any restraining device.

DSS held a public hearing on these proposed changes on September 17, 2003 in Sacramento. At this writing, these changes await review and approval by OAL.

**IMPACT ON CHILDREN:** According to the supporters of AB 899, including the California Youth Connection, abuses perpetrated by foster care providers on foster children exacerbate the many problems the children encounter that result in their being in foster care in the first place. Reporting of these abuses must be encouraged in order for the foster care system to be more responsive to foster children.

While child advocates welcome the implementation of AB 899's provisions, they expressed several concerns regarding DSS' regulatory proposal. In many respects, the proposed language does not seem to fully implement the language or intent of AB 899. For example, AB 899 requires that foster care providers provide each schoolage

child and his/her authorized representative with an age and developmentally appropriate orientation that includes an explanation of the rights of the child, and “addresses the child's questions and concerns.” Although DSS’ proposed regulatory language addresses the first part of this provision, it is silent as to how providers are to ensure that the child’s questions and concerns are being addressed.

Also, AB 899 provided that foster children have the right to visit and contact brothers and sisters, unless prohibited by court order. Although DSS’ proposed changes mention the right to contact family members (including siblings), the right to visit those siblings is not expressly set forth. Other provisions proposed by DSS—such as provisions which set limits on when and how a child can have visitors—appear to be inconsistent with the relevant provisions of the Welfare and Institutions Code, as amended by AB 899.

### **Foster Care Rates: Triennial Financial Audits and Cost Reimbursement**

On or about April 18, 2001, DSS received a letter from the federal Department of Health and Human Services, Administration for Children and Families, directing it to apply the annual financial audit requirements contained in Office of Management and Budget (OMB) Circular A-133 to group homes and foster family agencies. Pursuant to Single Audit Act, at 31 U.S.C. 7501 *et seq.*, subrecipients of federal funds who receive \$300,000 in combined federal funds must comply with the annual audit requirements contained in OMB Circular A-133. Under federal law group homes and foster family agencies who receive less than \$300,000 in combined federal funds do not have to meet the annual audit requirements contained in OMB Circular A-133.

AB 444 (Budget Committee) (Chapter 1022, Statutes of 2002) reduced the frequency of mandatory submissions of financial audit reports for those group homes and foster family agencies who receive less than \$300,000 in annual combined federal funds from every year, to at least once every three years. AB 444 was enacted to conserve state general fund dollars associated with both the reduction of administrative resources required to process and review group home and foster family agency financial audits, and audit reimbursement costs pursuant to Welfare and Institutions Code section 11466.21.

On July 1, 2003, DSS adopted, on an emergency basis, amendments to sections 11-405 and 11-406 of the MPP, to reduce the frequency of mandatory submissions of financial audit reports for those group homes and foster family agencies who annually receive less than \$300,000 in combined federal funds from once every year, to at least once every three years. On August 1, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. On October 29, 2003, DSS transmitted a Certificate of Compliance to OAL; at this writing, OAL is reviewing DSS’ submission.

**IMPACT ON CHILDREN:** Given the high reimbursement rate that group homes and foster family agencies receive per child per month (significantly higher than the rate paid to family foster homes), the number of such providers annually receiving less than \$300,000 in combined federal funds is estimated to be fairly small. Indeed, DSS estimates that the general fund savings associated with the reduction of administrative resources and audit reimbursement costs to be just \$250,000. However, for those group homes and family foster agencies who do meet this financial criteria, there will be less regulatory oversight to prevent against financial misfeasance, thus detrimentally affecting the welfare of the children involved. With the recent reports and findings of malfeasance by group home administrators, many advocates argue that the lessening of periodic auditing is unconscionable and will result in greater problems regarding youth receiving adequate services at these facilities.

### **Family Reunification Child Support Referral Requirements**

AB 1449 (Keeley) (Chapter 463, Statutes of 2003) required the Department of Child Support Services (DCSS), in consultation with DSS, to establish and promulgate, by October 1, 2002, specified regulations by which the local child support agency may compromise an obligor’s liability for public assistance debt in cases where the parent separated from or deserted a child who consequently became the recipient of aid under the AFDC-FC or CalWORKs programs, if specified conditions are met, and DCSS determines that compromise is necessary for the child’s support (see POVERTY section above for a description of DCSS’ rulemaking proposal implementing this provision of AB 1449). AB 1449 also required DSS, in consultation with DCSS, by October 1, 2002, to promulgate specified regulations by which county child welfare departments, in cases where the separation or desertion by a parent(s) results in aid, as specified, would determine whether it is in the best interests of the child to have his/her case referred to the local child support agency for child support services, as specified.

On August 1, 2003, DSS published notice of its intent to amend sections 31-206 and 31-503 of the MPP, to implement its portion of AB 1449. Specifically, the proposed changes would provide that if a child is receiving family reunification services, the social worker shall determine whether it is in the child’s best interest to make a referral to the local child support agency. In making this determination, the social worker shall take the following into consideration: the parent’s ability to meet the requirements of the reunification plan if the child's case is referred to the local child support agency, and the parent's ability to meet the current and future financial needs of the child if the child's case is referred to the local child support agency.

If the social worker determines it is in the best interest of the child not to make a referral to the local child support agency, the social worker shall forward their recommendation to a county eligibility worker for appropriate action. The social worker shall review this decision following each court hearing held under Welfare and Institutions Code section 361.5. If, upon completing this review, the social worker determines that due to a change in the child's circumstances, it is no longer contrary to the child's best interest, the social worker shall inform the appropriate county eligibility worker to refer the child's case to the local child support agency. The social worker shall document in the child's case plan if it is determined that it is not in the best interest of the child to refer his/her case to the local child support agency. The social worker may provide information regarding the best interest of the child as it pertains to child support issues to the local child support agency upon request.

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

**IMPACT ON CHILDREN:** Child advocates support the goals of AB 1449, which authorized county welfare departments to not refer, for child support collection, cases where the child was placed in foster care, and repayment of a public assistance debt would pose a barrier to reunifying the child with the obligor parent. However, DSS' proposed regulations were met with several concerns from child advocates. For example, DSS' proposed language impermissibly limits the applicable scope of the regulations to only those cases where a child is currently receiving family reunification services. This appears to conflict with AB 1449, which defined the scope of application to "any case of separation or desertion of a parent or parents from a child that results in aid under section 11400 of the Welfare and Institutions Code."

Also, one of the goals of the implementing regulations was to ensure uniformity of application among counties, by clearly defining the parameters of the counties' authority. DSS' proposed regulations leave discretion with the counties to determine what circumstances constitute "the best interests of the child," and therefore, would not ensure any uniformity statewide. Child advocates urge DSS to define those circumstances in which it is not in the best interests of the child to refer the case to the local child support agency, and require that the social worker/county welfare agency department document how the determination of whether to refer a case is made after each court hearing.

### **Criminal Record Exemption Regulations**

On July 16, 2003, on an emergency basis, DSS adopted new section 102416.1 and amended sections 80001, 80019, 80019.1, 80019.2, 80054, 80061, 80065, 80066, 87101, 87219, 87219.1, 87454, 87565, 87566, 87801, 87819, 87819.1, 87861, 87865, 87866, 101152, 101170, 101170.1, 101170.2, 101195, 101212, 101216, 101217, 102352,

102370, 102370.1, 102370.2, 102395, 102416, 102417, and 102419, Title 22 of the CCR, regarding the requirements and procedures for criminal background checks, including fingerprinting, and criminal background check exemptions for persons who work or are present in licensed facilities that provide care to children and dependent adults.

Among other things, the emergency regulations state that it shall be conclusive evidence that an individual is not of good character to justify issuance of an exemption if the individual is on probation or parole, or if the individual makes a knowingly false or misleading statement regarding (1) material relevant to their application for a criminal record clearance or exemption; (2) his/her criminal record clearance or exemption status to obtain employment or permission to be present in a licensed facility, after DSS has ordered that they be excluded from any or all licensed facilities; (3) or his/her criminal record clearance or exemption status in order to obtain a position with duties that are prohibited to him/her by a conditional exemption.

The regulations provide that DSS shall consider granting a criminal record exemption if the individual provides DSS with substantial and convincing evidence of good character and his/her criminal history meets one of the applicable criteria stated here:

- ◆ The individual has been convicted of one nonviolent misdemeanor, and one year has lapsed since completing the most recent period of incarceration or probation.

- ◆ The individual has been convicted of two or more nonviolent misdemeanors and four consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

- ◆ The individual has been convicted of one or more violent misdemeanors and 15 consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

- ◆ The individual has been convicted of one nonviolent felony and four consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

- ◆ The individual has been convicted of two or more nonviolent felonies and ten consecutive years have lapsed since completing the most recent period of incarceration, probation, or parole, whichever is latest.

- ◆ The individual has not been convicted of a violent felony.

- ◆ If the individual is currently on probation, and provides sufficient proof that the probationary period(s) is informal, unsupervised and no probation officer is assigned, the period of lapsed time as specified above shall begin from the last date of conviction(s).

On August 29, 2003, DSS published notice of its intent to adopt these provisions on a permanent basis. DSS must transmit a Certificate of Compliance to OAL by November 13, 2003, or the emergency language will be repealed by operation of law on the following day.



**IMPACT ON CHILDREN:** This rulemaking package clarifies and standardizes many procedural requirements relevant to the criminal record exemption, thus providing a framework for its consistent application. By setting forth the eligibility requirements for this exemption, and by mandating parental notification of specified events, these provisions help promote the safety and well-being of children in licensed foster care facilities.

### Minor Parent Regulations

Existing law requires DSS to adopt regulations regarding mother and infant programs serving children younger than six years of age who reside in a group home with a minor parent who is the primary caregiver of the child. On April 4, 2003, DSS published notice of its intent to amend sections 84001, 84065.2, 84065.5, 84065.7, 84200, 84201, 84222, 84265, 84265.1, 84268.1, 84268.3, 84272, 84272.1, 84274, 84275, 84276, 84277, 84278, 84278.1, 84279, 84287, and 84287.2, Title 22 of the CCR, regarding such minor parent and infant programs. Among other things, the proposed changes include the following:

- ◆ The regulations define the term “minor parent program” to mean a group home program that serves pregnant minors and minor parents with children younger than six years of age who are dependents of the court, nondependents, voluntary and/or regional center placements, and reside in the group home with the minor parent, who is the primary caregiver of the young child.

- ◆ The regulations provide that from 7 a.m. to 7 p.m., in minor parent programs, there shall be one on-duty child care staff person to each ten children, or fraction thereof, present. In minor parent programs, the term “children” shall include all children present in the facility, including minor parents and their child(ren). When the minor parent is not providing direct care and supervision to his or her child(ren), the facility shall provide that care and supervision. At any time the facility provides direct care and supervision of the minor parents’ children, there shall be one staff for every four children of minor parents, or fraction thereof.

- ◆ The regulations exempt minor parent programs from the “family group,” “family-like setting,” and “houseparent” requirements as those terms are defined.

- ◆ The regulations require group homes with minor parent programs to specify in the plan of operation the plan for providing parenting education to the minor parents.

- ◆ The regulations provide that the child care worker in a minor parent program must meet the education and experience qualifications specified in section 84265(d), Title 22 of the CCR, except that the specific courses and work experience shall include infant care, child development or early childhood education, adolescent development, parenting skills, and other courses appropriate to the care and supervision of the client population of pregnant minors and their children.

- ◆ The regulations require the licensee to assure that the minor parent disciplines his or her child in a manner consistent with specified requirements. For example, discipline must be education-based, consistent among caregivers, and include redirecting the child’s attention; focusing on the rule to learn and the reason for the rule; providing acceptable alternatives; providing time away from the precipitating situation; and arranging the environment to allow safe testing of limits. Discipline must not include confinement to cribs, high chairs, playpens, or other similar furniture or equipment.

DSS held a public hearing on these proposed changes on May 21, 2003, in Sacramento; at this writing, the amendments await review and approval by OAL.

**IMPACT ON CHILDREN:** These regulations are intended to allow and encourage the development of positive parenting skills through hands-on experience as the primary care providers so that young parents may develop the skills to ensure their children’s healthy growth and development.

### Victims of Crimes: Emergency Awards

On February 3, 2003, the Victim Compensation and Government Claims Board adopted, on an emergency basis, section 649.11, Title 2 of the CCR, to set forth the procedure for obtaining an emergency award. Pursuant to section 649.11, an applicant may indicate on the application that s/he is applying for an emergency award. The Board shall expedite the process of verifying the application to determine if an emergency award is appropriate by making telephone calls and transmitting documents electronically or by facsimile to expedite the process and promptly communicate the decision to the applicant. An emergency award will be allowed when necessary to avoid substantial hardship, such as the inability to provide for the necessities of life, included but not limited to shelter, food, medical care, or personal safety, or the inability to pay for funeral and burial expenses or crime scene cleaning expenses.

The amount of the emergency award being requested shall be considered when determining the amount or type of information required to verify the application for an emergency award. The information required must provide sufficient information to substantiate both that the emergency award is necessary to avoid substantial hardship as a direct result of the qualifying crime and that the applicant has an immediate financial need for an emergency award as a direct result of the qualifying crime. If sufficient information is not provided on the application, the application shall be processed as an application for non-emergency award assistance.

On February 28, 2003, the Board published notice of its intent to adopt section 649.11 on a permanent basis. At this writing, the permanent adoption awaits review and approval by OAL.

**IMPACT ON CHILDREN:** The state’s Victim Compensation Program helps innocent victims of certain

crimes and their family members when they have no other means of paying for crime-related losses. Child victims who are injured as the result of a qualifying crime are eligible to receive assistance. A child who is not directly injured or killed as a result of a crime but who, at the time of the crime, was a resident of California, and is the sibling or child of the victim or meets other specified criteria, may also receive assistance. The Board's adoption of a procedure to expedite awards when warranted will have a beneficial impact on child victims and their families who are dealing with the emotional, physical, and financial aftermath of the event.

### **Victims of Crimes: Service Limitations for Outpatient Mental Health Services**

On February 3, 2003, the Victim Compensation Board adopted, on an emergency basis, new sections 649.23–649.25, Title 2 of the CCR, to implement service limitations for outpatient mental health services. Among other things, the provisions:

- ◆ impose a limitation of up to 40 sessions for direct victims who are minors at the time of the qualifying crime (adult victims may receive up to 30 sessions), and provide that additional treatment must be authorized by the Board;

- ◆ provide that no more than three sessions of the authorized sessions shall be permitted for meetings or discussions between the treating therapist and collateral contacts of the person being treated, such as school counselors, teachers, and social workers;

- ◆ set forth factors for determining whether a person is eligible for additional outpatient mental health counseling related expenses, including whether the perpetrator of the qualifying crime was a person in a position of trust or authority with the victim, such as a parent, teacher, or religious leader; if photographs of a minor victim were made public; if other members of the victim's immediate family were victims of the same qualifying crime; and if the integrity of the victim's immediate family was destroyed by the qualifying crime; and

- ◆ provide that additional outpatient mental health counseling related expenses may be authorized for a limited duration if, among other factors, a minor victim reaches a developmental stage or a stage of cognitive development which results in impairment as a direct result of the qualifying crime.

On February 28, 2003, the Board published notice of its intent to adopt these provisions on a permanent basis; on June 4, 2003, the Board readopted the changes on an emergency basis. At this writing, the permanent provisions await review and approval by OAL.

**IMPACT ON CHILDREN:** For the past several months, the Victims Compensation and Government Claims Board has been experiencing severe cash flow problems; the situation has become so dire that the Board's monthly expenditures will eventually exceed its restitution fund revenues.

At its hearing on January 10, 2003, the Board adopted a variety of measures to address the fiscal challenge facing the Program. One of the measures adopted by the Board was service limitations for outpatient mental health counseling related expenses.

The Board receives a substantially higher percentage of applications for mental health counseling for child victims than other states do. According to the Board, the higher application rates are not the result of a larger child population per capita or a higher percentage of substantiated child abuse cases. The higher child application rate in California could be the result of the success of the outreach efforts by Board staff and other advocates, as well as the Board's partnerships with the Non-Profit Agreement providers who provide specialized treatment for child trauma. For mental health services paid in California in fiscal year 2001–02, the average number of sessions for children was 43 (the average number for adults was 42). Arguably, the Board's new limitation of 40 sessions per child will come close to meeting the needs of the typical child victim.

According to the Board, the new limitations will result in significant savings: "Establishing session limits in the 30 to 40 range would capture about half of the victims in both the adult and child groups. A provision for exceptions (*i.e.*, 'dire or exceptional') above the cap would give the Board an opportunity to examine more carefully the medical necessity of the treatment on a case-by-case basis and still allow for the possibility of additional counseling associated with more heinous crimes."

### **Anti-Discrimination Regulations**

On May 30, 2003, DSS published notice of its intent to adopt new section 89002 and amend sections 80017, 87118, 87817, 88030, 89317, 101168, and 102368, Title 22 of the CCR, which set forth anti-discrimination policies for DSS applicants. In order to make these various provisions consistent, DSS proposed to modify them all to state that any adult shall be permitted to apply for a license regardless of age, sex, race, religion, color, political affiliation, national origin, disability, marital status, actual or perceived sexual orientation, or ancestry. Proposed amendments to section 88030 would also require that all licensed foster family agencies shall accept applications from adult applicants, evaluate applicants for certification, or decertify homes, on a nondiscriminatory basis without regard to age, sex, race, religion, color, political affiliation, national origin, disability, marital status, actual or perceived sexual orientation, or ancestry.

At this writing, the proposed changes are undergoing review by OAL.

**IMPACT ON CHILDREN:** Although it was submitted after the conclusion of the 45-day public comment period, a letter written on behalf of Olive Crest Treatment Centers, Inc., raised some interesting concerns regarding these regulations as follows:

[S]ection 88030 purportedly requires a foster family agency to put a 75 year-old single male applicant with a highly infectious disability on the same ground as a healthy married couple in their mid-30's in determining who is best able to care for a particular child. This is not to say that a foster family agency might not ultimately conclude that the 75 year-old applicant can provide foster care, but denying the professional judgments of agencies and trained social workers through such regulatory fiat is not in the best interest of children. The very nature of child placement requires a case-by-case clinical evaluation of numerous tangible and intangible factors that does not lend itself to general regulatory mandates of the consideration or non-consideration of any given potentially relevant factor or factors.

Further, the letter contended that Family Code section 7950(b) expressly permits foster family agencies to consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster parents to meet the needs of the child of a given background as one of a number of factors used to determine the best interest of a child.

Because the letter was submitted after the 45-day public comment period, and not in response to a subsequent modification of section 88030, OAL declined to respond to the issues raised.

### **Update on Previous Rulemaking Packages** **Supportive Transitional Emancipation** **Program (STEP) Regulations**

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 the Supportive Transitional Emancipation Program (STEP). Among other things, the proposed regulations provide definitions, STEP eligibility requirements, STEP county responsibilities, and STEP rates. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 31.)

**Update:** At this writing, this regulatory proposal awaits review and approval by OAL.

### **Implementation of AB 1695 / Child Welfare** **Services Provisions of AB 1695 /** **Foster Family Homes Emergency Regulations**

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 provisions of AB 1695, urgency legislation providing statutory clarification of California's process for licensing/approval of foster family homes. On August 9, 2002, DSS published notice of its intent to adopt these changes on a permanent basis. On October 21, 2002, DSS readopted these changes on an emergency basis. (For

background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 32.)

**Update:** On February 18, 2003, DSS readopted these changes for the third time as emergency regulations. 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 certain child welfare provisions of AB 1695. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 32.)

**Update:** At this writing, these 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. DSS readopted this emergency package on October 28, 2002. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 32.)

**Update:** On April 9, 2003, OAL approved DSS' permanent adoption of these changes.

### **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 audits 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. 4, No. 1 (2003) at 34 and Vol. 3, No. 2 (2002) at 23).

**Update:** DSS made several modifications to its rulemaking proposal, and released the modified package on November 22, 2002, for an additional fifteen-day public comment period. Following that period, DSS made one additional revision and released the modified package for another fifteen-day public comment period on December 20, 2002. On January 30, 2003, OAL approved these regulatory changes.

## **JUVENILE JUSTICE**

### **New Rulemaking Packages**

#### **Initial Hearings**

**W**elfare and Institutions Code section 1720 provides, among other things, that the case of each ward shall be heard by the Youthful Offender Parole Board immediately after the case study of the ward has been completed and at such other times as is necessary to exercise the powers or duties of the Board. On May 19, 2003, the Board adopted, on an emergency basis, amendments to section 4941, Title 15 of the CCR, which implements section 1720. Prior to the change, section 4941 provided that each ward shall appear before a Board panel or referee for an initial hearing following completion of the case study at the Youth Authority Reception Centers only.

Section 4941 also provided that if parole is denied, the Board panel or referee shall establish a parole consideration date and order confinement under such conditions and in such treatment programs as it believes are best for the treatment of the ward and the protection of the public.

The Board's emergency amendments to section 4941 eliminate initial hearings and instead provide that the Board will hear the case of each ward committed to the Youth Authority, taking into consideration probation's case study, at a non-appearance file review to confirm or modify the ward's category, initial parole consideration date and date of next annual review ascertained by the Youth Authority's Intake and Court Services Unit upon reviewing the ward's file from the courts. The ward's category, initial parole consideration date and annual review date will be set in a Board Order at the ward's first appearance hearing.

The Board published notice of its intent to make these changes on a permanent basis on June 20, 2003; on October 14, OAL approved the permanent amendments to section 4941.

**IMPACT ON CHILDREN:** According to the Board, these changes address a historical erosion of CYA's role in determining the course of treatment and training for wards. Prior to these changes, the Board held initial hearings where, in addition to setting the ward's offense category, establishing the initial parole consideration date, and setting the date for the next annual review, the Board would give CYA recommendations for treatment strategies in the rehabilitation process of each ward. The Board extensively interviewed the ward, considered CYA staff clinical reports, and reviewed all information in the ward's file when making treatment recommendations to CYA. Although the Board is statutorily authorized to make such recommendations, CYA bears the ultimate responsibility in determining ward treatment and training.

Over the course of time, both the Board and CYA have come to treat the Board's recommendations as orders for treatment which must be implemented, and CYA's identified treatment goals have come to be viewed as recommendations. The Board's revision of section 4941 reflects its desire to have CYA reassume the primary role in developing individualized treatment plans for wards.

# 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.caichild-law.org](http://www.caichild-law.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).

**FOR FURTHER INFORMATION**

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