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Children's Advocacy Institute, University of San Diego School of Law

Children's Regulatory Law Reporter

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HIGHLIGHTS

KEY

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from January 1, 2000 through April 1, 2001; actions on those packages through April 1, 2001; and updates on previously-reported regulatory packages through April 1, 2001.

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

The following abbreviations are used in the *Children's Regulatory Law Reporter* to indicate the following California agencies or publications:

CCR	California Code of Regulations
CDE:	California Department of Education
CYA:	California Youth Authority
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

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CONTENTS

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 at the University of San Diego School of Law. Staffed by experienced attorneys and advocates, and assisted by USD law students, CAI works to improve the status and well-being of children in our society by representing their interests and their right to a safe, healthy childhood.

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

Children's Advocacy Institute Staff

Robert C. Fellmeth, J.D.
Executive Director

Elisa D'Angelo Weichel, J.D.
Administrative Director

Lupe Alonzo
Senior Policy Advocate

Kim Parks
Administrative Assistant

Stephanie Reighley
Administrative Assistant

Louise Jones
Administrative Assistant

CAI Intern/Contributor
Sapna Iyer

CHILD POVERTY

New Rulemaking Packages

Charitable Choice Provision

SB 516 (Haynes) (Chapter 551, Statutes of 1999) added section 10006 to the Unemployment Insurance Code, requiring the Department of Social Services (DSS) and the Employment Development Department (EDD) to adopt regulations that interpret the "charitable choice" provisions contained in section 604a of Title 42 of the United States Code (42 U.S.C. section 604a). The regulations will be applicable to the CalWORKs program that is administered by DSS and the Welfare-to-Work Grant program that is administered by EDD. The charitable choice provisions of 42 U.S.C. section 604a allow states to provide vouchers for services that are redeemable at religious organizations, and contain protections from discrimination for both religious groups and CalWORKs recipients.

On June 30, 2000, DSS published notice of its intent to add new sections 42-713.26 and 42-722 to the MPP. section 42-713.26 would specify that an individual who objects to the religious character of any welfare-to-work service provider to which they are assigned has good cause for not participating in the activity that requires that service until the county provides them with an alternate provider. According to DSS, this section is necessary to accommodate any reasonable religious preferences of participants and to avoid any potential conflict with the First Amendment to the U.S. Constitution or Article I, section 4 of the California Constitution.

Among other things, new section 42-722 would:

- clarify how county welfare departments (CWDs) may utilize charitable, religious, or private organizations to provide services to CalWORKs recipients;
- provide that a CWD shall not discriminate against an organization on the basis that the organization has a religious character;
- provide that CWDs must not exercise control over the religious beliefs of any religious organization that provides welfare-to-work activities and services to CalWORKs recipients, and must not require a religious organization to alter its form of internal governance, or remove religious art, icons, scripture, or other symbols;
- specify that religious organizations are not allowed to discriminate against an individual in regard to the provision of services under the CalWORKs program on the basis of religion, religious beliefs, or a refusal to participate in a religious practice;
- specify that religious organizations that contract to provide services under the CalWORKs program are subject to the same regulations as other contractors in regard to accounting for the expenditure of federal and state CalWORKs funds, in accordance with generally accepted auditing principles for the use of such funds under such programs;
- provide that if a religious organization places the federal funds it receives under the CalWORKs program into an account separate from its other funds, then only those funds will be subject to audit; and
- provide that no federal funds given directly to religious organizations to provide services or administer programs under the CalWORKs program are allowed to be spent for sectarian worship, instruction, or proselytization.

DSS held public hearings on these proposed sections on August 15 in Culver City, August 16 in Sacramento, and August 17 in Berkeley; all public comments were due on or by August 17, 2000. At this writing, the sections await adoption by DSS and review and approval by OAL.

Impact on Children: The proposed rules attempt to strike a balance between the religious nature of many available service providers and the religious sensibilities of a child or parent. On the one hand, encouraging religion-based charities to assist CalWORKs recipients benefits children. Many of them regard assisting the poor to be a core obligation. Moreover, the religious community has some presence in impoverished neighborhoods. In particular, child care slots are concentrated in suburban areas and are in short supply where they are most needed (to allow employment of CalWORKs parents). In addition, the state CalWORKs statute theoretically requires public service employment of most parents receiving TANF assistance within two years of first receipt of benefits after 1996 (if they have not obtained a job otherwise). The religious community may be able to provide or supervise some of that employment.

However, a parent's right to direct the religious upbringing of his or her child is a constitutionally recognized fundamental liberty interest. Further, parents and children are in contact with some of these providers without realistic choice. If child care services are provided from a religious provider and there is no other option, a parent faces loss of benefits sufficient to provide minimal rent if she refuses employment requiring such child care. Similarly, she cannot refuse a public service job. Accordingly, where religious organizations provide these services, they must be offered in a non-sectarian manner. Importantly, the rules not only prohibit the denial of services to persons of different religious faith than the provider, but prohibit proselytizing or other religious activity. At the same time, the rules recognize the reality of religious symbols and decor in such a provider's facilities and do not require their dismantling or concealment—which could prove impractical or expensive for some providers.

As constituted, the rules provide a sensible balance between the legitimate interests here in tension, allowing the supply of services so important to affected children from this important source, while curbing religious importuning.

Update on Previous Rulemaking Packages

The following is an update on rulemaking packages discussed in detail in previous issues of the **Children's Regulatory Law Reporter:**

Rent Voucher Update: A Rule is Adopted and Interpreted Contrary to Statutory Intent

California's implementation of federal welfare reform (PL 104-193) took the form of the 1997 "CalWORKs" statute (AB 1542 (Ducheny), Chapter 270, Statutes of 1997). During the 1997 legislative session, numerous specific bills were introduced, eventually merging into this single comprehensive measure to implement welfare reform. One of those specific bills was AB 282 (Torlakson) sponsored by the Children's Advocacy Institute. It provided for rent and utility vouchers for TANF parents whose safety net support was being cut as a result of "penalties" by the state or county. The concept was to provide a safety net floor of *at least* rent and utilities, to prevent children from being thrown in the streets. That provision, with slight alterations, became integrated into the CalWORKs statute, becoming section 11453.2 of the Welfare and Institutions Code.

The benchmark family of a mother and two children currently receives $625 per month in TANF support. A penalty imposed on the family (*e.g.*, if the mother is not working at a qualifying job within a specified time period) would cut this sum to $410 in the normal course. However, under the original intent of the voucher provision, where rent and utilities total more than the sanctioned amount—for example, $550—the reduction would be to that level, and either the difference between $410 and $550, or perhaps the entire $550 (depending upon the rules adopted) would be payable as vouchers to the landlord and utility.

On June 29, 1998, DSS adopted sections 40-033 and 40-307, and amended sections 44-303.3 and 44-304.6 of the "Manual of Policies and Procedures" (MPP) guiding CalWORKs implementation. The sections became effective on June 28, 1998. This rulemaking action was reported in the second issue of the *Children's Regulatory Law Reporter* (Special Release on CalWORKs Welfare Reform Regulations (Fall 1998) at 4-5). Our description of the new rule quoted it as providing "When the computed [TANF] grant is not sufficient to cover both rent and utilities, the county shall issue a voucher or vendor payment for the full amount of the grant...."

DSS and the counties have now interpreted the statute and this rule as written to add nothing for rent and utilities where the sanctioned amount is insufficient to cover rent and utilities, and to turn all existing cash assistance to vouchers. Hence, in our example above, the penalized family cut from $625 per month to $410 per month would not receive $550 to cover at least rent and utilities, but $410, which would then take the form of vouchers. Hence, a safety net protection has been converted into an unauthorized, unintended extra punishment.

Unless judicially corrected, the consequences of this erroneous rule will be momentous. The impoverished single mothers and unemployed families of California were receiving over $1,200 per month in safety net assistance as recently as the early 1990s. Rents have risen precipitously as vacancy rates have fallen to nil in most of the state's population centers. Utilities are skyrocketing with the failure of deregulation and excessive charges common at double or triple cost-justified levels. Moreover, TANF parents subject to penalties will increase markedly as the other provisions of CalWORKs providing for sanctions increasingly take effect. A substantial number of children already living in marginal circumstances will be without shelter, and a larger number will suffer nutritional shortfall and other harms which come from severe poverty.

PRA Collection and Distribution

On July 30, 1999, DSS published notice of its intent to revise existing child support program regulations regarding district attorneys' distribution of child, family, medical, and spousal support payments collected within the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) distribution hierarchy. Specifically, DSS proposed to amend sections 12-101, 12-108, 12-302, 12-711, 43-203, 43-205, 82-506, 82-508, 82-518, and 82-520 and adopt new sections 12-400 through 12-435 of the MPP; DSS also proposed to repeal sections 25-900 through 25-925 of the Handbook. Among other things, this rulemaking change provides step-by-step collection and distribution regulations, setting forth standards for the types and duration of assignment of support rights, the allocation of payments in multiple cases, the distribution hierarchy, the welfare distribution process, the disbursement of payments, and submission of child support program collection, distribution, and disbursement reports to DSS; the changes also specify the audit trail reports that must be maintained by district attorneys. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 4.)

Update: On January 18, 2000, OAL approved DSS' permanent adoption of these changes.

Child Support Pass-on Elimination Regulations

Also on July 30, 2000, DSS published notice of its intent to amend sections 12-101, 12-108, 12-405, 12-425, 12-430, 43-203, 82-518, and 82-520 of the MPP, to eliminate the pass-on payment in current assistance CalWORKs cases, effective April 1, 2000; pass-on payments are the amount of a current support collection that is in excess of the aid payment made during the month. Among other things, the changes require current support collections that would have been a pass-on payment to be applied to repay the aid payments made to the family in past months which have not been reimbursed; clarify that current support collections in federal foster care cases must be used to recoup only the current assistance payment; and establish the standard that the amount of current support collected is to be applied against both the current assistance payment and any past assistance payment that has not been otherwise reimbursed in nonfederal foster care cases. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 4.)

Update: On March 30, 2001, OAL approved DSS' revisions to these regulations.

Fleeing Felons/Convicted Drug Felons—Food Stamp Program Regulations

On October 1, 1999, DSS published notice of its intent to amend sections 63-100, 63-102, 63-400, and 63-402 of the MPP, to shift the burden of proof regarding fleeing status from the counties to the applicant/recipient felons; add parole or probation violation as a separate cause for ineligibility; add more specificity to the convicted drug felon regulations; clarify the definition of the term "fleeing felon"; and define the term "violation of probation or parole." (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 4.)

Update: OAL approved the changes on June 29, 2000.

CalWORKs Homeless Assistance Program

On October 29, 1999, DSS published notice of its intent to amend sections 40-000, 40-009, 44-200, and 44-211 of the MPP, to increase the daily Temporary Shelter allowance from $30 to $40 per day; change the once-in-24 months time limit regarding exceptions to once-in-12 months; and allow the county welfare departments to require a recipient to participate in a Homelessness Avoidance Case Plan if a recipient returns a second time within 24 months. DSS adopted the changes on an emergency basis on November 9, 1999. On December 15, 1999, DSS held a public hearing on the permanent adoption of the changes. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 5.)

Update: OAL approved the regulatory changes on May 11, 2000.

Child Support Financial Management Services Tax Refund Intercept Regulations

Under the PRA and the federal Office of Child Support Enforcement (OCSE) action transmittal 98-17, dated July 6, 1998, states are mandated to submit weekly additions, deletes, and upward and downward modifications of the child support arrearages owed by a noncustodial parent; these directives require DSS to move from an annual to an ongoing intercept system and are in conflict with the current intercept regulations. Failure to follow the federal directives would cause the Child Support Program in California's income tax refund intercept systems to be out of compliance with federal requirements. On October 29, 1999, DSS published notice of its intent to amend sections 12-701, 12-702, 12-703, 12-704, 12-705, 12-706, 12-707, 12-708, 12-709, 12-710, 12-711, 12-712, 12-713, 12-714, 12-715, 12-716, and 12-717 of the MPP, to allow counties to add new cases year round, and to submit upward and downward modifications and deletions. The amendments also include updates to the Child Support Program terminology. DSS adopted the changes on an emergency basis on November 24, 1999. On December 15, 1999, DSS held a public hearing on the permanent adoption of the amendments. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 5.)

Update: On May 4, 2000, OAL approved all of the regulatory changes except one. OAL disapproved DSS' proposed amendments to section 12-712.331 of the MPP, for failing to comply with procedural requirements of the Administrative Procedure Act. Specifically, the section references a notice for requesting a formal administrative review; that notice is to be provided by the Department of Child Support Services. Because the rulemaking file did not include the notice, OAL could not determine if it is identical to the previous OAL-approved DSS notice or if it is new (and if so, if it contains new regulatory requirements).

Shelter Cost Verification

On December 3, 1999, DSS issued notice of its intent to amend sections 63-300, 63-504, and 63-505 of the MPP, to exercise the federal option to eliminate the statewide mandate for verification of shelter costs in determining food stamp eligibility, unless questionable, and allow counties the option to mandate verification of these costs on a county-wide basis. Counties that opt to mandate verification of shelter costs will have to comply with regulations governing mandated verification. DSS' amendments also delete an out-dated portion of the MPP which requires state or federal approval if a county elects to mandate verification of dependent care costs, liquid resources and loans, or household size; according to DSS, those provisions are no longer supported by federal regulations. On December 21, 1999, DSS adopted the amendments on an emergency basis. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 6.)

Update: On May 3, 2000, OAL approved the permanent adoption of these regulatory changes.

Food Assistance Program

In January 1999, DSS adopted sections 63-031 and 63-411, and amended sections 63-102, 63-403, and 63-405 of the MPP, on an emergency basis, to comply with AB 2779 (Aroner) (Chapter 329, Statutes of 1998), which eliminated the age restriction for the California Food Assistance Program (CFAP) (food stamps benefits) for legal residents who were in the United States prior to August 22, 1996. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 at 3.) DSS readopted the rulemaking package, on an emergency basis, on July 28, 1999.

Update: On March 2, 2000, OAL approved the regulatory changes.

CHILD HEALTH

New Rulemaking Packages

Inpatient Delivery Services and Hospital Care for Newborns

Welfare and Institutions Code section 14132.42 mandates that Medi-Cal cover inpatient hospital stays of 48 hours following vaginal deliveries and 96 hours following deliveries by Cesarean section, unless the decision to discharge earlier is made by the treating, physician in consultation with the mother. When a decision for earlier discharge is made, the statute provides for a postdischarge follow-up visit for the mother and newborn within 48 hours of the discharge, when prescribed by the treating physician. These requirements ensure that the protections under the Newborns' and Mothers' Health Act of 1997 (Health and Safety Code section 1367.62) and Insurance Code section 10123.87 apply equally to all pregnant women eligible for benefits under Medi-Cal.

On March 13, 2000, DHS adopted emergency changes to sections 51003, 51305, 51327, 51337, 51503, and 51523, Title 22 of the CCR, to—among other things—explain that the Medi-Cal program will pay for one Early Discharge Follow Up Visit done in a doctor's office or in a clinic; that Medi-Cal will pay for mothers to stay in the hospital for either two or four days after a baby is born; that Medi-Cal will pay for sick newborns to stay in the hospital; that women who have babies in certain hospitals have to be sent to other hospitals in order for Medi-Cal to pay the costs of the hospital; that Medi-Cal will pay for an early discharge follow-up visit for mothers and babies who go home early; and that Medi-Cal will pay for one Early Discharge Follow-up Visit in the mother's home done by a Home Health Agency. Further, the changes clarify how doctors who do the Early Discharge Follow-up Visit can bill and get paid by Medi-Cal, and how Home Health Agencies that do the Early Discharge Follow-up can bill Medi-Cal and how much they will get paid.

On March 24, DHS published notice of its intent to adopt these changes on a permanent basis. The Department received public comments on the rulemaking action until May 8, 2000. On August 25, 2000, OAL approved DHS' permanent adoption of these changes.

Impact on Children: The first days after birth can be critical in the detection of initial problems, ranging from infection to disability. Although Medi-Cal has traditionally covered pre-natal care, based on the widespread recognition of its importance in achieving healthy births, the trend in immediate post-birth care has been *contra*. Managed care pressure to save on costs has led to a controversial pattern of earlier post partum discharge of women. The statute guiding this rule is intended to assure Medi-Cal payment for a minimum floor of delivery and post-delivery medical care. Where the implementing rules deny payment, medical care is problematical absent an obvious advance symptom.

The most troublesome aspect of the rules is the requirement of transfer to another hospital where the initial birthing facility refuses to accept Medi-Cal payments. Unless there is a medical reason for transfer, services should be provided onsite and compensation paid and accepted. Such availability has been traditionally required of all providers of common carriage services (*e.g.*, those offering transportation services to the general public) and should be *a fortiori* applied to a highly-regulated medical facility, which are dependent on tax subsidies and revenues in the normal course.

The essentially compelled transfer problem, as well as the lack of clarity over conditions justifying payment for more extended stays, do not advance the interests of children. However, other provisions in the proposed rules will have a health protective benefit. Perhaps most important is the explicit allowance of payment for at least one home health visit to the home of a recently delivering mother and her child.

Permanent Amusement Ride Safety Inspection Program

On September 15, 2000, the Department of Industrial Relations' Division of Occupational Safety and Health (DOSH) published notice of its intent to implement the Permanent Amusement Ride Safety Inspection Program (Labor Code section 7920 *et seq.*), governing the safe installation, repair, maintenance, use, operation, and inspection of permanent amusement rides. Specifically, DOSH proposed to adopt new sections 344.5, 344.6, 344.7, 344.8, 344.9, 344.10, 344.11, 344.12, 344.13, 344.14, 344.15, 344.16, and 344.17, Title 8 of the CCR. Among other things, the new regulations would contain the following provisions:

◆ Section 344.5 would exempt specified equipment and facilities from application of the proposed regulations. For example, it would exempt (1) any playground operated by a school or local government if the playground is an incidental amenity and the operating entity is not primarily engaged in providing amusement, pleasure, thrills, or excitement; (2) museums or other institutions principally devoted to the exhibition of products of agriculture, industry, education, science, religion or the arts; (3) skating rinks, arcades, laser or paint ball war games, indoor interactive arcade games, bowling alleys, miniature golf courses, mechanical bulls, inflatable rides, trampolines, ball crawls, exercise equipment, jet skis, paddle boats, air boats, helicopters, airplanes, parasails, hot air balloons (tethered or untethered), theaters, amphitheaters, batting cages, stationary spring-mounted fixtures, rider-propelled merry-go-rounds, games, slide shows, live-animal rides, or live-animal shows; or (4) permanent amusement rides operated at a private event that is not open to the general public and not subject to a separate admission fee.

◆ Section 344.6 would define several terms used throughout the proposed regulations.

◆ Section 344.7 would implement Labor Code section 3924, which requires each owner of a permanent amusement ride to annually submit to DOSH a certificate of compliance. Among other things, the regulation would require owners and operators to include certain identifying information with the certificate for each permanent amusement ride. Most importantly, a certificate of compliance must include a written declaration stating that, within the preceding twelve-month period, the permanent amusement ride was inspected by a qualified safety inspector (QSI), and that the permanent amusement ride is in material conformance with applicable requirements. The written declaration shall be executed by a QSI under penalty of perjury.

◆ Section 344.8 would require DOSH to conduct an operational inspection of each new permanent amusement ride, and that a DOSH QSI conduct the inspection before the ride is placed in operation and opened to public; require DOSH to conduct an operational inspection after any major modification has been made to a permanent amusement ride; require an annual QSI inspection of each permanent amusement ride at least once each year; require that a permanent amusement ride found to be unsafe as the result of an annual QSI inspection be closed to the public and not be reopened to the public until all necessary repairs and modifications have been completed and certified as completed by a QSI; require that a DOSH QSI conduct an annual audit on the records pertaining to each permanent amusement ride, including but not limited to record of accidents, records of employee training, and records of maintenance, repair, and inspection of the ride; and permit a discretionary DOSH QSI inspection of a permanent amusement ride to determine whether operation of the permanent amusement ride is safe. DOSH may initiate a discretionary inspection whenever it (1) receives notification, or otherwise learns, of an accident involving the permanent amusement ride required to be reported pursuant to section 344.15; (2) determines that a fraudulent certificate of compliance for the permanent amusement ride was submitted; (3) determines, based on factors such as ride cycles or number of riders, that a permanent amusement ride has a disproportionately-high incidence of accidents when compared to other rides of similar type and design in California; or (4) receives a complaint or otherwise becomes aware of information, when the complaint or information reasonably appears to be reliable and credible, that one of the safety-related systems or structural components of a ride is unsafe, or that a particular practice associated with a ride is unsafe. The regulation would require DOSH to conduct the inspections with the least possible disruption to the normal operation of a permanent amusement ride consistent with an effective inspection.

◆ Section 344.9 would permit the prohibition of the operation of a permanent amusement ride if, after inspection by DOSH QSI, the Division determines that the ride, or any part thereof, presents an imminent hazard or is otherwise unsafe for patrons. The Division shall frame the scope of the prohibition with the narrowest scope reasonably necessary to ensure the protection of the public. The regulation would provide that DOSH shall not issue an order prohibiting operation if the hazardous or unsafe condition can be corrected immediately and the operator, after being informed of the condition by DOSH, immediately abates the hazardous or unsafe condition. Moreover, if an unsafe condition does not constitute an imminent hazard to patrons, DOSH shall engage in an informal consultation with the owner or operator prior to issuing an order prohibiting operation. The purpose of the informal consultation shall be to gather information and resolve factual questions regarding the appropriateness of prohibiting operation.

If DOSH decides to issue an order prohibiting operation, it shall notify the owner or operator in writing of the grounds for prohibition of operation and of the conditions in need of correction at the time it issues the order prohibiting operation. Once DOSH prohibits operation, the permanent amusement ride shall not be reopened to the public until the conditions cited in the order prohibiting operation have been corrected and approved by an authorized DOSH representative.

The regulation would also provide that an owner or operator may appeal any order prohibiting operation, and that DOSH shall conduct appeal proceedings in accordance with Labor Code section 6327.

◆ Section 344.10 would set forth the requirements for certification as a QSI. Among other things, the section would provide that a candidate for certification as a QSI shall either (1) be a licensed engineer and have at least two years of experience in the amusement ride field, consisting of at least one year of actual inspection of amusement rides for a manufacturer, government agency, amusement park, carnival or insurance underwriter, and an additional year of practicing any combination of amusement ride inspection, design, fabrication, or installation, maintenance, testing, repair, or operation; or (2) provide satisfactory evidence of a minimum of five years' experience in the amusement ride field, at least four years of which were involved in actual inspection of amusement rides for a manufacturer, government agency, amusement park, carnival or insurance underwriter (the remaining experience may involve any combination of amusement ride design, installation, maintenance or operation), and produce a valid certificate of completion from an approved QSI Certification course evidencing at least 80 hours of formal education in amusement ride safety, and achieve a score of at least 80% on the written examination pertaining to subjects addressed in the Proposed Regulations and Chapter 6.2 of this Title.

◆ Section 344.11 would specify QSI education course requirements.

◆ Section 344.12 would provide permanent amusement ride owners and operators, as well as QSI course providers, with the right to a hearing in the event DOSH revokes or suspends a certification or approval. At hearing, the

Division would bear the burden of establishing good cause for any actions it takes.

◆ Section 344.13 would authorize permanent amusement ride owners and operators and QSI providers to appeal to DIR Director decisions of DOSH reached at a hearing conducted in accordance with proposed section 344.12. To request a hearing before the Director (or his or her designee), an appellant must submit a written appeal within five days of receipt of DOSH's decision. The Director will issue a written decision.

◆ Section 344.14 would permit a person or entity to operate a permanent amusement ride only if, at the time of operation, he, she, or it (a) has obtained a valid insurance policy in an amount not less than one million dollars per occurrence, and (1) has submitted to DOSH a copy of the policy; (2) has clearly identified in the policy the permanent amusement rides included and excluded; and (3) does not operate permanent amusement rides for which coverage is not provided; or (b) has obtained a bond in an amount not less than one million dollars except that the aggregate liability of the surety under that bond shall not exceed the face amount of the bond; or (c) qualifies as self-insured by providing a letter to DOSH attesting that the owner has total assets of at least $10 million and that the owner's total assets exceed the owner's total liabilities by either a minimum of $2 million or a ratio of at least ten to one.

◆ Section 344.15 would require each owner or operator of a permanent amusement ride to report or cause to be reported immediately to DOSH's Anaheim or Sacramento Amusement Ride Section Office by telephone each known accident where maintenance, operation, or use of the permanent amusement ride results in the death of a patron, or results in a patron injury requiring medical service other than ordinary first aid. For the purposes of this section, an accident is "known" if the owner or operator (1) witnesses the injury, and the injury witnessed reasonably appears to require medical service other than ordinary first aid, or (2) receives notice from any source reasonably appearing to be reliable and credible, that the maintenance, operation, or use of a permanent amusement ride has resulted in the death of a patron, or injury of a patron, if the injury is one requiring medical service other than ordinary first aid. The section would also require the owner/operator of a permanent amusement ride to preserve, for the purpose of a possible investigation by DOSH, the equipment or conditions that caused the accident if the death or injury reported resulted from the failure, malfunction, or operation of a permanent amusement ride. Finally, the section would require state, county, local fire or police agency to notify immediately by telephone DOSH's Anaheim or Sacramento Amusement Ride Section Office whenever the state, county, or local fire or police agency is called to an accident scene where a permanent amusement ride covered by these regulations is involved and a serious injury or death occurred.

◆ Section 344.16 would set forth the fee schedule for the Permanent Amusement Ride program. For example, the application fee for a QSI Certificate shall be $500.00; the fee for the biennial renewal of a QSI Certificate shall be $125.00; the fee for review of certificates of compliance and provision of related notifications shall be $250.00; and a fee of $125.00 per hour, or fraction thereof, shall be charged for all work performed in connection with audits, inspections, and investigations.

◆ Section 344.17 would require DOSH to maintain the confidentiality of all documentation received pursuant to these regulations to the extent that such documentation is protected by Labor Code section 6322 or any other applicable provision of law.

DOSH held a public hearing on these proposed regulations on November 20, 2000, in Oakland. At this writing, they await review and approval by OAL.

Impact on Children: Prior to the 1999 enactment of amusement park safety legislation, virtually no standards or advance inspections were assured from the public sector. The primary economic incentive to assure safety was the tort/insurance system. A series of tragic accidents at well-known amusement parks helped to spur enactment. Child advocates successfully argued that any machines or rides that throw children through the air or spin them around repeatedly at potentially lethal speeds, while surrounded by concrete or other hazards, should be subject to advance expert and periodic inspections.

The rules implement the statute consistent with its intent, taking into account the expense of advance inspections. The rules call for an initial inspection of all new facilities (and where there are major modifications—largely as defined by the amusement park) and relies thereafter on self-certification, and the reporting of injuries to trigger later inspections and compliance orders. Child advocates contend that although annual inspections may be onerous, at least once every five years, a major facility involving substantial movement and stress should be subject to an inspection, including expert review of the ride in operation.

However, the rules spell out in detail reporting requirements, which for the first time will allow more than anecdotal evidence of injury incidence (assuming compliance). Such data is important in gauging the appropriateness of periodic affirmative inspections—as are presently required by the state, for example, of automobile exhaust systems.

Healthy Families Program—Family Value Package

On June 20, 2000, MRMIB adopted—on an emergency basis—amendments to sections 2699.6500, 2699.6805, and 2699.6809, Title 10 of the CCR, to make various changes to the Healthy Families Program, the state's health, dental, and vision insurance program for children in low and moderate income families. On July 28, 2000, MRMIB published notice of its intent to adopt these changes on a permanent basis.

Specifically, the proposed regulatory action amends the Healthy Families Program Family Value Package provi-

sions. The purpose of the Healthy Families Program is to provide health services to uninsured low-income children who live in families above the federal poverty line and who are ineligible for Medi-Cal. In order to participate, health plans must meet the Family Value Package premium cost threshold. Existing regulations calculate this threshold by averaging the prices of the two lowest cost combinations of health, dental and vision plans, and adding 10%. This amendment would reduce the 10% figure to 7.5%. The amendment also contains a provision which would allow a dental plan to keep participating, even if it is not in a combination plan, in certain circumstances where there may not be enough provider capacity to serve the population otherwise. Other changes include the exclusion of the rate for infants from the family value package calculations, an increase of time for providers to file an appeal by moving the designation process up one month, and a revision of the federal poverty level (which increases annually).

On November 27, 2000, the Office of Administrative Law (OAL) disapproved MRMIB's permanent adoption of the changes on the basis that the Board's rulemaking record did not contain any evidence that it had voted to adopt the proposed amendments after the close of the public comment. On November 28, 2000, MRMIB readopted the changes on an emergency basis; on February 28, 2000, OAL approved the permanent regulatory amendments.

Impact on Children: This rule implements changes in California's Healthy Families program, funded two-thirds from federal sources (the Children's Health Insurance Program, or CHIP). The program is intended to provide health insurance to California children up to 250% of the poverty line. As of mid-2001, it has enrolled approximately 400,000 children. However, almost 300,000 previously covered Medi-Cal children have lost their assured coverage. Accordingly, most of the federal subsidy to the state (at a 2-1 ratio) to provide coverage to the state's children will likely be returned to the federal jurisdiction. Rather than effectively or presumptively covering all children in the state, and then billing *post hoc* the parents of the 7% of California children currently uncovered privately and ineligible for public coverage, the state has opted for the inefficient "barrier and qualification" approach, requiring premiums for child coverage from parents living just above the poverty line and paying charities and other non-profits to stimulate child enrollments one child at a time. See data and discussion in the Children's Advocacy Institute's *California Children's Budget 2000–01* (San Diego, CA; June 2000) at 4-1 to 4-7.

The proposed rules do not address the underlying flaw in the state's regulatory approach. The reduction in provider compensation by 2.5% may discourage supply, further limiting patient choice. The rules theoretically allow the Board to readjust compensation for the plans/providers offering the important "family value package" option where network capacity is threatened. However, such adjustments upward are unlikely given the political weakness of children and impoverished families. It is unclear why the price reduction here implemented is appropriate given the current marginal profit of affected providers, and the need for universal coverage. The last factor is of special importance given cost variation between locales, making compensation keyed to a level just above a "lowest cost" measure itself problematical. It stimulates what is called "cream skimming" or the signing up of those not needing services and the avoidance of populations who need coverage the most, or living in locales where it is more expensive to provide. Finally, the penurious cutting of compensation undermines supply at the very time the source of these revenues is scheduled for substantial refund to the federal jurisdiction, possibly to be distributed to other states with a more generous attitude toward child medical coverage.

Screening for Childhood Lead Poisoning

The Childhood Lead Poisoning Prevention Act (Health and Safety Code section 124125 *et seq.*), added by statute in 1986, established a comprehensive program for childhood lead poisoning prevention. The 1986 Act was followed by the Childhood Lead Poisoning Prevention Act of 1991 (Health and Safety Code section 105275 *et seq.*). The 1991 Act mandated that DHS establish a standard of care for health care providers on the evaluation and screening of children for risk of lead poisoning.

With regard to applicable federal requirements, the U.S. Health Care Financing Administration (HCFA) deems all Medicaid-eligible children at risk of lead poisoning and prohibits states from adopting a statewide plan for screening children for lead poisoning that does not require lead screening for all Medicaid-eligible children.

The HCFA requirements are embodied in the HCFA State Program Manual. They require health care providers furnishing services to Medicaid beneficiaries in the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program to screen children for lead at 12 and 24 months of age. In addition, those providers are required to screen those children between the ages of 36 months and 72 months of age who have not previously been screened for lead poisoning.

In addition, *Thompson, et al. v. Raiford, et al.* (U.S. District Court for the Northern District of Texas, Case No. 3:92-CV-1539-R) resulted in a stipulated settlement on behalf of a nationwide class certified as all Medicaid-eligible children under age 72 months who are eligible to receive EPSDT program services. The parties stipulated that the U.S. Department of Health and Human Services, through the HCFA Program Manual, will inform the states that all Medicaid-eligible children ages 6 months to 72 months are considered at risk and must be screened for lead poisoning. The parties further stipulated that each state would establish its own periodicity schedule after consultation with medical organizations involved in child health. These periodicity schedules and any other associated office visits must be used as an opportunity for anticipatory guidance and risk assessment for lead poisoning.

On October 10, 2000, DHS adopted—on an emergency basis—Chapter 9, Title 17 of the CCR, commencing at section 37000, to establish a standard of care on screening for childhood lead poisoning with which physicians, nurse practitioners, and physician's assistants providing primary care to children from age 12 months to age 72 months must comply. On October 27, 2000, DHS published notice of its intent to adopt these regulations on a permanent basis.

According to DHS, lead is a heavy metal which human bodies do not need; it is especially harmful to young children. The only way to know for sure if a person has lead poisoning is to "screen"—test the person's blood to discover how much lead is in it. According to DHS, however, not all children need to have blood tests. Experts say that children who qualify for help from public programs have a high risk of lead poisoning. Also, children who spend time around old peeling paint (such as children who live in older buildings or buildings being renovated) have a high risk of lead poisoning. Experts agree that all of these children should be tested for lead when they are one year old, and again when they are two years old. If they are less than six years old and did not get tested at the right time, they should get tested.

Additionally, experts agree that other children should be evaluated to determine their risk of lead poisoning. To evaluate means to ask parents if their children spend time around old peeling paint or places that are being fixed up. If the parents say "yes," the children should be tested. However, most California children have not been evaluated for risk. According to DHS, one of the reasons children have not been tested or evaluated is that their doctors do not think it is important.

Accordingly, DHS' proposed regulations would require doctors to tell the parents of young children about lead poisoning, and require doctors to either test or evaluate all children for lead poisoning. Doctors would be required to test (with consent of the parent(s)) all children in certain public programs such as Medi-Cal, CHDP, Healthy Families, WIC, and similar programs. Physicians would be required to ask the parents of other children whether the children are around old peeling paint or places being fixed up. If the answer is "yes," the doctors are to test the children's blood (with the consent of the parent(s)). Doctors would be required to screen these children when they are one year old and again when they are two years old. Doctors would also have to screen children whenever they find out a child less than six years old was not screened at the right time.

On February 8, 2001, DHS readopted the regulations on an emergency basis. At this writing, the regulations await adoption by DHS and review and approval by OAL.

Impact on Children: The deleterious, partly permanent injury to a developing brain from even low levels of lead contamination is well established, and more recent research has reaffirmed the connection. Studies have found levels as low as 10 to 20 ug/Dl to correlate strongly with deficits in abilities to read, write, and solve math problems. Lead harms developing brain mechanisms which recognize and copy shapes, visualize objects, and form non-verbal concepts. Critically, the General Accounting Office released a study in 1999 finding that 12% of WIC infants examined had blood levels above the documented "harmful" threshold. For two-thirds of those children surveyed by WIC, no other screening had occurred.

Nor is the situation in California atypical. Last year, the California State Auditor released a report concluding that the state has made little progress in protecting California's children from lead contamination. For a summary of the literature on lead contamination danger and citations, and a recitation of California's relatively low spending priority to prevent this permanent damage, see the Children's Advocacy Institute's *California Children's Budget 2000–01* (San Diego, CA; June 2000) at 4-47 to 4-50.

The proposed rules represent important steps to address the problem—if there is widespread compliance. For the first time, as the rules read, the widely acknowledged impoverished children of the state are to be tested, and tested en masse. And testing may well extend into less risky populations following proper inquiry by the child's primary care physician. Given the enrollment of new children into health coverage, these changes are significant. The primary remaining concern is with the financing of the tests, and of mitigation measures should the test indicate levels above current thresholds.

The managed care structure of Healthy Families and low compensation paid for Medi-Cal services means that separate and defined compensation must be provided for such tests, and for the mitigation to be required. Under the capitated pricing scheme now common for medical services, plans and providers have a strong incentive not to find a major source of expense—particularly if the harm is not immediately lethal or visible. At best, however, the new rules call for the first substantial roll-out of screening and mitigation in the state's history. At worst, they may provide the basis for litigation enforcement of their terms by child advocates bringing petitions for ordinary mandamus to secure compliance.

AIM Program Income Deductions

The Access for Infants and Mothers (AIM) Program provides health insurance to low and moderate income pregnant women and the infant(s) born during the covered pregnancy. The program, established under the Managed Risk Medical Insurance Board (MRMIB), is funded from three sources: 80% through the Cigarette and Tobacco Products Surtax Fund (Prop. 99), 13% through state general fund and federal funds from Title XXI of the Social Security Act, and 7% through subscriber contributions. AIM is a means tested program, covering pregnant women with family incomes above 200%, but not more than 300% of the federal poverty level (FPL). Women with family incomes below 200% FPL qualify for no cost Medi-Cal services for their pregnancy, which is funded by state and federal funds. The AIM Program requires a premium,

which is 2% of the annual gross family income. In addition, payment of $100 is required for the infant's second year of coverage unless records of up-to-date immunizations are submitted before the baby's 1st birthday, in which case the additional payment is reduced to $50.

MRMIB's enrollment estimates indicated that the demand for the AIM program will exceed funding levels for the second consecutive year. The 1999–2000 budget provided funding for an average of 360 new women per month. As of April 2000, the average enrollment was 418 women per month. The increase in enrollment is attributed to the attention drawn to AIM through the implementation of the Healthy Families Program and a new focus in the AIM outreach strategy implemented last fiscal year, which includes individual application follow-up. The upward enrollment trend was expected to continue throughout fiscal year 1999–2000 and remain high in future years.

Since AIM is not an entitlement program, if the demand exceeds funding levels, the program must be closed to new enrollment in order to cover the cost of currently enrolled women and babies. To keep the program open to new enrollment through fiscal year 1999–2000, MRMIB estimated that it needed approximately $8.8 million in additional funding. This level of funding is not available from Prop. 99, which covers most of the AIM Program. Instead, MRMIB proposed, and the Administration accepted, a plan to reduce AIM enrollment by channeling more women into the Medi-Cal Program by applying income deductions when determining eligibility.

On March 17, 2000, MRMIB adopted emergency regulations implementing this change; on April 14, 2000, the Board published notice of its intent to adopt the changes on a permanent basis.

MRMIB estimates that 25% of the women who apply for AIM are eligible for no cost Medi-Cal pregnancy related services. MRMIB further estimates that the implementation of income deductions in the AIM program will result in a decrease up to 25% in AIM enrollment, which will allow the program to remain operational and continue enrollment. According to MRMIB, the proposed changes would increase access to health care for women at the higher end (300% FPL) because the use of deductions will reduce their countable income.

Under Insurance Code section 12698, MRMIB had the option of reducing the income eligibility levels back to 250% FPL in order to maintain the program within its funding levels. The Board, with the support of the Administration, is not pursuing that alternative because (1) there is not sufficient enrollment between 250%–300% FPL to offset the expected deficit, and (2) women in the 250% to 300% income levels would lose sponsored coverage for their pregnancy, and are unlikely to qualify for Medi-Cal. These changes would shift access to prenatal care for women with income around 200% of the FPL into Medi-Cal, which is at no cost for the families. Since Medi-Cal is funded with 50% federal funds and 50% state funds, California maximizes its federal reimbursement by aligning its eligibility standards with Medi-Cal. It is the joint goal of the AIM and Medi-Cal Programs to lower the number of unsponsored births, and under these regulations each program can better contribute to that goal.

On July 10, 2000, the Office of Administrative Law approved MRMIB's permanent adoption of these changes.

Impact on Children: Child advocates have been critical of the AIM program as a privatized option which is expensive, covers a narrow population, and provides yet another fragmented basis for coverage which should be universal. However, lacking alternative coverage through a properly expansive Medi-Cal/Healthy Families option, it provides coverage to many pregnant women and their young infants which would otherwise be lacking, particularly prenatal care for uninsured moderate income women in the state. The temporary closure of the program would likely decrease prenatal services and increase maternal complications during birth. Most uninsured pregnant women in this income bracket (around 75%) will remain ineligible for no-cost Medi-Cal services and are restricted from entering the private insurance market due to their pre-existing Medi-Cal condition: pregnancy. If the AIM Program were to cease enrollment for part of each year, the health care options of some women could be severely limited, to the detriment of their infants. To wit, moderate income pregnant women would either face a high share-of-cost Medi-Cal monthly deductible or have to pay for services completely from their own resources. Both of these scenarios act as financial barriers to accessing necessary prenatal care. Although the proposed regulations do not provide the universal, efficient system child advocates favor, they continue otherwise problematical coverage for births in working families living above the poverty line, but at low income levels.

Provider Rate Increases

On November 13, 2000, DHS adopted—on an emergency basis—new section 51503(m) and amendments to sections 51503, 51505.1, 51505.2, 51509.1, 51518, and 51527, Title 22 of the CCR, to implement the changes in maximum reimbursement rates for selected Medi-Cal services provided for in the state's 1999–2000 Budget Act (Chapter 50, Statutes of 1999). According to DHS, these rate increases for these services will help ensure continuing access to care for Medi-Cal beneficiaries.

Specifically, the Legislature appropriated funding for rate increases for selected physician and related services, ambulance services, and optometry services. Rates for non-obstetric anesthesia, non-obstetric surgery, and the professional component of non-obstetric radiology are being increased by 10.5%. According to DHS, the legislative intent of this funding was to increase access to services for which rates were decreased in 1992.

Additionally, rates for obstetrical anesthesia are being increased by 21.8%; rates for tubal sterilization surgeries are being increased by 10%; Medi-Cal rates for vasectomy sterilization surgeries are being increased to the amounts paid under the Family Planning, Access, Care and

Treatment program, an increase of 71.7%; rates for selected optometry services are being increased by 18.1%; rates for selected ambulance services are being increased by 11.7%; and rates for Medi-Cal physician services which are provided under the California Children's Services program are being increased to amounts which are 5% greater than the Medi-Cal rate that would otherwise be applicable.

OAL approved the permanent adoption of these changes on April 4, 2001.

Impact on Children: The rules join other rate increases for Medi-Cal services for children which have been long overdue, as rates had fallen against inflationary increase over the last decade. Most of the increases do not fully compensate for inflation cost increases to providers; however, at least one of the two birth control procedures here increased more than match inflationary increases, constituting a rare real-cost increase. Many child advocates contend that the data support the chosen priority. Over one-half of California's children are not intended by their parents. Over 30% of all births are to unwed women. Contrary to common perception, most of the unwed mothers are not teens—over 80% are adult women. Paternal commitment (in the form of child support) to many of the four million children sired under these circumstances has now reached the record high of $26 per month per child, of which the family receives $14. This population of children is substantially disproportionately represented among children who are impoverished, disabled, abused, and arrested. Accordingly, future children will benefit by this alteration, but children would benefit the most by an open, mature discussion of this issue—now largely impeded by notions of political correctness, allegations of "social engineering," and widespread immaturity about sex-related subjects.

Healthy Families Program—American Indian/Alaskan Native Cost Sharing

On March 21, 2000, MRMIB adopted—on an emergency basis—amendments to sections 2699.6500, 2699.6600, 2699.6705, 2699.6713, 2699.6721, and 2699.6813, Title 10 of the CCR, to stop charging family contributions and co-payments for the Healthy Families Program for American Indian (AI) and Alaskan Native (AN) families with eligible children, if the family has documented their AI or AN status. The purpose of this action is to comply with federal policy directives to waive all cost sharing for AI/AN children, and to encourage additional AI/AN families to enroll their children.

On April 21, MRMIB published notice of its intent to adopt these changes on a permanent basis; on July 17, 2000, OAL approved the permanent changes.

Impact on Children: At the time of this rulemaking change, only 875 American Indian children were enrolled in the Healthy Families Program; only 15 Alaskan Native children were enrolled. Both numbers represent a small fraction of eligible children in both categories, particularly in the state with the second largest Native American population in the country.

Healthy Families Program—Eligibility Expansion

AB 1107 (Chapter 146, Statutes of 1999) made several significant changes to the Healthy Families Program, including the following: it increased the family's income eligibility maximum to 250% of the federal poverty level; it implemented Medi-Cal income deductions; it provided coverage for additional recent legal immigrants; it extended coverage to emancipated minors and certain other minors not living at the home of a parent or guardian, or that are applying on behalf of their own children; it modified residency requirements to be consistent with those in the Medi-Cal program; and it revised the definition of "initial treatment" in DHS' Child Health and Disability Prevention Program to include reimbursement for services provided to HFP subscribers up to 90 days prior to their effective date of coverage (increasing the period from thirty days).

On January 10, 2000, MRMIB adopted—on an emergency basis—new section 2699.6801 and amendments to sections 2699.6500, 2699.6600, 2699.6603, 2699.6607, 2699.6011, 2699.6613, 2699.6625, 2699.6800, and 2699.6903, Title 10 of the CCR, to implement the Healthy Families eligibility expansions described in AB 1107, to require documentation to apply Medi-Cal deductions, to assure a more seamless interface with Medi-Cal eligibility, and to clarify the length of time a child is eligible for the Healthy Families Program prior to annual eligibility review.

On February 4, 2000, MRMIB published notice of its intent to adopt these changes on a permanent basis; on June 16, OAL approved MRMIB's permanent adoption of these regulations.

Impact on Children: See discussion below.

Healthy Families Program—Family Sponsorship

On February 4, 2000, MRMIB published notice of its intent to adopt new sections 2699.6817, 2699.6819, 2699.6821, 2699.6823, 2699.6825, and amend sections 2699.6500, 2699.6600, 2699.6607, 2699.6809, and 2699.6813, Title 10 of the CCR, to implement the standards and procedures for family sponsorship in the Healthy Families Program. A family contribution sponsor is a person or entity that pays a family's contributions for the first twelve months of eligibility; a family who has a family contribution sponsor is excused from paying family contributions for the first twelve months.

Among other things, the proposed regulations provide that a sponsor must be registered with MRMIB, and establish the procedures for that registration; allow for refund of all of the sponsor's contribution if the family is determined to be ineligible, or part of the contribution, if individual children within the family are determined to be ineligible; and allow MRMIB to disqualify a sponsor if the sponsor violates, or encourages an applicant to violate, program rules.

On September 5, 2000, OAL approved MRMIB's adoption of these changes.

Impact on Children: See discussion below.

Healthy Families Program—Application Assistance

On March 2, 2001, MRMIB published notice of its intent to adopt changes to sections 2699.6619 and 2699.6629, Title 10 of the CCR, to—among other things—allow participating Healthy Families Program health plans to provide application assistance; expand the initial health plan transfer period from thirty days to three months; and clarify the plan transfer process at open enrollment to ensure that Healthy Families Program subscribers maintain enrollment in a plan that serves their county of residence.

MRMIB is scheduled to hold a public hearing on the proposed changes on April 17, 2001, in Sacramento. At this writing, the changes await adoption by MRMIB and review and approval by OAL.

Impact on Children: The three Healthy Families rule changes noted above are intended to expand child health insurance coverage to more children. As explained above, they follow the marginally effective strategy of the state to charge working poor parents premiums (as well as co-payments when services are provided) and to individually sign-up children for coverage. As an alternative, the Children's Advocacy Institute has advocated a presumptive eligibility strategy. Only 7% of California's children are currently uncovered privately and ineligible for a public program. Rather than risk providing some services to this small number of children, the state has created thirteen separate programs, each with different qualifications and paperwork. A family's children will shift from one program to another over time, as children grow older, as income changes, and as the number of children in the family change.

As suggested above, the rational solution is to declare all privately uncovered children to be covered, provide preventive public health services to all, and then bill parents earning more than 300% of the poverty line costs incurred by their children on a sliding scale where appropriate (*e.g.*, where substantial services are rendered to their children). Such an approach saves on the considerable costs of administering multiple programs, barriers and filtering, paperwork, incentive payments to sign up children, and the other myriad costs, which currently consume substantially more in resources than the cost to cover the 7% of children these barriers keep from coverage and subsidy. The CAI proposal would then confer a refundable tax credit to employers who provide private dependency coverage to limit "crowd out"—the surrender of private dependency coverage to a public system. This overall solution would utilize the $850 million in federal monies available in an efficient and fair system of coverage. Instead, the three rules above reflect further adjustments under the traditional, inefficient system of sign-up promotion, qualification, filtering, premiums. The expansion provision implement statutory changes to cover more children after disclosure that most federal money due California is projected to be returned to Washington—in an amount greater than any previous return of federal monies by a state.

One important extension provides for the coverage of foster children emancipated from the system and now eligible notwithstanding their "adult" status where they income qualify (applicable to almost all of them). These foster care children have the "state" as their parent. Regrettably, the state's parental record is itself one of irresponsible neglect. Although a caring parent will continue to support a child past the age of 18, particularly to assure some advanced education for employment, the state has not historically done so when functioning as a parent. The granting of Medi-Cal coverage to these persons is no substitute for the transitional housing help and tuition/room and board assistance which a parent properly provides and the state continues to shirk. But such assistance may be important as a precedential acknowledgment that a state has a duty to assist her own children, over whom she exercises direct legal parental authority.

The family sponsorship rules provide an example of the miasma of paperwork and complexity which arises from gratuitous barriers. First, a premium barrier is erected which serves no purpose other than to discourage parents from assuring medical coverage for their children. Parents living at $13,000 to $20,000 per year are expected to spend up-front from $100 to $300 or more to cover their children. Given energy and rent increases, many of these families live at the edge of economic viability, exacerbated by TANF grants that have halved in inflation-adjusted amount over the past decade. Medical coverage is not a service commonly amenable to "cheating" or diversion of funds for adult purposes or discretionary spending. Medical coverage for children costs one-fifth per person the amount it does for seniors—all of whom have substantial public coverage assurance. The family sponsorship rules reflect the growth of government in well-intentioned but irrational directions. Given the ill-advised premiums, parents may obtain sponsorship from others to pay those premiums. Then, of course, a filtering system must be set up to deal with this assistance, including the refund of monies not due and owing because of underlying disqualification. The family sponsorship rules reflect the inexorable advancement of the filtering labyrinth.

The third set of rules described above, governing transfers between programs, is important to any jurisdiction which offers a choice of plans for Healthy Family coverage. The difficulty in transferring between plans has been a difficult and persistent problem for covered children. Often paid based on enrollment sign-ups, and aware of the relatively minimal costs of most children, plans have not always been accurate about services offered. Accordingly, parents sometimes learn post-enrollment that facilities are not located nearby, or that needed specialty services are not available within a given plan. These rule changes allow greater latitude and opportunity—at least on paper—to

shift between plans, an important asset for parents and their covered children.

Update on Previous Rulemaking Packages

The following is an update on rulemaking packages discussed in detail in previous issues of the **Children's Regulatory Law Reporter:**

California Children's Services Medical Eligibility

On May 6, 1999, DHS—on an emergency basis—repealed section 41800, and adopted new sections 41508, 41509, 41510.2, 41510.4, 41515.1, 41515.2, 41516.3, 41517.3, 41517.5, 41517.7, 41518.2, 41518.3, 41518.4, 41518.5, 41518.6, 41518.7, 41518.8, 41518.9, 41800, 41811, 41815, 41819, 41823, 41827, 41831, 41832, 41835, 41839, 41844, 41848, 41852, 41856, 41864, 41866, 41868, 41870, 41872, and 41876, Title 22 of the CCR. According to DHS, these new regulations clearly specify which medical conditions are eligible for treatment through the California Children's Services program. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 8.)

Update: On April 18, 2000, DHS readopted the regulatory changes on an emergency basis. On July 7, 2000, OAL approved DHS' permanent adoption of the proposed changes, with the exception of sections 41518.6 and 41852(c), which were severed and disapproved for failure to comply with the clarity and necessity standards of the Administrative Procedure Act.

Pediatric Day Health Care

Welfare and Institutions Code section 14132.10 requires DHS to establish pediatric day health care services as a Medi-Cal covered benefit through the filing of emergency regulations. On November 26, 1999, DHS published notice of its intent to adopt new sections 51242.1 and 51532.3 and amend sections 51184, 51242, and 51340.1, Title 22 of the CCR, on an emergency basis, to specify the requirements for facility participation; establish the admission criteria and professional health care personnel standards; specify utilization control requirements; and establish a reimbursement rate for pediatric day health care services. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 13.)

Update: On April 19, 2000, OAL approved DHS' permanent adoption of these regulatory changes.

EDUCATION

New Rulemaking Packages

Standardized Testing and Reporting

SB 376 (Chapter 828, Statutes of 1997) established the Standardized Testing and Reporting (STAR) program (Education Code section 60640). The STAR program replaced the Pupil Testing Incentive Program in California as a part of the statewide pupil assessment program.

According to the Board of Education, school districts need flexibility to deal effectively with diverse pupil populations; however, the current STAR regulations provide flexibility only in testing special education pupils. On July 21, 2000, the Board published notice of its intent to amend section 853, Title 5 of the CCR, in order to provide flexibility to school districts in the administration of the designated achievement test authorized by Education Code section 60640 to English learners. The proposed regulation will permit the provision of standard and nonstandard accommodations to those English language learners enrolled in the school district for less than one year for whom such accommodations would be appropriate due to the pupil's limited English proficiency. The proposed change would require a school district policy for the administration of nonstandard accommodations to ensure consistency throughout the school district.

The Board held a public hearing on the proposed language on September 7 in Sacramento, and subsequently adopted the amendments. On November 8, 2000, OAL approved the changes.

Impact on Children: Governor Davis' education reform measures are keyed to "school accountability" based on student test results. Scholars and educators have criticized the reforms' alleged over-emphasis on the single variable of test results, which leads to "teaching to narrow tests," and to the tests' failure to measure the effect of non-English speaking students. Currently, 35% of California school children do not speak English as a first language, with a larger percentage in the lower grade levels. These children are dispersed unevenly between schools, and to measure school performance based on their results may be misleading. Some of these immigrant children will pick up language skills allowing them to score better quite apart from substantive knowledge. The distortion these children may infer to interschool and class comparisons may be exacerbated by the state's rejection of bilingual education.

The proposed rules are intended to slightly ameliorate for this inconsistency by allowing some latitude to adjust for additional time necessary for these students to get through the test questions and register their answers, in the same way special education students (*e.g.*, those with dyslexia) are commonly given extra time or are otherwise accommodated. The standard does rely on school district discretion, which raises the problem of inconsistent application—as districts are well aware of the financial assistance implications of test results. However, limiting discretion to those students present in the district for less than one year may moderate that disparity danger.

Standardized Testing and Reporting

The Standardized Testing and Reporting (STAR) program currently serves as the backbone for the Public Schools Accountability Act of 1999. Regulations that accurately support current statute are necessary for the uniform

administration of STAR under which more than 4.5 million pupils are tested annually. The administration of STAR and the development and administration of the California standards-based tests costs in excess of $40 million per year. More than $677 million in awards will be provided to schools in 2000 based on the basis of their performance on STAR. The large scale of this program, both in fiscal terms, as well in numbers of students and schools, requires accurate and timely regulations.

AB 2812 (Chapter 576, Statutes of 2000) made several changes to the Education Code sections that authorize STAR. Specifically, changes were made in the testing "window"—the time at which testing is to occur in school districts, and in the required dates on which the California Department of Education is required to post statewide STAR results on the Internet. Specific authorization now exists in statute for the development and administration of separate tests that are aligned to the State Board-adopted content standards. A direct assessment of writing at one elementary and one middle school grade is now mandated as part of the STAR program.

On November 24, the Board published notice of its intent to amend sections 850, 852, 853, 855, 857, 858, 859, 862, 864.5, 866, 867, 867.5, 868, 870, 880, 884, 891, and 894, Title 5 of the CCR, to reflect the recent statutory changes. Under the proposed regulations, school districts would test pupils at approximately the same time in their instructional calendar and school districts would administer the standards-based tests in addition to the designated achievement test.

In addition, some legislative changes to the STAR designated achievement test are not applicable to the designated primary language test; the regulations that had been applicable to both tests are in some cases no longer applicable to one or the other, and must be separated. The testing windows for the designated achievement test and the designated primary language test are no longer the same, and no separate standards-based tests will be developed for the primary language test. Finally, a change in the definition of "excessive orders" has been made in the regulations applicable to both tests.

In addition to noticing its intent to adopt the changes on a permanent basis, the Board submitted them to OAL on an emergency basis; OAL approved the emergency action on November 27, 2000, to be effective January 1, 2001. The Board must transmit a certificate of compliance to OAL by May 1, 2001, or the emergency language will be repealed by operation of law on the following day.

Impact on Children: See discussion of impact above. Among other things, these rules attempt to promote consistency between schools by mandating a common window for test administration.

High School Exit Examination

To improve pupil achievement in California high schools and ensure that students who graduate from high school demonstrate grade-level competency in English/language arts and mathematics, the Legislature amended the Education Code in 1999 to authorize, among other things, the development of a California high school exit examination and administration of the examination in each public school and state special school that provides instruction in grades 10, 11, and 12.

The legislative changes established the high school exit examination, requiring that beginning in the 2000–01 school year, pupils in grade 9 may take the exit examination; beginning in the 2001–02 school year, pupils in grade 10 must take the examination; and beginning in the 2003–04 school year, each pupil completing grade 12 must pass the examination to receive a high school diploma. The examination will be offered in English/language arts and mathematics and will be aligned to state content standards in these content areas. School districts must provide supplemental instruction to pupils who do not demonstrate sufficient progress toward passing the examination. Pupils with special needs may be administered the examination with appropriate accommodations, and pupils who do not possess sufficient English language skills may be deferred from having to pass the examination for up to 24 months until they have received six months of instruction in reading, writing, and comprehension in English.

On November 24, 2000, the Board published notice of its intent to adopt new sections 1200–1216, Title 5 of the CCR, to clarify what school districts must do to administer the high school exit examination. The proposed regulations define terms used in the legislation; specify requirements for test administration, accommodations for students with disabilities and English language learners, test security, apportionment, and recordkeeping; and provide guidance on dealing with cheating.

The Board held a public hearing on the proposed sections on January 11, 2001, in Sacramento, and adopted them at its March 7, 2001 meeting. At this writing, the sections await review and approval by OAL.

Impact on Children: These rules constitute an extension of the "accountability" agenda of the Davis Administration. The reform seeks to substitute tested competence for "social promotion," requiring a test in order to receive a high school graduation credential. Employers and higher education would theoretically be assured that a high school diploma implies a minimum level of language and mathematics competence. Such an alteration in policy can have a positive effect on affected children if: (a) the test is sufficiently broad and relevant to test needed skills, and (b) additional resources are committed to increase the supply and competence of teachers. The last reform is of special importance because California currently has the second highest class size in the nation for grades 4 through 12. Together with parental involvement, class size and teacher competence are the most important variables in education success. However, most new funding by the Davis administration has focused on accountability measures without useful investment in resources. Substantial monies have gone into politically attractive "gratitude" generating

bonuses and grants to teachers (regardless of performance), as well as to students who score in the upper ten percent (regardless of need). But class size improvement has received less attention, and although improving teacher competence has attracted a number of spending programs, none has been funded to significant scale.

Award Programs Linked to API

On November 24, 2000, the Board published notice of its intent to adopt new Article 1.7, consisting of sections 1031–1038, Title 5 of the CCR, to implement the following three programs:

(1) The Governor's Performance Award Program of the Public Schools Accountability Act of 1999, under which the Superintendent of Public Instruction must rank all public schools based on the academic performance index (API) in decile categories. The API rankings indicate the target annual growth rates, the actual growth rates attained by the schools, and how growth rates compare schools that have similar characteristics. The Act requires the Board to establish a Governor's Performance Award Program (GPA) to provide monetary and non-monetary awards to schools that meet or exceed API performance growth targets. It would make all schools, including charter schools and schools participating in the Immediate Interventions/Underperforming Schools Program eligible to participate in the GPA.

(2) The Certificated Staff Performance Incentive Act, which makes one-time performance awards available to certificated teachers and other certificated school employees in certificated positions in eligible underachieving schools where the academic performance of pupils significantly improves beyond the minimum percentage growth target.

(3) The Academic Performance Index Schoolsite Employees Performance Bonus (API/SSEPB), which was established in 2000 by the Legislature for one year only. The API/SSEPB is based on the results of the 2000 STAR examination and related to the criteria for the GPA. The purpose of the API/SSEPB is to recognize individuals and schools that meet API performance growth targets.

Among other things, the proposed regulations provide the following:

- The API shall be used to measure performance of schools and shall be the measure of accountability for all schools, except those that fall under the alternative accountability system.
- All schools that reach their growth targets or an API of 800 and growth of at least one point, have comparable improvement, as defined, and meet the specified minimum participation rate shall be recognized through the Governor's Performance Award Program and the API/SSEPB.
- To be eligible to receive awards under the Certificated Staff Performance Incentive Act, schoolsites must have attained a statewide decile rank of 1–5 in the base year of the current growth API, meet all relevant statutory requirements, and meet specified regulatory requirements. For example, the regulations would require eligible schoolsites to improve by a minimum of two times its annual growth target on its API between the base year and the current growth year. Further, the regulations would require that all numerically significant ethnic or socioeconomically disadvantaged subgroups at a school must have improved by a minimum of two times their annual growth targets; however, subgroups with an API of 800 or above must maintain a subgroup API of 800 or above.
- The API/SSEPB shall be allocated to individuals and to the schoolsite. Funds will be distributed to the schoolsite for those individuals who worked at the schoolsite for the school year for which the growth API was calculated; these bonuses shall be distributed on an FTE basis to all employees assigned to the school site.
- Use of funds at the schoolsite for the Governor's Performance Award Program and the API/SSEPB awards shall be decided by the existing schoolsite governance team/schoolsite council representing major stakeholders and then ratified by the governing board of each local educational agency.

On December 28, 2000, OAL approved the Board's emergency adoption of these sections. The Board held a public hearing on the permanent adoption of the sections on January 11, 2001, and subsequently adopted them at its March 7, 2001 meeting; the Board must transmit a certificate of compliance to OAL by April 27, 2001, or the emergency language will be repealed by operation of law on the following day.

Impact on Children: See discussion above of the previous two rule changes. These rules implement a system of incentive bonuses to teachers whose performance increases, as represented by test results. Many teachers object that such test results do not adequately reflect the work of a superior teacher, *e.g.*, the stimulation of curiosity, the teaching of underlying skills, the enhancement of self-initiative. However, the merits of reward for performance is well demonstrated in a variety of market contexts. Ideally, accountability measures could be broadened, and perhaps some credit conferred for student performance two or three years after skills are imparted and their benefits begin to accrue. However, the performance-based reward system, both to schools and to teachers, is preferable to the 2000–01 regrettable option of providing bonus checks without performance requirements. The reforms implemented by these rules must be measured against two alternative strategies: reducing class size in grades 4 through 12, and increasing the quality of public school teaching. The former will demand increased supply, which can partly compromise quality enhancement. To do both together requires a major and sustained commitment which the current rules do not reflect.

Education Technology Grant Program

The Education Technology Grant Program provides funding to school districts and charter schools for the purposes of acquiring computers for instructional purposes at

public schools. The Program's first priority is to ensure that high school pupils in schools offering three or fewer Advanced Placement courses have access to advance placement courses online. The second priority is to increase the number of computers available in public schools.

Existing law also provides that the Secretary for Education may adopt emergency regulations governing the method of allocating funds for the Education Technology Grant Program for the 2000–01 fiscal year. On October 26, 2000, the Secretary adopted new sections 90000–90009, Title 5 of the CCR, pertaining to the method of allocating funds for the Program. On December 8, 2000, the Secretary published notice of her intent to adopt those sections on a permanent basis.

Among other things, the regulations define a number of terms, including computers, access to on-line advanced placement courses, education technology plan, and eligible schools; reference technical specifications for computers purchased through the program; specify that the Secretary will calculate the number of computers currently installed in eligible schools by using the California Technology Assistance Project to conduct an inventory of existing resources and expected resources; detail the application process, instructing the Superintendent or fiscal agent of a school district regarding how to apply for funds; and specify the formula the Secretary will use to calculate the amount of grants to local school districts.

The regulations also detail the responsibilities of eligible schools or districts, including: (1) having a technology plan, (2) using the funds to improve the student-to-computer ratio in the schools with the highest ratios, (3) bringing the student-to-computer ratio to 5:1, or lower if the Secretary allocates sufficient additional funding, (4) certifying that the equipment purchased meets the technical specifications, (5) agreeing that all computers will have maintenance for three years, (6) certifying that all hardware will be used for instructional purposes and will be placed in classrooms, libraries, or technology/media centers, (7) assuring that the school or district has a policy regarding student access to the Internet, and (8) assuring that the school will enter the new equipment into the California Education Technology Inventory.

OAL approved the permanent adoption of these changes on March 29, 2001.

Impact on Children: The impact of these rules will depend substantially on resources to be allocated for hardware purchase and teacher computer training. Currently, California ranks near the bottom of the nation in computers per student, notwithstanding its locus at the center of the nation's silicon revolution. Numerous programs have been announced to provide up-to-date hardware. The capacity of the Internet to assist teachers is substantial, particularly given the computer literacy of so many children. However, local jurisdictions have failed to require their cable franchisees (which receive essentially exclusive rights to use public rights of way) to wire individual classrooms with wideband capacity. Both telephony and cable tend to drop a single line off to the central administration building in most schools.

Lacking internal wiring, the hardware purchases of schools yield limited gains in terms of Internet access, cross-school classes, and interactive learning. The high school/advanced placement focus of the new rules will assist college aspirants in high schools where a small percentage currently graduate to higher education. However, the rules' modest ambitions reflect a regrettable failure to roll-out, quickly and to scale, existing and demonstrably effective education technology.

School Facilities Construction

In December 1999, the Board of Education submitted to OAL an emergency rulemaking action to revise standards and procedures for school site selection and development of plans for the design and construction of school facilities by state funded and locally funded districts. Specifically, the Board sought to amend sections 14001, 14010, 14011, 14012, 14030, 14031, 14032, 14033, 14034, 14035, 14036, and 14037, and repeal sections 14012 and 14033, Title 5 of the CCR.

With regard to school site selection, the action defines "useable acres," increases recommended site size up to 13% for various categories of schools, and adds site size requirements for Community Schools and Continuation High Schools. The action also addresses planned use of certain power line setbacks, clarifies the safety study required when a site is within 1,500 feet of a railroad track easement, and requires a district to contact the Department of Toxic Substance Control if a proposed site is within 2,000 feet of a significant disposal of hazardous waste. For state-funded districts, the action requires justification that the site size is appropriate per the district Facilities Master Plan, requires districts to follow State Superintendent of Public Instruction recommendations if the proposed site is within two miles of an airport, and requires districts to certify there are no district-owned sites deemed useable or that the district intends to sell an available alternative district-owned site and use the proceeds for the new site. With regard to facility design, the rulemaking action concerns submission of preliminary and final plans to the Department, and adds requirements for a written justification for classrooms less than 960 square feet, resource specialist space, science laboratory design, computer instructional support area, art studios, music rooms, dance studios, theater/auditoriums, and plumbing. It also provides that approvals for plans are in effect for a maximum of two years, instead of one. The action also changes references to statutory provisions throughout and delete provisions regarding self-certified districts as defined in Education Code 17706(e), which has been repealed.

On January 10, 2000, however, OAL disapproved the Board's emergency changes. Among other things, OAL found that the information presented by the Board did not demonstrate that the emergency changes are immediately necessary to preserve health and safety, or general welfare;

the proposed amendment of section 14030(n) to incorporate by reference Appendix C of the 1995 edition of the Uniform Plumbing Code cannot be approved by OAL, as it is a building standard which has not been approved by the State Building Standards Commission; the Board must obtain the concurrence of the Department of Finance in its projection that the emergency regulation will have "no fiscal impact" on state agency costs, or an indication from the Department of Finance that the estimate presented to OAL with the emergency regulations is satisfactory; the proposed amendment of sections 14030(h)(3)(A) and (E) and 14036 to require compliance with provisions in the Leroy F. Greene State School Building Lease-Purchase Law of 1976 is inconsistent with the limitation in Education Code sections 17009.3 and 17009.5; several provisions fail to satisfy the clarity standard of the Administrative Procedure Act; the Board included citations to statutes that the Board is not empowered by statute to implement, interpret, or make specific in the reference notes for a number of regulatory sections; and the Board omitted appropriate authority and reference citations from a number of rules.

On April 21, 2000, the Board published notice of its intent to adopt these changes on a permanent, non-emergency basis; the package was revised to address the many problems identified by OAL in the preceding action. The Board held a public hearing on the proposed changes on June 8 in Sacramento, and subsequently adopted the changes. On October 30, 2000, OAL approved the revised package.

Impact on Children: This rule is partly driven by the calamitous siting of Belmont High School in Los Angeles directly on a hazardous waste site, leading to its abandonment after substantial construction and capital cost.

School Plans for Consolidated Categorical Aid Programs

State law has recently been amended regarding the requirements for comprehensive school plans for schools and school districts participating in consolidated categorical aid programs. For example, new Education Code section 52054(a) requires that schools participating in the Immediate Intervention/Underperforming Schools Program appoint a broad-based schoolsite and community team, consisting of a majority of non-schoolsite personnel.

On April 21, the Board published notice of its intent to amend sections 3930 and 3932, Title 5 of the CCR, to reflect the current school plan requirements. As amended, section 3930 provides that each school receiving consolidated application funds, as defined, shall develop a comprehensive program plan for students who will receive additional services from these funds. Each plan shall be based on an assessment of school capability to meet the educational needs of each pupil, specify objectives, and indicate steps necessary to achieve such objectives, including intended outcomes. This comprehensive plan shall account for all program services for participating students, including at least those provided by district and by consolidated application program funds. A school that includes the provisions of all state and federal categorical educational programs in a single, comprehensive plan shall be deemed to have complied with the planning requirements of those programs.

As amended, section 3932 provides that school districts maintaining programs shall provide opportunities for the involvement of parents, community representatives, classroom teachers, other school personnel, and students in secondary schools, in the planning, implementation, and evaluation of their consolidated application programs. Schools shall be deemed to have met this requirement by establishing a school site council under the provisions of Education Code sections 52852 and 52855. The local governing board may satisfy the requirement of Education Code section 52054(a) for a school-site and community team by augmenting an existing school site council authorized under Education Code section 52852 and former Education Code section 52012 with at least one additional person not employed at the school.

The Board held a public hearing on the proposed changes on June 8, 2000 in Sacramento, and subsequently adopted the changes. On November 17, 2000, OAL approved the amendments.

Impact on Children: These rules reflect the common public strategy of appointing a committee (including local community actors), developing a plan, formulating a series of steps for deficient children, directing services to such children, and measuring the progress made. This *de rigeur* formula for legislative passage may stimulate some community involvement. However, meetings of adults do not necessarily translate into student achievement. Parental involvement, better teachers, smaller classes, and access to technology and first class educational materials require substantial resources which local committees will not have available under public school budgets, where California remains ranked nationally among the bottom ten states in per pupil spending.

Educational Equity

On May 26, 2000, the Board of Education published notice of its intent to amend sections 4900–4940, Title 5 of the CCR, relating to educational equity. According to the Board, the changes clarify the protections from discrimination, harassment, and illegal bias for pupils and employees of local educational agencies that receive state and/or federal financial assistance. The protected classes are sex, sexual orientation, ethnic group identification, race, ancestry, national origin, religion, color, and mental or physical disability. According to the Board, the changes strengthen requirements in the areas of sexual harassment and sex discrimination in accordance with the judgment in *California Women's Law Center v. State Board of Education* (Los Angeles Superior Court Case No. BC113409) and implement the provisions of AB 499 (Chapter 915, Statutes of 1998), which change the focus of Division 1, Part 1, Chapter 2 of the Education Code from

sex equity to educational equity.

The Board held a public hearing on the proposed changes on July 13, 2000 in Sacramento; at this writing, the changes await review and approval by OAL.

Impact on Children: The proposed rules implement a statute which rewrote prior law governing discrimination "in the provision of educational services" by public schools. The new law distinguishes kindergarten through high school institutions for higher education and prescribes somewhat different procedures for each. Part of the revision was to assure consistency between state law and comparable federal standards. The most significant expansion of coverage is with the term "sexual orientation," consistent with a 1999 legislative change. Such expansion could promote tolerance by adding to the tools available to sanction those who judge, promote, and retain employees on such irrelevant bases. Further, it includes sexual orientation within the discrimination prevention ambit of the statute. Given the proclivity of children and youth to ostracize those who differ in any noticeable respect, and occasionally to bully and torment such persons, the rules could address such behavior. However, the emphasis of the statute is on job performance of public employees, and the remedies available to implement the rules—apart from instructional remonstration—are unlikely to reach student-to-student conduct except in the extreme circumstance of physical attack.

Nondiscrimination

On April 21, 2000, the Board of Education published notice of its intent to amend sections 4900, 4902, 4910, 4920, 4921, 4930, 4931, 4940, and 4960, Title 5 of the CCR, to add sexual orientation to the provisions relating to nondiscrimination in elementary and secondary educational programs. According to the Board, the changes are necessary to provide guidance to local educational agencies to ensure that no person in California is subjected to discrimination on the basis of sexual orientation; the amended sections are designed to provide public educational agencies with a framework by which their conduct is judged.

The Board held a public hearing on the proposed changes on June 8, 2000 in Sacramento. At this writing, the changes await review and approval by OAL.

Impact on Children: See discussion above.

Update on Previous Rulemaking Packages

The following is an update on rulemaking packages discussed in detail in previous issues of the Children's Regulatory Law Reporter:

Charter Schools—Satisfactory Progress

AB 544 (Chapter 34, Statutes of 1999) established parameters for a pupil's eligibility for generating charter school apportionments and authorized charter school apportionments for pupils over 19 years of age under specific circumstances. Specifically, to remain eligible for generating charter school apportionments, a pupil over 19 years of age shall be continuously enrolled in public school and make satisfactory progress toward award of a high school diploma, The legislation directed the Board to adopt regulations, on or by January 1, 2000, defining the term "satisfactory progress." On November 18, 1999, the Board of Education amended section 11965, Title 5 of the CCR, on an emergency basis, to define the term "satisfactory progress" for charter school pupils over 19 years of age. Specifically, section 11965 provides that, for each charter school, the term "satisfactory progress" means uninterrupted progress (1) toward completion, with passing grades, of the substance of the course of study that is required for graduation, from a non-charter comprehensive high school of the school district that authorized the charter school's charter, that the pupil has not yet completed, (2) at a rate that is at least adequate to allow the pupil to successfully complete, through full-time attendance, all of that uncompleted coursework within the aggregate amount of time assigned by the chartering agency for the study of that particular quantity of coursework within its standard academic schedule. If the chartering agency is not a school district having at least one non-charter comprehensive high school, the applicable high school graduation requirements and associated time assignments shall be those for the comprehensive high school(s) of the largest unified school district, as measured by average daily attendance, in the county or counties in which the charter school operates. For individuals with exceptional needs, the term "satisfactory progress" means uninterrupted maintenance of progress towards meeting the goals and benchmarks or short-term objectives specified in his or her individualized education program until high school graduation requirements have been met, or until the pupil reaches an age at which special education services are no longer required by law.

Update: On February 22, 2000, OAL approved the Board's permanent adoption of these changes.

Charter Schools—Independent Study Program

In December 1999, the Board of Education submitted to OAL, on an emergency basis, new sections 11700.1, 11704, and 11705, Title 5 of the CCR, to provide guidance to charter schools in determining how to apply independent study law to charter school independent study programs. Among other things, section 11700.1 would provide additional definitions applicable to charter schools; section 11704 would recognize that charter schools are not limited to operations within a single district by linking the pupil-teacher ratio for charter schools to the largest unified school district in the county or counties in which the charter school operates; and section 11705 would provide that,
for purposes of Education Code section 51745(e), a charter school that includes any of grades 9 to 12, inclusive, shall be deemed to be an alternative school of every high school district and unified school district within which it operates.

Update: On May 2, 2000, OAL approved the Board's permanent adoption of these regulatory changes.

CHILD PROTECTION

New Rulemaking Packages

Adoption Assistance Program

Recent legislative changes to the Adoption Assistance Program (AAP) (1) require a licensed adoption agency to provide information on the availability of mental health services for AAP eligible children to the prospective adoptive family; (2) revise the responsibility of counties with respect to children voluntarily relinquished for adoption to make the county in which the relinquishing parent resides responsible for determining eligibility and providing the AAP benefit; (3) remove the use of family income to determine the AAP benefit amount; (4) require a licensed adoption agency to inform the prospective adoptive family that they will continue to receive AAP benefits in the agreed upon amount unless situations as defined in Welfare and Institutions Code sections 16119(f)(1) through (6) occur; (5) require a licensed adoption agency to provide written information about the AAP to a prospective adoptive family at the time of application and once again immediately prior to the finalization of the adoption; (6) require a licensed adoption agency to encourage a prospective adoptive family to sign a deferred adoption agreement if they elect not to receive AAP benefits at the time of adoptive placement; and (7) extend the eligibility and availability of AAP payments to children whose initial adoptions are dissolved and who are re-adopted.

On December 1, 2000, DSS published notice of its intent to amend sections 35001, 35013, 35067, 35177, 35179, 15211, 35325, 35326, 35333, 35334, 35337, 35339, 35341, 35343, 35344, and 35351, Title 22 of the CCR, and sections 11-401 and 45-803 of the MPP, to implement the legislative changes. Among other things, the regulatory changes require adoption agencies to determine the amount and duration of the AAP benefit without the use of an income means test; consistently determine the maximum AAP benefit, which is the foster family home payment that would ahve been made on the child's behalf if the child had not been placed for adoption; not use the foster family agency (FFA) rate to determine the AAP benefit; determine the circumstances of the family and how the family is going to incorporate the child into its household; and adjust the AAP benefit automatically whenever the state-approved basic foster care maintenance payment is adjusted.

The changes also provide that the longest allowable duration between AAP reassessments is two years; the AAP benefit shall not extend beyond the month in which the child becomes 18 years of age, unless the adoption agency has determined that the child has a mental or physical disability that may warrant payment until the age of 21; repeal language requiring the adoptive parents to notify the child's agency immediately upon any change in the provision of services for which payment is authorized; allow for the reduction of AAP benefits if the child's needs decrease; and set forth the process adoptive families must follow to request an increase in the amount of the AAP benefit.

On November 30, 2000, and again on March 30, 2001, DSS adopted the changes on an emergency basis; at this writing, the permanent changes await review and approval by OAL.

Impact on Children: California currently has over 110,000 abused and neglected children in foster care. The state is their parent. Only a small percentage of these children are adopted; in fact, many have been labeled "unadoptable," a category that includes most children above two years of age, minorities, and children with special needs. The consensus view of experts is that adoption is the optimum outcome for these children. Those who remain in foster care are transferred between caregivers an average of four times through their foster care years. Important parental attachment is missing and the psychological impact of "detachment syndrome" is momentous.

The new rules implement an important change in state policy, disregarding the income of adopting parents for purposes of adoption assistance. To the extent that adoption assistance compensation matches foster care payments, the regrettable current misincentive not to adopt is reduced. Such a decision does not subtract from the amount of money paid (and available to be spent on a child). Many counties have adopted a policy of not paying adoption assistance to lower middle class or middle class families who might be able to afford the cost of an adoptive child without assistance. But foster care providers are paid regardless of personal income, because they are caring for the state's child. Adults willing to adopt these children relieve the state of the financial burden under a relationship which produces commitment, focus on a child by an adult, a precious bond which is to the advantage of all concerned. Greater compensation will increase the supply of persons who will make such a commitment. The love of a parent for a child is not properly translatable into compensation; however, the more people who are led into such a relationship, the more who will forge the bonds which lead to a parental relationship.

The compensation levels at issue here (generally in the $400 to $600 per month range) will not generate profit for the adopting parent. Rather, the monies paid remain somewhat short of the out-of-pocket cost of providing for a child. AB 1330 (Steinberg), currently pending in the Legislature, would increase foster care compensation by 20% over the next four years. Such an enhanced payment would remain below the out-of-pocket cost of providing for a child, and would still constitute less than one-fourth the current average payment per child paid for group placement. Similar measures have been killed in the "suspense file" of the Assembly or Senate Appropriations Committees each of the past four years. If these needed increases occur, they will hopefully be reflected in similarly increased adoption assistance funding to inhibit perverse financial incentives not to adopt foster children.

On the downside, the rules reflect the state's callous policy toward emancipated foster care youth. Once a foster

child turns 18, the state—unlike private responsible parents—generally abandons the new adult to the uncertain fate of a youth unemployment rate of above 17%, high rents, and ex-pensive higher education options. The early investment termination in these children is particularly regrettable given the evolving international economy, where most employment will require vocational training—if not more advanced higher education. The rules reflect that overall abdication of responsibility in the adoption setting. Except for extreme cases of extraordinary disability, no assistance can be obtained for any child after the child is 18 years of age.

Child advocates urge another policy: The state must perform as a responsible parent and provide educational and room and board assistance to a child until the age of 23—so long as he or she is a student in good standing at an accredited institution and leading toward enhanced employment. Arguably, that assistance should be forthcoming for those adopting parents who have relieved the state of foster care obligations, provide more intimate and personal parenting for their children, and warrant assistance and public investment in their children—both because of the public advantage it portends, and as a further stimulation to perform this critical and needed adoptive role.

Transitional Shelter Care Facilities

On December 1, 2000, DSS published notice of its intent to adopt sections 80001, 84300, 84322, 84361, 84365, 84368.1, 84368.2, and 84368.4, Title 22 of the CCR, and sections 31-112 and 31-410 of the MPP, to implement statutory provisions requiring DSS to adopt regulations and develop standards that govern Transitional Shelter Care Facilities. Such facilities are licensed by DSS, primarily serve children previously placed in a community care facility and who are awaiting placement in another community care facility appropriate to their needs, are county-owned and operated or run by a nonprofit organization under contract with the county, provide 24-hour nonmedical short-term care for children under 18 who are in need of personal services, supervision, assistance essential for daily living, and protection, and provides short-term care for children who have been removed from their homes based on neglect or abuse, and for children who are seriously emotionally disturbed who are wards or dependents of the court.

Currently, children in need of short-term care, removed from placement in community care facilities and awaiting subsequent placement in other community care facilities, are placed in licensed group homes or unlicensed county operated emergency shelter care facilities. In 1985, the DSS Director exempted from group home licensure emergency shelter care facilities operated by counties, pursuant to Health and Safety Code section 1505(o). The lack of regulations addressing specific needs of these children in temporary care has led to overcrowding, improper placement of children, and mixing of populations which creates a risk of harm to children in these facilities. The intent of creating the transitional shelter care facility category is to strengthen the operation of public children's shelters for abused and neglected children by requiring some of these unlicensed facilities to obtain a license from DSS. Since these children are emotionally disturbed, neglected or abused, they are not easy placements and have special needs. The intent of these regulations is to ensure that the county finds the best placement for the child and to prevent further unsuccessful placements, and to ensure the protection and safety of children in transitional care.

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

Impact on Children: The number of children subject to emergency shelter from unlicensed facilities has been increasing steadily. As the record of the rulemaking indicates (see above), many problems attend current placements. The proposed rules will affect only a small percentage of these facilities, and subject them to rudimentary requirements. However, it makes sense to impose at least the same floor of requirements on publicly-provided emergency shelters as is required for private providers who must meet licensure standards.

It is possible that the tightening of mandatory standards may impede supply, and the underlying problem if such standards are not met is: What is the alternative?

Of greatest concern is compliance with applicable basic standards with possible dramatic increases in demand. The combination of economic downturn, rising unemployment, energy price increases, gasoline price hikes, a rent vacancy rate of below 1% in impoverished urban areas (with predictably rising rents), and the cut-off of TANF assistance to over 500,000 California children within the next two years may add appreciably to the emergency housing burden of many counties.

Community Care Licensing—Minor Parent Regulations

AB 2773 (Chapter 1056, Statutes of 1998) added sections 1530.8(a)(2) and (d)(1) through (4) to the Health and Safety Code, requiring the Department of Social Services (DSS) to adopt regulations regarding children under six years of age residing in a group home with a minor parent who is their primary caregiver. Current regulations apply particular standards to all group homes that accept children younger than six years, whether or not accompanied by a minor parent; those regulations have requirements for the care of the under six child that are unnecessary when the minor parent is caring for the child.

On February 25, 2000 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, 84287.2, 84279, Title 22 of the CCR, in order to implement new standards for minor parent programs; DSS proposed the regulatory changes to create a more applicable set of standards for homes with minor parent programs. The proposed regulations would apply to mother (parent) and infant programs that serve children who are younger

than six, are dependents of the court, reside in a group home with a minor parent, and have a primary caregiver who is the minor parent. The programs must meet all of these requirements in order to be regulated by the new rules. Among other things, the regulations provide for minor parent programs to be exempt from the "family-like setting" requirement that is applicable to most group homes, because it is thought that the minor parent provides the family-like environment for his or her child. While the new rules provide that certain duties previously reserved for staff may be provided by the minor parent, staff members still retain supervisory duties. The regulations provide that children of minor parents are counted in the home's staff-to-child ratio to ensure that the young children are cared for when the minor parent is not doing so. In addition, the proposed changes require parenting education classes and activities in which the minor parents can spend time with the children.

On April 19 and 20, 2000, DSS held a public hearing on the proposed sections. Based on public testimony, DSS modified the regulations, primarily in the area of funding. At this writing, the regulations await review and approval by the OAL.

Impact on Children: While these rules may somewhat ease the burden on staff in group homes, they may inadvertently cause some children to receive an inadequate level of attention and assessment of their needs. Although a minor parent may take on certain duties concerning his or her child, many may not be qualified or able to properly care for the child. The parenting education classes need to be emphasized and enforced in such programs, and staff should focus on teaching parents to foster and develop a family bond with their children, rather than just assigning some of their own responsibilities to the minor parents.

Administrative Actions

On March 31, 2000 DSS gave notice of its intent to amend sections 80018(d)(2)(B), 80042(a), 80061(h), 87042, 87218(a)(4) and (5), 87340(c), 87342(a), 87818(c)(2)(B) and (C), 87842(a)(1), (2), (5),(6), 101169(d)(2)(B), 101205(a)(2)(A) (Handbook),(a)(3), (a)(3)(A) (Handbook), 101206 (Handbook), and adopt sections 80018(d)(2)((E), 80030(a)(3), 80040(a)(3), 80046, 84045, 87040(a)(2), 87046, 87231(a)(1), 87346, 87830(a)(3), 87840(a)(2), 87846, 101169(d)(2)(E), 101181(b), 101208, Title 22 of the CCR, to implement SB 933 (Chapter 311, Statutes of 1998), which mandates DSS to require several provisions to be applied to any corporation applying for community care licensing.

The provisions require licensees to list the facilities that any directors or officers of the corporation have been affiliated with, by way of employment, membership on a board, or licensure. Such information is deemed necessary in order to determine whether the individuals are eligible to work at the facility. The provisions also prohibit the licensure of a corporation with a board member or officer who is not eligible to work in a residential care facility (subject to giving the applicant notification and an opportunity to remove that individual), and prohibit directors and officers from maintaining contact with clients of a licensed facility if the individuals have violated certain rules or regulations, engaged in certain conduct, or been denied a criminal record exemption. In addition, the statute requires that all community care facilities provide their board of directors with copies of substantiated complaints and group home licensees must retain copies of licensing reports for three years.

DSS maintains that it is important for directors and officers of a corporation to perform their duties in good faith and in the best interest of the facility and the clients, and that these regulations are necessary to preserve the health and safety of clients. On May 16, 17, and 18, DSS held a public hearing on the proposed regulations. On October 4, 2000, OAL approved the regulatory changes.

Impact on Children: By requiring additional information from members of the board of directors, executive director, or officer or corporation licensed to or applying for a license to run various types of community care facilities, prohibiting licensure under specified circumstances, and requiring distribution of substantiated complaints to certain persons, these regulatory changes should help improve the oversight of children's facilities.

Establishment of Kin-GAP Program

SB 1901 (Chapter 1055, Statutes of 1998), as modified by AB 1111 (Chapter 147, Statutes of 1999), created the Kinship Guardianship Assistance Payment (Kin-GAP) Program to ensure that those children exiting the foster care system to enter guardianship with a relative will still receive benefits for a period of time after the transfer. Prior to entering the Kin-GAP Program, the majority of kids will have been receiving either federal Aid to Families with Dependent Children-Foster Care (AFDC-FC) or California Work Opportunity (CalWORKs) benefits. The purpose of Kin-GAP is to provide for a smooth transition out of foster care, and to promote permanent placements for children.

The Kin-GAP program is funded with Temporary Assistance to Needy Families (TANF), state, and county funds. Basic eligibility for the program is based on the TANF/CalWORKs Program with some minor modifications. On July 1, 2000, DSS adopted, on an emergency basis, new sections 11-301, 90-101, 90-105, 90-110, 90-115, and amendments to sections 31-201, 40-121, 40-181, 40-183, 40-188, 40-189, 40-190, 42-101, 42-302, 42-712, 44-133, 44-316, 44-317, 82-510, 82-820, and 82-832 of the MPP to address eligibility criteria for the program. Among other things, the new regulations set forth the following provisions:

- Before a child may receive Kin-GAP, he or she must be living with a relative caregiver for at least twelve months, at which time the relative will assume legal guardianship and the juvenile court dependency for the child is dismissed. This twelve-month mark will signal the exit of the child from the foster care system and entry into the Kin-GAP program.

◆ The county responsible for Kin-GAP payments will be the county with former jurisdiction over the child.

◆ Payments may continue until the child has graduated from high school or reached his 19th birthday, whichever comes sooner.

◆ A relative legal guardian, who is receiving Kin-GAP on behalf of a former child, is exempt from time limits and Welfare-to-Work activities.

◆ The net income of children who receive Kin-GAP benefits is considered income only to the Kin-GAP child. This provision ensures that the Kin-GAP child's income and aid payment is not considered available for other members in the home who are receiving CalWORKs Cash Aid.

◆ Children in Kin-GAP are not subject to monthly reporting requirements and subsequent termination if the report is not received on time. Reporting will only be required in months where there is actually income to the child, or changes to the child's case, which may affect the child's eligibility.

◆ For purposes of Kin-GAP, the child must be living in the home of a relative who has been approved by the county. The approval may take place prior to the child's transfer to the program, and need not be reassessed after the child transfers from CalWORKs or AFDC-FC to Kin-GAP.

◆ Kin-GAP payments are not permitted if a parent is living with the child in the relative's home. This regulation's purpose is to prevent parents from circumventing the requirements of the TANF/CalWORKs Program, which requires parents to participate in work activities. Minor parents receiving Kin-GAP, however, are exempt from this provision.

◆ If a child is receiving Kin-GAP, he or she is not eligible to receive CalWORKs or Cash Aid.

DSS published notice of its intent to adopt these regulations on a permanent basis on May 19, 2000, held a public hearing on July 19, 2000, and subsequently adopted the changes. On December 12, 2000, OAL approved DSS' permanent adoption of the changes.

Impact on Children: The Kin-GAP program will benefit children by promoting permanent placement into the homes of relatives. The payments will provide an incentive for relatives to take on the responsibility of becoming a legal guardian where the financial cost of giving up foster care recompense may have inhibited such a role previously. The guardianship role implies somewhat greater stability for involved children. Their foster care provider is no longer a kind of "hired child sitter" by the state, but assumes substantial parental authority. Such persons are able to make parental decisions without court (state) review and assent. Importantly, foster care parents lacking such status have little right to contest DSS decisions to place children elsewhere. And the typical foster care child is subject to such damaging movement, termed "foster care drift" by child advocates. However, a legal guardian has legal status and must be heard before that status is abridged or terminated. Accordingly, California's Kin-GAP reforms, which these rules implement consistent with their legislative intent, add to the number of children benefitting from long-term, stable parenting.

Criminal Record Clearances and Exemptions and Child Abuse Central Index

On May 18, 2000, DSS adopted, on an emergency basis, new sections 80019.1, 80019.2, 87019.1, 87019.2, 101170.1, 101170.2, 102370.2, and amendments to sections 80019, 87019, 87219, 87819, 87819.1, 88019, 88019.02, 89034, 101170, 102369, 102370, and 102370.1 of Title 22 of the CCR, regarding criminal record clearances for all individuals who have contact with people receiving care at community care facilities. These regulations were enacted pursuant to SB 933 (Chapter 311, Statutes of 1998) and AB 1659 (Chapter 881, Statutes of 1999).

The provisions call for added protections and more stringent requirements than the current law provides. Specifically, section 80019 calls for additional fingerprinting requirements for new employees and current employees who will have contact with children. Fingerprints must now be submitted to the California Department of Justice or civil penalties will apply. This section also sets forth additional security measures with regards to the transfer of criminal clearance records. A report must now be submitted to the DSS in writing, which must include some form of documentation and a valid driver's license.

Section 80019.1 provides for new requirements regarding exemptions to criminal record clearance. The Department now has authority to deny exemption requests if a person fails to provide documents or fails to cooperate with the exemption process. The standard for requesting an exemption has been made tougher by this regulation: a person must show "substantial and convincing" evidence of being rehabilitated, and that they are presently in good character, to justify employment, residence, or even presence in a facility. As evidence of good character and rehabilitation, the Department shall consider evidence of honesty and truthfulness as revealed in exemption application documents. This section also provides that if an individual is denied a request to transfer a criminal record exemption, the Department shall provide the individual with a right to an administrative hearing to contest the decision. If a criminal record exemption cannot be granted, the Department may deny the application or revoke the individual's license.

Section 80019.2 requires the Department to conduct a Child Abuse Central Index (CACI) check for the applicant and all individuals subject to criminal record review, and shall approve or deny a facility license, employment, residence, or presence in the facility based on the results of the review. This provision also requires the Department to investigate any reports received from the CACI. However, a license may not be denied based on the CACI report unless the Department substantiates the allegation of child abuse.

On June 20–22, 2000, DSS held public hearings on these proposed regulations to adopt them on a permanent basis. On December 19, 2000, OAL approved the rulemaking package.

Impact on Children: These new rules implement more thorough criminal history clearance checks of persons working with children and employed by community care facilities. Traditionally, such employment has been somewhat attractive work for pedophiles, as it allows close contact with children who are often without effective adult protection or close parental supervision. Some of the children in these facilities have themselves been molested previously, and some tend to "act out" sexually in their new surroundings. Accordingly, the special risk here presented warrants careful preventive checks. These rules are adopted against the backdrop of a report by the California State Auditor criticizing the criminal record check performance of licensed child care facilities. See California State Auditor/Bureau of State Audits, *Department of Social Services: To Ensure Safe, Licensed Child Care Facilities, It Needs to More Diligently Assess Criminal Histories, Monitor Facilities, and Enforce Disciplinary Decisions* (Sacramento, CA; August 2000).

Update on Previous Rulemaking Packages

The following is an update on rulemaking packages discussed in detail in previous issues of the **Children's Regulatory Law Reporter:**

Child Welfare Services

Community Treatment Facilities

On October 27, 1999, DSS amended, on an emergency basis, sections 31-002, 31-205, 31-206, 31-320, 31-406, and 31-420 of the MPP, to establish placement standards for Community Treatment Facilities (CTFs). These regulations establish the criteria and responsibilities for county social workers and probation officers when considering or making placements of children in CTFs. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 21.)

Update: On March 28, 2000, OAL approved DSS' permanent adoption of these regulations.

DSS Assumption of Complaint Investigation Responsibility from FFAs

SB 933 requires DSS to take over the responsibility for complaint investigations of certified family homes, which had previously been handled by Foster Family Agencies (FFAs). In order to specify these regulatory changes, on June 28, 1999, DSS adopted new sections 88063, amended sections 88018, 88022, 88045, 88061, 88064, 88065, 88069.7, and repealed sections 88031, 88050, and 88051, Title 22 of the CCR, on an emergency basis. These rule changes were intended to better alert DSS to problems warranting investigation within the family foster care system. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at .)

Update: On February 1, 2000, OAL approved the adoption of these regulations.

Group Home Administrator Certification

SB 933 requires that all administrators of group homes successfully complete a DSS approved certification program prior to employment. On September 22, 1999, DSS adopted, on an emergency basis, sections 84064.2, 84064.3, 84064.4, 84064.5, 84090, 84090.1, 84090.2, 84091, 84091.1, 84091.2, 84091.3, and 84094.4, and amendments to sections 80001, 84001, 84018, 84061, 84064, 84065, 84066, and 84164 of the MPP regarding qualifications and duties of certified administrators of group homes including certification, recertification, and forfeiture. The regulations also set forth the approval, denial, and revocation criteria and procedures for Initial Certification Training Programs and Continuing Education Training Programs. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 23.)

Update: On March 9, 2000, DSS readopted the emergency regulations; on May 24, 2000, OAL approved the Department's permanent adoption of the regulations.

Group Homes Staff and Manager Training

SB 933 requires DSS to adopt standardized training regulations for group home staff in order to foster statewide consistency and to ensure that they are appropriately and adequately trained. In compliance with this requirement, DSS adopted, on an emergency basis, sections 84001a.(3), and 84065.2(b)(5), Title 22 of the CCR. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 2 (2000) at 23.)

Update: On January 26, 2000, OAL approved the Department's permanent adoption of the regulations.

JUVENILE JUSTICE

New Rulemaking Packages

Mental Health Services/Standards for Medical and Dental Services

Welfare and Institutions Code section 1755.3 gives the Youth Authority the power to authorize necessary medical, surgical or dental care, upon the recommendation of an attending physician or dentist, whenever any person under their jurisdiction is in need of such services. Existing regulations regarding such authorization are embodied in Title 15, Division 4, Chapter 3, Subchapter 3, Article 1 of the CCR. These provisions, however, do not provide for mental health treatment services, nor do they include more recently established state and federal standards which protect the rights of persons with a mental disorder who require the involuntary administration of psychotropic medication.

To address the lack of regulatory standards for mental health services, on August 18, 2000, the Youth Authority gave notice of its intent to add Article 1.5, sections 4742, 4743, 4744, 4745, 4746, and 4747 to the existing regula-

tions within Title 15. The provisions establish standards for mental health services, assessment, and referral, and for suicide prevention and response for Youth Authority wards. Additionally, the provisions establish standards for the justification and administration of psychotropic medication, and substantive and procedural requirements for the involuntary administration of such medication. Specifically, section 4747 provides that involuntary psychotropic medication may be provided in an emergency when action is immediately necessary for the preservation of life or the preservation of bodily harm to self or others, and it is impracticable or impossible to obtain informed consent. This section provides for procedural safeguards consistent with *Keyhea v. Rushen* (Solano County Superior Court Case No. 67432), Order Granting Plaintiff's Motion for Clarification and Modification of Injunction and Permanent Injunction, filed October 31, 1986. The safeguards include notification, hearing, and appeal procedures when involuntary psychotropic medication is administered in excess of the 72 hours authorized for emergency treatment, to those wards meeting the *Keyhea* criteria. The Youth Authority also proposes to adopt an outside review process for minors, when a parent or guardian is not available, who do not meet the *Keyhea* criteria but have a diagnosed mental disorder that would benefit from psychotropic medication.

In addition to adopting Article 1.5, the Youth Authority is amending sections 4730, 4732, 4733, 4734, 4735, 4736, 4737, 4739, and 4740 of Article 1, for compliance with Correctional Treatment Center regulations and licensure law. For instance, section 4732 requires a complete baseline health evaluation, rather than just a physical exam, for all wards. In addition, it requires a complete history and laboratory tests when the medical record is not available. The amendments also require informed consent for complex treatment and procedures and the administration of psychotropic medication as well as establish criteria for whether a ward is competent to give informed consent. Section 4733 defines informed consent as "consent which is obtained without duress or coercion and which clearly and explicitly manifests consent to the proposed medication, treatment or procedure in writing."

On October 3, 2000, the Department of Youth Authority held a public hearing on these proposed regulations. As of this writing, the Department is still awaiting approval by OAL.

Impact on Children: The addition of mental health services to the explicit list of available assistance will benefit the substantial number of juvenile offenders who will benefit from such treatment. Unsurprisingly, the incidence of Serious Emotionally Disturbed ("SED") children among incarcerated youth is disproportionately high. The new rules retain substantial discretion within CYA as to what services will be sought for whom. That is, the rules are framed in terms of authorized services rather than mandated services. However, the rules do mandate some limitations on the use of psychotropic medication, consistent with recent case law. That case law and the instant rules do grant substantial discretion to state officials supervising CYA facilities, but at least create a framework for an external check on that discretion—important to the protection of involved children.

Youth Authority Standards for Correspondence

On August 18, 2000, the Department of Youth Authority gave notice of its intent to amend section 4695, Title 15, Division 4, Chapter 3, Subchapter 2, Article 1 of the CCR, to change the regulatory standard with regard to the inspection of reviewable mail and correspondence between inmates of separate correctional facilities. The amendment's purpose is to discourage violence and crime within correctional facilities.

According to the Department, it has limited ability to determine if reviewable ward mail advocates a criminal act, encourages violence or harm to a person, or promotes institutional gang activity. To overcome this problem, the amendment provides that employees may open, inspect, and read all reviewable mail and may authoize a delay in reviewable mail that is written in another language other than English, and may require translation and notification to the ward. The amendment also limits incoming packages sent by officials or offices listed as confidential sources under non-reviewable mail in an attempt to limit the amount of contraband entering the facilities and the number of items requiring searching.

Another reason the Department deems the amendment necessary is to control correspondence between wards or inmates in separate correctional facilities or within segregated sections of the same facility. Ward to ward correspondence that does not require prior approval of the superintendent allows unlimited transmission of contraband, information about rival gangs, or other information that may endanger wards or staff. To deal with this problem, the amendment requires that ward to ward correspondence may take place only with prior approval of the superintendent or person in charge of the facility. This part of the amendment also establishes that mail to a psychotherapist is reviewable mail and comes within those standards.

On October 11, 2000, the Department held a public hearing on this matter. As of this writing, the amendment still awaits review and approval by the OAL.

Impact on Children: While these regulations may have the intent of suppressing crime and violence within juvenile facilities, they greatly impede on an inmate's right to privacy.

Minimum Standards for Local Juvenile Facilities

On August 18, 2000, the State Board of Corrections gave notice of its intent to adopt new sections 1327 and 1328, and amend sections 1302, 1310, 1313, 1314, 1321, 1322, 1324, 1326, 1341, 1342, 1343, 1351, 1352, 1353, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1370, 1371,

1372, 1377, 1390, 1391, 1402, 1412, 1431, 1437, 1438, 1450, 1461, 1462, 1463, 1464, 1465, 1484, 1488, 1510, 1521, 1522, 1526, 1527, 1543, 1550, and 1561, Title 15 of the CCR, regarding minimum standards for local juvenile facilities. These regulations apply to a variety of provisions, including training and management requirements, health services, food, safety and sanitation, and programs and activities.

Among other things, the amendments change the staffing requirements for camps from a minimum of 1:6 positions for each ten minors in residence to a ratio of 1:15 during waking hours and 1:30 during sleeping hours; require forty hours of training prior to assuming responsibility for supervision of minors, and clarify that training needs to include proper orientation to child supervision duties; require halls and camps to implement procedures for documented fifteen-minute safety checks of minors when they are asleep or in their rooms or dorms; specify the notification requirements in the event that a minor detained in a juvenile facility, jail, lock-up, or court holding facility has a serious illness or injury; require facility administrators to develop a furlough policy and procedure; require that minors be oriented to emergency and evacuation procedures necessary for their safety; strengthen existing requirement that appropriate counseling be provided for all minors in custody; clarify that only the amount of force necessary to ensure the safety of the minor and others can be used; require that a facility's policies and procedures include identifying known medical conditions that would contraindicate certain restraint devices or techniques; reduce the medical opinion on the safety of placement and retention in restraints from four to two hours of placement, the time frame for subsequent medical clearance for continued retention from six hours to three, and the time period for mental health consultation from eight hours to within four; indicate that "continuous" direct supervision is required when minors are held in restraints; establish that visitor searches do not need to be based on a "probable cause" legal standard; assure that minors have free access to grievance forms; require that facilities have policies and procedures for addressing and documenting concerns raised by parents, guardians, staff, and other parties who may have an interest in the minor's welfare; require the facility administrator to annually request the superintendent of schools to certify that the facility school programs comply with relevant regulations; require that the facility request individual assessment plans from the minor's prior school; add social awareness programs that incorporate currently required electives; require that equivalent recreational programming be provided for both males and females; provide that education cannot be denied as a disciplinary sanction to promote acceptable behavior; clarify that health care services must address acute "symptoms" in addition to known conditions; provide that a medical clearance is needed for any minor who displays outward signs of intoxication or is known or suspected to have ingested any substance that could result in a medical emergency; emphasize that referrals to a medical treatment facility must be timely, provide that a facility's policy and procedures must address how transportation will be provided, and require that follow-up occur; require that an annual pharmacist's report on the status of pharmacy services be provided to the health authority and facility administrator; require the involvement of the mental health director when a facility is developing suicide prevention plans, policies, and procedures; require facilities to provide therapeutic diets and maintain a therapeutic diet manual; and clarify that equipment maintenance, physical plant maintenance, and inspections must be done in a timely manner.

On October 4, 2000, the Board held a public hearing on these proposed amendments to Title 15 and 24. On January 11, 2001, these regulatory changes were approved by OAL.

Impact on Children: The proposed rules set minimum standards for the management of youthful offenders. While the rule's instructions have been close to the policies in many institutions, well-publicized abuses and injuries (and resulting lawsuits) have involved the improper use of restraints, over-prescription of tranquilizers, isolation from visitors, failure to provide medical care, and other problems.

One troubling aspect of the changes, applicable to the substantial number of juveniles in camps, is the lowering of the staff-to-minor ratio to just over one third its previous level—a substantial drop in adult supervision, monitoring, personal attention, and influence, to the detriment of the children involved.

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 Victim Compensation and Government Claims Board (formerly the Board of Control) Victims of Crime Program

This Board's activities are largely devoted to the Victims of Crime (VOC) program, the first victims' compensation program established in the United States. It reimburses eligible victims for certain expenses incurred as a direct result of a crime for which no other source of reimbursement is available. The VOC program 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.

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.

State Board of Education and Department 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; the Board's website address is www.cde.ca.gov/board.

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.

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 may disseminate education information relating to the prevention, diagnosis and treatment of mental disorder; conduct educational and related work to encourage the development of proper mental health facilities throughout the state; coordinate state activities involving other departments and outside agencies and organizations whose actions affect mentally ill persons. DMH provides services in the following four broad areas: system leadership for state and local county mental health departments; system oversight, evaluation and monitoring; administration of federal funds; 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.

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.

California Youth Authority

State law mandates the California Youth Authority (CYA) to provide a range of training and treatment services for youthful offenders committed by the courts; help local justice system agencies in their efforts to combat crime and delinquency; and 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; its 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.

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 2000–01* is currently available at www.acusd.edu/childrensissues.

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 11342.600. 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, 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 has 120 days within which to correct the deficiencies cited by OAL and resubmit the rulemaking file to OAL.

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

Interested persons may petition the agency to conduct rulemaking. Under Government Code section 11340.6 *et seq.*, any person may file a written petition requesting the adoption, amendment, or repeal of a regulation. Within 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).

University of San Diego

SCHOOL OF LAW

Children's Advocacy Institute

University of San Diego
School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4806
(619) 260-4753 (fax)

Sacramento Office:
926 J Street, Suite 709
Sacramento, CA 95814
(916) 444-3875
(916) 444-6611 (fax)

www.acusd.edu/childrensissues