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Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 6, No. 1 (2006)

HIGHLIGHTS

Poverty

DSS amendments extend CalWORKs eligibility to specified classes of disabled persons who are otherwise eligible for benefits when enrolled full-time in high school or a vocational/technical training program, even though they cannot reasonably be expected to complete either program before reaching age 19

Nutrition

Department of Education rulemaking seeks to implement the California Fresh Start Pilot Program, aimed at promoting the consumption of fresh fruits and vegetables among schoolage children

Health/Safety

Health Facilities Financing Authority emergency regulations implement the Children's Hospital Program as authorized by Proposition 61, which authorizes grants to eligible participating general acute care hospitals to finance capital outlay projects

Special Needs

Department of Developmental Services emergency regulations implement the Family Cost Participation Program, requiring that some families pay part of respite, day care, and camping services provided for their disabled children by regional centers

Child Care

Department of Social Services proposed rulemaking would require child care licensees to notify parents/authorized representatives and DSS of any unusual incident or injury to any child while in care in a licensed family child care home

Education

Board of Education proposed regulations establish Reading First Achievement Index to determine whether a school district is making significant progress in improving reading achievement in grades K-3 in Reading First schools

Child Protection

Department of Social Services proposed regulations expand foster youth personal rights to include the right of foster youth age 16 or older to have access to postsecondary educational and vocational opportunities and financial aid information



KEY

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from December 18, 2004, through April 14, 2006; actions on those packages through April 14, 2006; and updates on previously-reported regulatory packages through April 14, 2006.

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

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

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

CHILDREN'S REGULATORY LAW REPORTER

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Children's Regulatory Law Reporter

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PREFACE

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

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

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

In addition to monitoring proposed regulatory changes that will impact children, as described herein, CAI is also pleased to be a part of a workgroup convened in Spring 2006 by the Department of Social Services' Community Care Licensing Division. The charge of the workgroup is to review existing children's residential licensing regulations and policies to identify provisions that do not promote

a home-like environment and have become barriers to preparing foster youth for life as an independent young adult. CAI anticipates that the workgroup will produce a significant number of proposed changes that would improve the foster care experience for children, and is hopeful that DSS will then seek to implement the workgroup's final recommendations.

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CHILD POVERTY

New Rulemaking Packages

Fry v. Saenz Eligibility for CalWORKs

Section 42-101.2 of the MPP prohibited the granting of CalWORKs cash aid to a child who has reached 18, unless the child can reasonably be expected to graduate before age 19. In *Fry v. Saenz*, Sacramento County Superior Court Case No. 00CS01350, petitioners—children who have disabilities that prevent them from completing school by 19—claimed that this provision violates the American with Disabilities Act (ADA) because it discriminates against recipients who would not graduate before age 19 due to a disability. The court agreed, and ordered DSS to implement a reasonable modification of the law to provide CalWORKs cash aid to otherwise eligible 18-year-olds who are attending school full-time and are not expected to graduate before age 19 due to a disability.

On April 22, 2005, DSS amended section 42-101.2 of the MPP, on an emergency basis, to extend CalWORKs eligibility to specified classes of disabled persons who are otherwise eligible for such benefits when enrolled full-time in high school or a vocational/technical training program, even though they cannot reasonably be expected to complete either program before reaching age 19. Among other things, the amendments provide the following:

(1) Children who currently receive or have in the past received SSI/SSP benefits shall be considered disabled. Past or present 18-year-old recipients of SSI/SSP benefits who attend school full-time shall be considered an eligible child in their parent/caretaker relative's assistance unit (AU) and aid shall continue for the otherwise eligible parent/caretaker relative until the child completes the program, turns 19 or stops attending school full-time, whichever occurs first.

(2) Children who currently receive or have in the past received services through a Regional Center Program pursuant to the Lanterman Act shall be considered disabled. Otherwise eligible 18-year-olds who attend school full-time and are considered disabled under this criterion shall be eligible for CalWORKs benefits until they complete the program, turn 19 or stop attending school full-time, whichever occurs first.

(3) Children who currently receive services at school in accordance with their Individual Education Plan (IEP) or receive services pursuant to Section 504 of the Rehabilitation Act or have received such services in the past shall be considered to be disabled. Otherwise eligible 18-year-olds who attend school full-time and are considered disabled under this criterion shall be eligible for CalWORKs benefits until they complete the program, turn 19 or stop attending school full-time, whichever occurs first.

When a child does not meet any of the three criteria, the parent/caretaker relative can provide independent verification of a current or past disability by a health care provider

or a trained, qualified learning disabilities evaluation professional.

On May 27, 2005, DSS published notice of its intent to amend section 42-101.2 on a permanent basis. On August 12, 2005, DSS readopted its emergency amendments. On December 9, 2005, DSS transmitted a certificate of completion to OAL; at this writing, OAL has not taken final action on the approval of these changes.

IMPACT ON CHILDREN: This regulatory action completes several years of work by the Western Center on Law and Poverty, Legal Services of Northern California, and Legal Aid Society of San Diego, which brought the underlying litigation challenging the state's so-called "completion rule" on the grounds that it discriminates against children with disabilities in violation of the ADA, and that it is not essential to the CalWORKs program. As the court noted,

Depriving a family of benefits because a disabled child is not expected to complete high school or job training by age 19 obviously does not enhance the family's "right and responsibility to provide sufficient support and protection of its children."...Similarly, the cutoff of benefits for this reason does not promote the family's "right and responsibility to provide its own economic security by full participation in the work force to the extent possible"....[A] disabled 18-year-old with schooling or job training unfinished is ill-prepared to work, and having to care for the child without CalWORKs aid may impede the parents' participation in the work force. Barring a family from receiving benefits because a disabled 18-year-old will not complete high school within a year patently detracts from the family's "right and responsibility to...provide every opportunity for educational and social progress."...Finally, cutting off benefits under these circumstances does nothing to "reduc[e] dependency" or "promote the rehabilitation of recipients".... it leaves disabled children more dependent than before, thus discouraging the "rehabilitation" of all aid recipients.

By expanding the group of children who can receive CalWORKs cash aid prior to their graduation from high school, this regulation directly helps to support children with disabilities.

CalWORKs Program Changes

The CalWORKs Welfare-to-Work program is the employment and training component of CalWORKs, California's version of the federal Temporary Assistance for Needy Families (TANF) program. Federal welfare reform enacted the TANF program through the Personal Responsibility and Work Opportunity Reconciliation Act in 1996 and limits cash aid to a family with an adult to a total of five years. The intent of the Welfare-to-Work program is to provide employment and

training services to the maximum possible number of the adult CalWORKs population to assist them in achieving economic self-sufficiency within this time frame.

On December 2, 2005, DSS published notice of its intent to amend sections 11-501, 42-302, 42-701, 42-711, 42-712, 42-713, 42-715, 42-716, 42-718, 42-719, 42-720, 42-721, 42-722, 42-802, 42-1009, 42-1010, 44-111, and 63-407, and repeal section 42-710 of the MPP. Among other things, these changes would revise the program's "work first" approach and establish a universal engagement requirement that will engage families as soon as possible in services they need to become economically self-sufficient. The proposed regulations will also eliminate the 18- or 24-month time limit on participation in specified education and training activities and require adults to participate in at least 20 hours per week in core welfare-to-work activities that will provide them with the necessary training to obtain employment. The balance of their 32- or 35-hour per week participation requirement can be spent in other specified non-core activities that will aid recipients in obtaining employment.

DSS held a public hearing on these proposed changes on January 18, 2006. On April 3, 2006, OAL approved DSS' adoption of these changes on an emergency basis. At this writing, the permanent changes await review and approval by OAL.

IMPACT ON CHILDREN: Unless exempt, applicants/recipients of CalWORKs are required to participate in welfare to work activities as a condition of receiving aid. CalWORKs recipients who are not required to participate in welfare to work activities may volunteer to take part in the program. Adults in one-parent families must spend at least 32 hours per week in welfare to work activities. The minimum participation requirement for two-parent families is 35 hours per week. After receiving aid for up to a maximum of 24 months, non-exempt adults must work in unsubsidized employment or participate in community services activities for the minimum number of hours listed above.

After recipients find work, a variety of services are available for up to 12 months to assist them to retain their employment and become fully self-sufficient.

Temporary exemption from the work participation requirement is available where necessary support services are unavailable (including child care for children under 10 years of age), where employment would interrupt approved education or job training, and for certain inappropriate terms of employment. Women with newborns are exempt for six months; counties may limit that period to three months or extend it to twelve months, based on local criteria.

State Hearing Regulations

On December 9, 2005, DSS published notice of its intent to amend sections 22-000, 22-001, 22-002, 22-003, 22-004, 22-009, 22-045, 22-049, 22-050, 22-053, 22-054, 22-059, 22-061, 22-063, 22-064, 22-065, 22-069, 22-071, 22-072, 22-073, 22-074, 22-075, 22-076, 22-077, 22-078, and 22-085 of the MPP, regarding state

hearings conducted in relation to public social service programs such as CalWORKs, Food Stamps and Medi-Cal. According to DSS, these changes will make the state hearing process more efficient and clarify ambiguous or unclear language. Among other things, the changes would do the following:

- provide authority for the Director to designate that a state hearing decision is a precedent decision because it contains a significant legal or policy determination of general application that is likely to recur;

- clarify that there is no jurisdiction through state hearing process in matters involving child custody and child welfare service issues while the child is under the jurisdiction of the juvenile court;

- provide remedies, including the tolling of the period to file for a hearing, the right to a postponement, and the right to aid paid pending, to limited-English-proficient claimants who receive notices of action that do not meet the requirements of MPP section 21-115.2; and

- clarify that prior to a hearing, a party may request in writing to the regional Presiding Administrative Law Judge that a hearing be limited to the jurisdictional issue;

Also, current regulations provide that if a claimant fails to appear for a state hearing, he/she has 10 days to reopen the request for hearing and then following a nonappearance decision, the party has 30 days to request a rehearing. These provisions modify this process by eliminating the 10-day reopening period. Instead, a dismissal decision is immediately issued when the claimant does not attend the hearing. The claimant is given 15 days from receipt of the dismissal decision to request the dismissal decision be set aside. If the dismissal decision is not set aside, the claimant is advised of the right to appeal in Superior Court.

Current regulations set forth certain alternatives for county representation of a case when the claimant resides out of county. These provisions allow the responsible county to appear by telephone when the claimant resides in another county and the state hearing is held in that county of residence.

DSS held a public hearing on these proposed changes on January 25, 2006; at this writing, the changes await review and approval by OAL.

IMPACT ON CHILDREN: When individuals have applied for, received, or are currently receiving benefits/services from an assistance program, as specified, and have complaints about how their application or benefits/services are/were handled, they may discuss the complaint with a representative of the welfare department for the county in which they live (or where they lived when they received the benefits/services); file a formal complaint; file a discrimination complaint; or request a hearing. The specified assistance programs include the Adoptions Assistance Program; the California Food Assistance Program; CalLearn; CalWORKs; Child Welfare Services; Medi-Cal; and Food Stamps.

Hearings must be requested within 90 days, starting from when the county/agency took the action complained

about. If an individual did not know about the county's action, he/she may file a hearing request after 90 days; however, at the hearing, he/she must prove that he/she never received a Notice of Action or that he/she did not receive it until the 90-day period was over.

The MPP currently provides standards and requirements for the administration of these state hearings; the proposed regulations are expected to make the process more efficient and improve the existing regulations used in preparing, scheduling, and conducting state hearings.

Update on Previous Rulemaking Packages **Quarterly Reporting for the CalWORKs Program**

Effective July 1, 2004, DSS adopted emergency revisions to the CalWORKs Program regulations to allow counties to utilize the monthly reporting/retrospective budgeting method until they are able to fully implement the quarterly reporting/prospective budgeting system. Specifically, DSS amended sections 22-071, 22-072, 22-305, 40-103, 40-105, 40-107, 40-119, 40-125, 40-131, 40-173, 40-181, 40-183, 40-188, 40-190, 41-405, 42-209, 42-213, 42-221, 42-302, 42-406, 42-407, 42-716, 42-721, 42-751, 42-769, 44-101, 44-102, 44-111, 44-113, 44-115, 44-133, 44-205, 44-207, 44-211, 44-304, 44-305, 44-313, 44-314, 44-315, 44-316, 44-318, 44-325, 44-327, 44-340, 44-350, 44-352, 44-400, 44-401, 44-402, 47-220, 47-320, 48-001, 80-301, 80-310, 82-612, 82-812, 82-820, 82-832, 89-110, 89-130, and 89-201, and adopted section 40-036 of the MPP to implement the changes. On December 17, 2004, DSS readopted the changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 4.)

Update: On August 5, 2005, OAL approved DSS' permanent adoption of these changes.

NUTRITION

New Rulemaking Packages **California Fresh Start Pilot Program**

SB 281 (Maldonado) (Chapter 236, Statutes of 2005) added Article 11.5 (commencing with section 49565) to the California Education Code, establishing the California Fresh Start (CFS) Pilot Program, to be administered by the Department of Education in consultation with the Department of Food and Agriculture and the Department of Health Services.

The goal of the CFS Pilot Program is to promote the consumption of fresh fruits and vegetables among schoolage children by providing a total of \$18.2 million in funding, with \$17.8 million dedicated to School Breakfast Programs (SBP). The law encourages public schools main-

taining kindergarten or any grades 1 to 12, inclusive, to provide fruits and vegetables that are not juice or have not been deep-fried to pupils in order to enhance the fruits and vegetables served in a SBP.

SB 281 further requires that a school districts/charter schools give priority to the purchase of fresh fruits and vegetables from California producers, when commercially available. Reimbursement for this program is \$0.10 per meal to be paid in quarterly installments by the CDE to supplement, but not supplant, a SBP. Funds must be deposited into the nonprofit food service account of the school district or charter school.

On March 16, 2006, the Department adopted, on an emergency basis, sections 15566, 15567, 15568, and 15569, Title 5 of the CCR, to implement the CFS Pilot Program in a timely manner and allow school districts and charter schools to participate in the CFS Pilot Program to provide public school pupils nutritious fruits and vegetables, and be able to seek reimbursement for such servings during the 2005-06 academic year.

According to the regulations, all school districts and charter schools that operate a SBP are eligible to participate in the CFS Pilot Program. To receive reimbursement, the school district or charter school shall, among other things:

- Provide one or more supplemental servings of nutritious fruits or vegetables, or both, at breakfast, at no additional charge to a pupil and give priority to serving fresh fruits or vegetables. If already serving two nutritious fruits and/or vegetables at a site during breakfast, the district or charter school may provide one to two servings of nutritious fruits and vegetables for after school snacks. Such snacks do not need to be provided through the National School Lunch Program (NSLP), but if they are, serving size requirements may differ from the one-half (1/2) cup required for the CFS Pilot Program.

- Spend at least 90% of the CFS Pilot Program funding received on the direct purchase of nutritious fruits or vegetables, or both, and give priority to purchasing California-produced fresh fruits or vegetables.

- Not spend any of the funding for the purchase of juice or for the provision of fruits and vegetables that have been deep fried.

- Include tasting and sampling of nutritious fruits and vegetables as part of nutrition education at school sites participating in the CFS Pilot Program.

On March 17, 2006, the Board published notice of its intent to adopt these provisions on a permanent basis. A hearing is set for May 2, 2006.

IMPACT ON CHILDREN: SB 281 was sponsored by Governor Arnold Schwarzenegger, who has a particular fondness for bills aimed at nutrition, exercise, and obesity prevention. According to the Governor, recent reports published by the U.S. Centers for Disease Control indicate that over 9 million, or 16% of children and teens ages 6 to 19 are overweight—three times the percentage in 1980. The reports also indicate that roughly one-third of school students are not engaging in the recommended amounts of

moderate or vigorous physical activity and that a similar number of adults are inactive during their leisure time. As a result, among California's children, more than one out of three is overweight or at risk of being overweight. Providing children with more access to fruits and vegetables is a positive step in encouraging them to develop healthy eating habits.

National School Lunch Express Enrollment

On February 2, 2006, MRMIB filed with OAL amendments to section 2699.6600, Title 10 of the CCR, to implement SB 1196 (Cedillo) (Chapter 729, Statutes of 2004), which directs MRMIB to accept, process and determine eligibility for the Healthy Families Program (HFP) using the National School Lunch Program (NSLP) Health Coverage Applications and supplemental forms. Implementing SB 1196 requires changes to the current HFP regulations to reflect the authority of MRMIB to receive and process NSLP applications and any supplemental forms forwarded from the Medi-Cal program. These regulations became effective as emergency regulations on February 9, 2006.

On March 10, 2006, MRMIB filed notice of its intent to adopt these provisions on a permanent basis. A hearing is scheduled to be held on April 26, 2006.

IMPACT ON CHILDREN: Under Express Enrollment, the application for the school lunch program is used, when the parent or guardian consents, for determining Medi-Cal eligibility. If the child is eligible for free lunches, the application is forwarded and a determination is made regarding eligibility for no-cost Medi-Cal. If the child is found ineligible for Medi-Cal, the application will now be turned over to the appropriate entity for HFP determination. If the child is eligible only for reduced cost lunches, the parent or guardian must be notified that they are not eligible for the Express Enrollment process for determining Medi-Cal eligibility.

The School Lunch Program is an excellent avenue for reaching uninsured children and enrolling them in Medi-Cal and should be used for other programs such as Healthy Families and other health insurance programs.

Food Stamp Eligibility for Drug Felons

Current federal law prohibits extending Food Stamp benefits to individuals convicted of felony drug offenses unless the state opts out of this prohibition by passing a state law. In 2004, the Legislature passed AB 1796 (Leno) (Chapter 932, Statutes of 2004), amending Welfare and Institutions Code § 18901.3 to extend Food Stamp benefits to individuals convicted of felony drug offenses for the use or possession of a controlled substance(s). However, individuals convicted of felony drug offenses for unlawfully transporting, importing, selling, furnishing, administering, giving away, possessing for sale, purchasing for purposes of sale, or manufacturing a controlled substance shall continue to be ineligible for Food Stamp assistance.

On July 1, 2005, DSS adopted, on an emergency basis,

amendments to sections 63-103, 63-300, 63-402, 63-503, 63-509, 63-801 of the MPP, in order to implement AB 1796. Among other things, the changes require that individuals convicted in a state or federal court of a felony that has as an element the possession or use of a controlled substance (not a disqualifying felony specified in MPP Section 63-402.229) shall, as a condition of eligibility, provide proof of one of the following (and when such proof is not available, the county welfare department (CWD) shall accept self-certification under penalty of perjury as proof):

- (a) completion of a government-recognized drug treatment program;
- (b) participation in a government-recognized drug treatment program;
- (c) enrollment in a government-recognized drug treatment program;
- (d) placement on a waiting list for a government-recognized drug treatment program; or
- (e) other evidence that the illegal use of controlled substances has ceased. The applicant must state what the other evidence is and provide proof. The applicant must also certify under penalty of perjury that their illegal use of controlled substances has ceased. The CWD shall consider the evidence and must clearly document the reasons upon which denial or approval of benefits is made.

Pursuant to AB 1796 (Leno) (Chapter 932, Statutes of 2004), these emergency regulations were to remain in effect for 180 days. On July 1, 2005, DSS published notice of its intent to adopt these changes on a permanent basis. On December 28, 2005, DSS transmitted its Certificate of Compliance to OAL, which approved the permanent regulations on February 10, 2006.

IMPACT ON CHILDREN: The amendments support adults who are trying to remain drug-free, become self-sufficient, and provide appropriate care and support for their children. Both the legislation and the implementing regulations have built-in safeguards to ensure benefits will still be denied to individuals convicted of certain felony drug charges, such as unlawfully transporting, importing into this state, selling, furnishing, administering, giving away, possessing for sale, purchasing for purposes of sale, manufacturing a controlled substance, possessing precursors with the intent to manufacture a controlled substance, or cultivating, harvesting, or processing marijuana or any part thereof, or unlawfully soliciting, inducing, encouraging, or intimidating a minor to participate in any of the above activities. These regulatory changes will help support the children of adults who have struggled but are working on becoming drug-free.

Update on Previous Rulemaking Packages Quarterly Reporting in the Food Stamp Program

Effective July 1, 2004, DSS amended—on an emergency basis—sections 63-034, 63-102, 63-103, 63-300, 63-301, 63-410, 63-501, 63-503, 63-504, 63-505, 63-801, and 63-804, and adopted sections 63-508 and 63-509 of the MPP to implement a Quarterly Reporting/Prospective Budgeting

(QR/PB) reporting system for the Food Stamp Program that is compatible with the same reporting system in the CalWORKs program. On December 17, 2004, DSS readopted the changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 7.)

Update: On August 5, 2005, OAL approved DSS' permanent adoption of these changes.

Transitional Food Stamps and Face-to-Face Interview Exemptions

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

Effective April 19, 2004, DSS amended—on an emergency basis—sections 63-300, 63-500, and 63-504 of the MPP to implement the statutory changes discussed above. On April 2, 2004, DSS published notice of its intent to adopt these changes on a permanent basis. On August 17, 2004, DSS readopted these changes on an emergency basis. On November 4, 2004, DSS released a modified version of this regulatory proposal for an additional fifteen-day public comment period.

(For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 1 (2004) at 9 and Vol. 5, No. 2 (2004) at 8.)

Update: On January 25, 2005, OAL approved DSS permanent adoption of these changes.

HEALTH / SAFETY

New Rulemaking Packages

Newborn Screening Program Fee Increase

SB 1103 (Chapter 228, Statutes of 2004) amended Health and Safety Code § 125001 to require DHS to expand the coverage of the Newborn Screening Program to include “tandem mass spectrometry screening for fatty acid oxidation, amino acid and organic acid disorders and congenital adrenal hyperplasia as soon as possible.” On December 31, 2004, DHS amended—on an emer-

gency basis—section 6508, Title 17 of the CCR, to increase the total fee for Newborn Screening Program services from \$60 to \$78. On January 21, 2005, DHS published notice of its intent to increase the fee on a permanent basis. On April 29, 2005, DHS transmitted a certificate of compliance to OAL, which filed the permanent changes on May 19, 2005.

IMPACT ON CHILDREN: This regulatory action constitutes the third fee increase to the Newborn Screening Program since 2001. The net impact of these changes on third party payers—as well as the uninsured—is an 85.7% fee increase in just five years. In fact, uninsured individuals will bear a bigger brunt of the fee increase than will third-party payers, as section 6508(b) authorizes DHS to offer a reduced fee to comprehensive prepaid group practice direct health care service plans with 20,000 or more births in the last completed calendar year for which complete statistics are available, which elect to provide testing, follow-up and/or counseling services to its members. The newborn screening testing program enables early diagnosis of congenital disorders, thereby minimizing or preventing adverse outcomes or other serious long term disabilities. However, to the extent this additional fee increase negatively impacts the often meager resources of uninsured individuals, it will have a carryover impact on the well-being of their newborn children.

Treatment Authorization Requests

Federal law requires that Medi-Cal provide core health care services, including but not limited to, hospital inpatient and outpatient care, nursing services, physician services, laboratory services, family planning, and regular examinations for children under the age of 21. Many Medi-Cal services are covered subject to utilization control, which utilizes a treatment authorization request (TAR) process to ensure that services provided are medically necessary in order to qualify for payment. Under the current process, a Medi-Cal fee-for-service provider submits a TAR to a DHS Medi-Cal field office; documentation that substantiates the medical necessity of the service requested must be included with the submission. The field office Medi-Cal consultant reviews the request and returns a decision regarding the TAR to the provider. If a provider disagrees with the decision of a Medi-Cal consultant regarding a TAR, the provider may choose to appeal the decision. Currently, this appeal is submitted to the field office that denied the TAR. If the field office appeal staff uphold a decision to deny or modify the TAR and the provider still disagrees, the provider may submit a second-level appeal to the Medi-Cal Operations Division (MCO) headquarters, where the second-level review takes place.

Added in July 2000, Welfare and Institutions Code section 14133.05 requires DHS to review TARs for medical necessity only. Prior to the enactment of section 14133.05, if a TAR was submitted outside established timeframes for the service being requested, there was no requirement that it be reviewed for medical necessity and the TAR could be denied based on the late submission.

In contrast to the TAR submission requirements, the timelines for submission of an appeal of a decision on a TAR have not changed. Therefore, an appeal can still be denied if submitted outside accepted appeal timeframes.

On February 3, 2006, DHS published notice of its intent to amend section 51003, adopt new section 51003.1, and redesignate current section 51003.1 as 51003.3, Title 22 of the CCR. This regulatory action specifically proposes amend Section 51003 by deleting the timeliness requirements for TAR submissions; stating that TARs will be reviewed for medical necessity only; removing most of the language in subsection (g) regarding the existing provider appeal process; and revising the date of the Request for Extension of Stay in Hospital, form 18-1 (2/87) to (8/93).

Additionally, the rulemaking action seeks to adopt a new section 51003.1 that establishes a one-level appeal process for Fee-For-Service Medi-Cal providers to follow for TAR decisions. Under this new system, a provider of services may appeal the decision of a Medi-Cal consultant regarding a TAR, as follows:

- The provider shall submit a written appeal to DHS within 90 calendar days from the date on the TAR, which is the date a decision on the TAR is made by the Medi-Cal consultant. The written appeal shall be postmarked by the U.S. Postal Service; personally delivered to DHS and date stamped upon receipt; or labeled with the date shipped, and delivered to DHS by a common carrier. Calendar days shall include Saturday, Sunday, and holidays.

- The written appeal shall include the original TAR number and service type requested; date(s) or service(s) in dispute; the reason the appeal should be granted; any additional documentation that a provider chooses to submit that supports the basis for the conclusion that the services are medically necessary, and a new, completed TAR for the services appealed.

- DHS shall review the provider appeal and send a written decision, and the basis for that decision, to the provider. When the appeal decision is based on a review of documented medical necessity, the written decision shall be sent to the provider within 180 calendar days from the date of receipt by DHS. When the appeal decision is a denial based on failure to submit the appeal within 90 calendar days from the date of the decision on the original TAR, the written decision shall be sent to the provider within 60 calendar days from the date of receipt by DHS.

- If a provider is not satisfied with the appeal decision, the provider may seek a judicial remedy pursuant to Code of Civil Procedure section 1085.

At this writing, the regulatory package awaits review and approval by OAL.

IMPACT ON CHILDREN: Section 14133.05 of the Welfare and Institutions Code has been in effect since July 7, 2000, mandating that a request for a treatment authorization received by DHS shall be reviewed for medical necessity only. Accordingly, advocates question why DHS is just now proposing this regulatory action; the agency's delay in amending section 51003 has left in place obsolete

regulatory language, pertaining to circumstances under which retroactive approval may be given on a TAR that is submitted outside the established timelines, for well over five years. In any event, to the extent that this regulatory action will ensure that TARs are reviewed by DHS for medical necessity only, it will help expedite the treatment authorization process and benefit Medi-Cal users, many of whom are children.

This regulatory action would also consolidate the current two-level TAR appeal process into a one-level appeal. Eliminating the first-level provider appeal will shorten the time in which the provider must wait to receive a final decision, thus making the appeal process faster for providers, and ultimately, patients.

Children's Hospitals Program

Proposition 61, the Children's Hospital Bond Act of 2004, was passed by the voters in November 2004, authorizing \$750 million in general obligation bonds, to be repaid from state's general fund, for grants to eligible children's hospitals for construction, expansion, remodeling, renovation, furnishing and equipping children's hospitals. Of that amount, 20% is to be used for grants to specified University of California general acute care hospitals, and 80% for grants to general acute care hospitals that focus on children with illnesses such as leukemia, heart defects, sickle cell anemia and cystic fibrosis, provide comprehensive services to a high volume of children eligible for government programs, and that meet other stated requirements.

Proposition 61 authorizes the Health Facilities Financing Authority (Authority) to award grants to eligible participating general acute care hospitals for purposes of financing capital outlay projects and requires the Authority to develop evaluation criteria and a process for awarding grants; requires the Authority to develop a written application for the awarding of grants within 90 days of the adoption of Proposition 61; requires grants to be awarded within 60 days from receipt of an application for funds; and requires the Authority to take into account several specified factors when selecting grantees and determining grant amounts.

On February 11, 2005, the Authority adopted—on an emergency basis—sections 7030 through 7050, Title 4 of the CCR, to implement the Children's Hospital Program as authorized by Proposition 61. Among other things, the proposed regulations would do the following:

- Section 7030 clarifies the applicability of certain terms and words which shall be interpreted and applied in a uniform manner when used in any application related to the implementation and administration of the Act.

- Section 7031 makes specific the eligibility criteria for eligible children's hospitals. The provisions authorize the Authority to require applicants to provide a current, general acute care license, audited financial statements that do not contain any going concern qualifications, a completed application form, ownership documentations of the property if the applicant is proposing to use funds for a project

other than equipment acquisition, and reasonable assurance that any projects involving architect, design and/or engineering fees, or acquisition of real property is a component of a larger project that will ultimately benefit the health and welfare of California's sick and/or injured children.

■ Health and Safety Code sections 1179.23 and 1179.24 establish the maximum individual grant award and specifies that no grant can exceed the total cost of the project. Section 7032 implements and makes specific these provisions by authorizing the Authority to grant maximum awards as defined.

■ Health and Safety Code Section 1179.24 specifies that funds available for grants under Health and Safety Code Section 1179.23 not exhausted by June 30, 2014 shall become available for an application from any eligible hospital. Section 7033 clarifies that in the event of available excess funds available for grants, priority will be given to those eligible facilities that have not previously received the maximum grant award to ensure broad distribution of grant awards.

■ Section 7034 establishes that all eligible children's hospitals interested in applying for a grant must complete an application.

■ Section 7035 specifies the time and manner of submitting an application to the Authority.

■ Section 7036 details the information required for submission in an application for a grant including financial information, organizational information, legal information, and an agreement and certification.

■ Section 7037 details the manner in which applications will be evaluated by staff.

■ Section 7038 details the evaluation criteria that will be reviewed by the Authority, including how well the project contributes to the population served, how well the children's hospital contributes to the population served, applicant's demonstration of project readiness and feasibility, sources and uses of funds, and financial capacity of the applicant.

■ Section 7039 details the initial allocation notification process for awarding funds after applications have been evaluated.

■ Section 7040 establishes an appeals process for applicants including the circumstances under which an appeal may be filed, the timing of the appeal, the review of the appeal by the staff and Authority, and the securing of funds for a successful appellant.

■ Section 7041 provides for approval by the Authority of grant awards and notification of approval to grantees.

■ Section 7042 specifies when the Authority, at its discretion, can award grants, in the event there are remaining grant funds as of June 30, 2014.

■ Section 7043 specifies when the Authority or the Authority staff may have the discretion to consider a change in use of the grant funds.

■ Section 7044 details the terms and conditions that will be set forth in a grant agreement.

■ Section 7045 makes specific the process of releasing

grant funds as grant awards for non-University of California Children's Hospitals.

■ Section 7046 makes specific the process of releasing grant funds as grant awards for University of California Children's Hospitals.

■ Section 7047 makes specific the verification required for submission to the Authority once the grant-funded project is complete for all hospitals.

■ Section 7048 details the terms by which grant funds must be returned to the Authority due to noncompliance with the Program.

■ Section 7049 specifies that forfeited grant funds are to be deemed remaining funds for purposes of section 7042.

■ Section 7050 interprets and makes specific this provision by requiring grantees to retain all Program and financial data and to provide audited information to the California Bureau of State Audits or Authority upon request.

On February 25, the Authority published notice of its intent to adopt these provisions on a permanent basis. The Authority readopted these provisions on an emergency basis on May 26, 2005. On September 14, 2005, the Authority transmitted a Certificate of Compliance to OAL, which approved the permanent regulations on October 27, 2005.

IMPACT ON CHILDREN: Over one million times each year, children facing life-threatening illness or injury are cared for at regional Children's Hospitals without regard to a family's income or ability to pay. Children are referred to these pediatric centers of excellence for treatment by other hospitals in California. Children's Hospitals save hundreds of children's lives every day. Many children are cured, while others have their young lives extended for many years. And all have the quality of their lives improved. The implementation of Proposition 61 will help make room in these hospitals to treat the children who need care.

Update on Previous Rulemaking Packages Incorporating AIM Infants Enrolling Into the Healthy Families Program

On July 1, 2004, MRMIB adopted—on an emergency basis—section 2699.6608, amended sections 2699.6500, 2699.6600, 2699.6606, 2699.6607, 2699.6611, 2699.6613, 2699.6617, 2699.6619, 2699.6625, 2699.6631, 2699.6705, 2699.6717, 2699.6725, 2699.6801, 2699.6809, and 2699.6813 of Chapter 5.8, Title 10 of the CCR, and amended sections 2699.100, 2699.200, 2699.201, 2699.205, 2699.209, 2699.400, and 2699.401 of Chapter 5.6, Title 10 of the CCR, to implement recent statutory changes regarding the automatic enrollment in the Healthy Families Program of an infant born to an AIM subscriber who is enrolled in the AIM Program on or after July 1, 2004. On July 30, 2004, MRMIB published notice of its intent to adopt the changes on a permanent basis. MRMIB held a public hearing on September 15, 2004. (For background

information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 9.)

Update: On January 7, 2005, OAL approved MRMIB's permanent adoption of these changes.

Medi-Cal Estate Recovery Program Definitions

On July 27, 2004, DHS amended—on an emergency basis—sections 50960 and 59061, Title 22 of the CCR, to accomplish the following: (1) add annuities to the definition of “estate” as an asset from which DHS may seek recovery for Medi-Cal expenditures; (2) add the definition of “annuity” to the regulations and specify that only annuities purchased on or after September 1, 2004, are affected by this regulation; (3) specify how DHS' claim for reimbursement for Medi-Cal expenditures shall be recovered from an annuity as part of a deceased beneficiary's estate; and (4) make other technical changes to properly implement estate recovery mandates under state and federal law, including a recent settlement agreement and permanent injunction in the case of *California Advocates for Nursing Home Reform, et al. v. Bonta, et al.* (2003) 106 Cal.App.4th 498. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 12.)

Update: On January 3, 2005, OAL approved DHS' permanent adoption of these changes.

Medi-Cal Enrollment Process and Criteria

On October 7, 2004, DHS added and/or amended—on an emergency basis—sections 51000.1, 51000.1.1, 51000.3, 51000.4, 51000.6, 51000.7, 51000.16, 51051, 51000.10.1, 51000.15.1, 51000.20.9, 51000.30 (and various forms incorporated by reference in this section), 51000.31, 51000.40, 51000.45, 51000.50, 51000.51, 51000.52, 51000.53, 51000.55, 51000.60, and 51451, Title 22 of the CCR, to strengthen application and enrollment processes for Medi-Cal providers. On October 22, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. DHS held a public hearing on December 8, 2004, with the public comment period ending December 10, 2004. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 12.)

Update: On January 27, 2005, and again on June 2, 2005, DHS readopted these changes on an emergency basis. On September 29, 2005, DHS transmitted a Certificate of Compliance to OAL, which filed it on November 10, 2005.

Nurse-to-Patient Ratios in General Acute Care Hospitals

On November 12, 2004, DHS amended—on an emergency basis—section 70217, Title 22 of the CCR, to delay implementation of specified nurse-to-patient ratios, from 1:6 to 1:5, scheduled to take effect on January 1, 2005.

DHS determined that it is necessary to maintain the current ratio, which became effective January 1, 2004 for medical, surgical, medical/surgical, and mixed units, until January 1, 2008. These regulations affect personnel (including registered nurses, licensed vocational nurses, and licensed psychiatric technicians) employed at licensed general acute care hospitals. According to DHS, during the first ten months of the existing ratios, hospitals cited the ratios as a cause for the closure of two hospitals and the closure or reduction in capacity of several hospital emergency rooms and other patient care units. DHS included copies of letters from several hospitals documenting closure and/or reduction in capacity in its rulemaking package as proof of the need to implement these emergency regulations. However, the California Nurses Association challenged the contention that the new ratios caused the closures, reporting that virtually all of the hospitals that closed this year had reported years of financial losses.

On December 3, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 16.)

Update: On March 3, 2005, the Sacramento County Superior Court ordered a preliminary injunction halting implementation of the emergency amendments in *California Nurses Association v. Schwarzenegger et al.*, No. 04CS01725; that injunction was made permanent in June 2005. Despite the court's action halting implementation of the emergency regulations, DHS readopted them twice, effective March 15, 2005, and July 14, 2005.

The Governor initially appealed the court's order, but he withdrew his appeal on November 10, 2005, thus ending the litigation over the emergency amendments. Accordingly, the version of section 70217 adopted on September 26, 2003, and operative January 1, 2004, remains in effect.

Although DHS predicted that the 1:5 ratio would have detrimental effects on hospitals, the state received no complaints from hospitals during the first nine months after the 1:5 ratio went into effect in March 2005.

SPECIAL NEEDS

New Rulemaking Packages

Family Cost Participation Program

On December 22, 2004, DDS adopted—on an emergency basis—sections 50243, 50245, 50247, 50249, 50251, 50253, 50255, 50257, 50259, 50261, 50262, 50263, 50265, and 50267, Title 17 of the CCR, to implement the Family Cost Participation Program (FCPP), which went into effect on January 1, 2005, requir-

ing that some families pay part of respite, day care, and camping services provided for their disabled children by regional centers. Among other things, the regulations provide the following:

- The parents of a child who meet the definition under Welfare & Institutions Code § 4783(a)(1) shall be jointly and severally responsible for the assessed amount of family cost participation; however, in the case of a divorce, legal separation, or established paternity, the family cost participation assessment shall be computed on the gross annual income of both parents unless inconsistent with a court order stating otherwise.

- DDS shall develop a pamphlet describing the FCPP, and regional centers shall provide the pamphlet to the parents of children, ages 3 through 17 years, during initial intake and assessment and at all subsequent Individual Program Plan (IPP) review meetings where changes occur to day care, camping, or respite services.

- Parents whose child is Institutionally Deemed Medi-Cal eligible shall be exempt from the FCPP for that child.

- The FCPP Schedule, the official table developed by DDS and used by the regional centers to determine the amount of family cost participation, will be reflective of the Federal Poverty Guidelines as adjusted for family size and scaled by income levels and establish the lowest family cost participation at 5%. DDS shall adjust this schedule consistent with changes in the Federal Poverty Guidelines but not more often than once each calendar year.

The emergency regulations went into effect on January 1, 2005. On January 11, 2005, DDS published notice of its intent to adopt these regulations on a permanent basis. On May 2, 2005, DDS readopted the changed on an emergency basis. On June 9, 2005, DDS submitted its rulemaking file to OAL, which approved the regulations on July 22, 2005.

IMPACT ON CHILDREN: Families that meet the following conditions will be affected by the new cost participation program:

- The children are 3 through 17 years old;
- The children live at home;
- The children are not Medi-Cal eligible; and
- The family income meets a certain limit.

If a family has more than one minor child living in the home, or in a 24-hour, out-of-home placement, who are not Medi-Cal eligible, and receiving services and support paid for by the Regional Center, the cost participation amount will be adjusted. If a family has more than four children ages 3 through 17, it will not be required to participate in the program. Families with incomes below 400% of the poverty line would be exempt from the cost participation program.

Pursuant to DDS' schedule of participation rates, the lowest rate of 5% would apply to a two-member household with an annual income of \$51,320; a three-member household with an annual income of \$64,360; a four-member household with an annual income of \$77,400, and so forth. The highest rate of 80% would apply to a two-member household with an annual income of \$166,790; a three-

member household with an annual income of \$209,170; a four-member household with an annual income of \$251,550, and so forth. A family's annual co-payment cannot exceed: \$6,400 annually, if the child is age 3 through 6; \$7,000 annually, if the child is age 7 through 12; or \$7,900 annually, if the child is age 13 through 17.

According to DDS, it used the following principles to guide the implementation of the FCPP:

- All families who are financially able to participate in the cost of services provided to their children should do so.

- Family cost participation shall be developed in such a manner that will not create an unacceptable financial burden, will maintain the integrity of the family, and encourage families to continue caring for their children in their own home.

- Family cost participation will not compromise the health and safety of consumers receiving services.

- The assessment of family cost participation will not affect the development of the consumer's IPP.

- Consideration will be given to the number of family members dependent on the income and the number of children who receive services through the regional center, while either in the family's home or out-of-home, including developmental centers.

- The system must be simple and cost effective to administer.

- The amount of the family cost participation assessment will be less than the amount of the parental fee for 24-hour, out-of-home placement in order to encourage families to continue caring for their children in their own home.

- The system must not affect the DDS' eligibility for other funding sources (*i.e.*, Home and Community-Based Medicaid Waiver, Early Start funding, and others).

- The system must react to changes in family economic conditions or unforeseen, unusual family hardships, and allow for the re-determination of the level of cost participation based on those changes.

These new regulations should, according to the DDS' guiding principles, provide funding for enhanced services for children in financial need while, at the same time, balancing participating families' ability to afford mandatory co-payments.

Special Education—Highly Qualified Teachers

Section 6111, Title 5 of the CCR, requires middle and high school teachers new to the profession to meet certain highly qualified teacher requirements as mandated by the No Child Left Behind Act (NCLB). On May 20, 2005, the Board published notice of its intent to amend section 6111 to provide an alternative method a middle or high school level special education teacher, who is new to the profession, may use to demonstrate subject matter competence for purposes of meeting "highly qualified" teacher requirements. As revised, the section provides the following:

- A teacher who meets NCLB requirements and is new to the profession at the middle and high school levels, in addition to having at least a bachelor's degree and either

being currently enrolled in an approved intern program for less than three years or holding a credential in the subject taught, must have passed or completed one of the following for every core subject currently assigned:

- (1) A validated statewide subject matter examination certified by the Commission on Teacher Credentialing,
- (2) University subject matter program approved by the Commission on Teacher Credentialing,
- (3) Undergraduate major in the subject taught,
- (4) Graduate degree in the subject taught, or
- (5) Coursework equivalent to undergraduate major.

■ A new special education teacher who is currently enrolled in an approved special education intern program for less than three years or who holds a special education credential, and can demonstrate subject matter competence in mathematics, language arts, or science, may demonstrate competence in the other core academic subjects in which the teacher teaches through the High Objective Uniform State Standard Evaluation not later than two years after date of employment.

On July 5, 2005, the Board held a public hearing on these proposed changes, which it subsequently adopted. On November 15, 2005, OAL approved these changes.

IMPACT ON CHILDREN: In theory, the idea of ensuring that teachers be “highly qualified” in the subjects taught is a good one. However, putting that idea into practice has not been a success, for a variety of reasons. In August 2005, a widely published article by Ben Feller of the Associated Press reported that although most states say that more than 90% of their teachers are highly qualified, this claim is greeted skeptically because of questions over how the states define quality and how they collect their data. The article noted the following criticisms of the “highly qualified” teacher certification process:

■ The Education Trust, which advocates for poor and minority children, found many state standards are “so lax as to include virtually every teacher in the state, regardless of actual demonstration of content knowledge.”

■ The nonpartisan Education Commission of the States said most states do not use objective criteria, creating a “trap door” for teachers to escape the intent of the law.

■ The independent Center on Education Policy has cited lenient standards as one reason that states and districts report such high numbers of highly qualified teachers.

■ The National Center on Teacher Quality said many states have inflated teachers' competency by giving them credit for mentoring or committee work of years ago.

While increasing California's ability to meet NCLB standards, these new regulations do little to assure the actual high quality of teachers based on their individual classroom performance and their ability to teach their student population. Advocates continue to push for outcome measures based on individual performance rather than qualification standard based merely on a formulaic rubric.

Special Education Hearing Officers

The Individuals with Disabilities Education Act (IDEA) guarantees all children with special needs a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet each child's unique needs. Under IDEA, a Local Educational Agency must give parents an opportunity to present complaints regarding any matter related to the education or placement of the child, or the provision of a FAPE to the child. Upon occurrence of certain conditions, and upon the presentation of such a complaint, the parent or guardian is entitled to a due process hearing before an impartial hearing officer. However, no federal statute or regulation specifies a minimum set of requirements for hearing officers or spells out necessary qualifications expected of hearing officers. Consistently, federal courts have been silent on the issue.

On February 18, 2005, the Superintendent published notice of his intention to adopt new sections 3082.1, 3082.2, 3082.3, 3082.4, and 3082.5, Title 5 of the CCR, to set forth the minimum qualifications and training standards for hearing officers, as well as to provide guidance on impartiality and conflict resolution and hearing officer supervision. Among other things, the proposed regulations provide the following:

■ Hearing officers shall be attorneys licensed to practice law in California who have at least five years of full-time experience in the active practice of law, which shall have included at least two years of experience in the presentation of evidence and examination of witnesses before trial courts or quasi-judicial administrative bodies.

■ No hearing officer may assume her/his duties unless she/he possesses a working knowledge of the law and regulations governing services to pupils with exceptional needs who qualify for services under the IDEA and related California laws and regulations. Hearing officers shall also possess familiarity with precepts central to the pedagogy in special education, including services and supports available to pupils with exceptional needs; and, a demonstrated ability to write clear and concise decisions.

■ The entity responsible for conducting due process hearings shall provide ongoing training for hearing officers as may be necessary to ensure hearing officers maintain familiarity with the law, procedures applicable to due process hearings and mediations, as well as changes in other pertinent legal and substantive matters concerning special education. Subjects to be included in trainings may include, but are not be limited to, due process hearing procedures, relevant new developments in caselaw relating to IDEA and applicable California laws and regulations, and, services and supports available to pupils with exceptional needs.

■ No hearing officer will hear a case involving a contested issue of law or fact where it is established that the hearing officer has an actual conflict of interest, as defined. If at any time in the proceedings a hearing officer determines she/he has a conflict of interest, the hearing officer may not continue to preside over any further proceedings,

except to the extent it is necessary to transfer the matter or take any other further actions as necessary for the orderly change of hearing officer. • A hearing officer shall disclose to all parties any actual or apparent conflict of interest.

■ A hearing officer who has a pecuniary interest in the outcome of the hearing is presumed to have a conflict of interest.

■ A conflict of interest includes any condition that would interfere with a hearing officer's objectivity.

■ The hearing officer shall not be a current employee, agent, board member, or contractor of the local educational agency or of the Department of Education, or a spouse, parent, child, brother, sister, grandparent, legal guardian, or conservator of the pupil with exceptional needs on whose behalf the due process proceedings are being conducted.

■ Any hearing officer whose familial relationship extends to a pupil with exceptional needs shall not be associated with the hearing or disposition of a matter involving a school district or other entity in which the familial relation of the hearing officer is enrolled, has been enrolled, or prospectively is likely to be enrolled.

■ A party or attorney appearing in a due process hearing may move to remove a hearing officer. Said motion must be initiated by written motion, supported by affidavit or declaration under penalty of perjury, in which facts are alleged establishing a prima facie case that the hearing officer before whom the due process hearing is pending or to whom it is assigned has a conflict of interest or is prejudiced against any party or attorney. Said motion shall be filed with the hearing officer no more than 10 days after the date the hearing officer becomes known to the party contesting the hearing officer's impartiality. The hearing officer shall rule on the motion, subject to supervisory review.

■ Every decision issued by a hearing officer following a due process hearing shall first be approved by a supervising agent of the entity responsible for conducting due process hearings before the decision may be issued by the hearing officer. Supervising agents shall review hearing officer proposed decisions for factual and legal accuracy as well as consistency with previous decisions. A supervising agent of the entity responsible for conducting due process hearings shall be experienced and knowledgeable in special education laws and principles. Supervising agents should have at least 10 years of experience in the practice of law and possess at significant experience in matters relating to special education, as well as significant experience in civil or criminal trial courts, appellate courts or administrative bodies where quasi-judicial proceedings are conducted.

■ A supervising agent of the entity responsible for conducting due process hearings shall devote his/her professional services exclusively to the supervision or administration of hearing officers engaged in special education matters.

On August 5, 2005, the Superintendent published notice of his intent not to proceed with this regulatory action. According to the notice, the Superintendent will initiate at a later date, with notice as required by law, a new proposal

to adopt regulations pertaining to the same or similar subject matter.

IMPACT ON CHILDREN: The Superintendent's Initial Statement of Reasons supporting this proposed regulatory action indicated that during CDE staff's informal discussions with stakeholders, the staff found repeated references of conflict and complicated litigation. Many anecdotes, if not most, suggested a picture of parties involved in ongoing battles that were described in terms that sharply contrast with the image of parents and school districts working cooperatively to identify and implement a program of instruction that is best suited to provide FAPE for the child, as surely envisioned by the drafters of the IDEA. Based on the current adversarial nature of these hearings, it is imperative to have competent, trained, and impartial hearing officers presiding over the proceedings. Child advocates urge the Superintendent to re-institute his effort to put into regulation minimum requirements that will help produce well-reasoned, well-written and fair decisions for the benefit of the parties—especially the children involved in these proceedings.

Medi-Cal Specialty Mental Health Services

On July 29, 2005, the Department of Mental Health published notice of its intent to adopt sections 1810.100 through 1850.505, Title 9 of the CCR, to implement, interpret, and make specific Welfare and Institutions Code sections 5775–5780 and 14680–14685, which provide for the phased implementation of managed mental health care for Medi-Cal beneficiaries through fee-for-service or risk-based contracts with mental health plans (MHPs). These proposed regulations would establish requirements for the second phase of implementation, which combines the first phase, which consolidated the authorization and funding of Medi-Cal reimbursed psychiatric inpatient hospital services, with the consolidation of the authorization and funding of other specialty mental health services. The primary goal of this program change is to create improved quality of care and access to specialty mental health services for Medi-Cal beneficiaries in the most cost-effective manner possible.

Regarding children, one of the package's most relevant provisions is proposed section 1830.210, which establishes medical necessity criteria consistent with federal Medicaid and state Medi-Cal requirements for specialty mental health services for beneficiaries under 21 years of age who are eligible for EPSDT services under federal law. Specifically, subsection (a) provides the medical necessity criteria for these children, which differ from those applicable to all other beneficiaries in the criteria used to determine the impairment and appropriateness of an intervention. For these children, a service is generally medically necessary if it corrects or ameliorates the beneficiary's mental illnesses. Specific criteria in this subsection are based on the applicable regulation governing the regular Medi-Cal program, with modifications necessary to focus on specialty mental health issues only.

Subsection (b) explains that if other appropriate specialty mental health services are available through the MHP on a timely basis, requests for EPSDT supplemental specialty mental health services may not be approved.

Subsection (c) provides guidelines for the MHP's approval of an EPSDT supplemental specialty mental health service when an institutional level of care may be more cost effective than the EPSDT supplemental specialty mental health service. The determination of whether or not an institutional level of care is available must be consistent with the stipulated settlement in the case of *T.L. v. Belshé*; therefore, a reference to the settlement is included.

DMH held a public hearing on the proposal on September 16, 2005. At this writing, the regulations await submission to OAL for review and approval.

IMPACT ON CHILDREN: During the public comment period, it was suggested by the California Alliance of Child and Family Services that if a child can be served at home, in his own community, then he should be, even if it costs more. Unfortunately, DMH dismissed this suggestion, contending that its proposed language is consistent with the requirements of section 51340(m), Title 22 of the CCR, which requires that DMH not approve a request for EPSDT diagnostic and treatment services or EPSDT supplemental services in home and community-based settings if the Department determines that the total cost incurred by the Medi-Cal program for providing such services to the beneficiary is greater than the total costs incurred by the Medi-Cal program in providing medically equivalent services at the beneficiary's otherwise appropriate institutional level of care, where medically equivalent services at the appropriate level are available in a timely manner. Thus, children will not be served in what would arguably be the most comfortable and convenient setting for their treatment.

Update on Previous Rulemaking Packages **Vouchered Respite**

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

On September 10, 2004, DDS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 19.)

Update: On December 22, 2004, DDS readopted these provisions on an emergency basis. On April 19, 2005,

DDS transmitted a Certificate of Compliance to OAL, which filed it on May 18, 2005.

Habilitation Transfer

On July 22, 2004, DDS amended—on an emergency basis—sections 54302, 54310, 54320, and 54370, and adopted new sections 54351, 58800, 58801, 58810, 58811, 58812, 58820, 58821, 58822, 58830, 58831, 58832, 58833, 58834, 58840, 58841, 58842, 58850, 58851, 58860, 58861, 58862, 58863, 58864, 58870, 58871, 58872, 58873, 58874, 58875, 58876, 58877, 58878, 58879, 58880, 58881, and 58882, Title 17 of the CCR, to enable DDS to assume all functions and responsibilities with respect to the administration of the Habilitation Services Program (HSP). On October 29, 2004, DDS published notice of its intent to adopt these regulatory changes on a permanent basis. On November 29, 2004, DDS readopted these provisions on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 20.)

Update: On March 30, 2005, DDS readopted these provisions on an emergency basis. On June 21, 2005, DDS transmitted a Certificate of Compliance to OAL, which filed it on August 1, 2005.

CHILD CARE / CHILD DEVELOPMENT

New Rulemaking Packages

Child Development: Child Protective Services and At-Risk Children

SB 1104 (Committee on Budget and Fiscal Review) (Chapter 229, Statutes of 2004) requires child care and development contractors to change the amount of child care and development services provided to families if the family has children who are recipients of child protective services and who are at risk of abuse, neglect, and exploitation. In addition, child care and development contractors must collect family fees if the family has children who are recipients of protective services or who are at risk of abuse, neglect, or exploitation, unless they are exempt from paying fees for no more than a combined total of up to twelve months based on the referral from the county welfare department, child welfare services worker or a legal, medical, or social services agency or emergency shelter.

On May 6, 2006, the Superintendent of Public Instruction amended—on an emergency basis—sections 18066, 18069, 18078, 18081, 18083, 18084, 18092, 18103,

18106, 18109, and 18110, and adopt new section 18092.5, Title 5 of the CCR, to facilitate implementation of SB 1104 by providing procedures for child care and development contractors to follow for children receiving child protective services and children at risk of abuse, neglect, or exploitation. Among other things, the rulemaking action defines the term “at risk of abuse, neglect, or exploitation” to mean a child who has been identified by a legally qualified professional in a legal, medical, or social services agency, or emergency shelter as being at risk of abuse, neglect, or exploitation, and referred for child care and development services.

New section 18092.5 provides that if eligibility and need for federal and state subsidized child development services as specified in Education Code sections 8263(a)(1) and (a)(2) are based on the child being at risk of abuse, neglect, or exploitation, the basic data file shall contain a written referral, dated within the six months immediately preceding the date of application for services from a legally qualified professional from a legal, medical, social service agency, or emergency shelter certifying that:

- The child is at risk of abuse, neglect, or exploitation and that the family needs child care and development services; and
- The probable duration of the need for child care and development services; and
- The name, business address and telephone number, and signature of the legally qualified professional from the legal, medical, or social services agency, or emergency shelter who is making the referral and the name of the agency or shelter with whom the individual is associated.

The amendments also provide that families receiving services because the child is at risk of abuse, neglect, or exploitation, may be exempt from paying fees for up to three months if the referral prepared by a legally qualified professional from a legal, medical, or social services agency, or emergency shelter specifies that it is necessary to exempt the family from paying a fee. Families receiving services because the child is receiving protective services may be exempt from paying fees for up to twelve months if the referral prepared by the county welfare department, child welfare services worker specifies that it is necessary to exempt the family from paying a fee. The cumulative period of time of fee exemption for families specified above shall not exceed twelve months.

On May 20, 2005, the Superintendent published notice of his intent to adopt these changes on a permanent basis. On September 2, 2005, the Superintendent forwarded a certificate of compliance to OAL, seeking approval of the changes on a permanent basis. However, on October 14, 2005, OAL notified the Superintendent of its disapproval of the certificate of compliance; the Superintendent subsequently readopted the changes on an emergency basis on that same date. Following that action, a new certificate of compliance was required to be transmitted to OAL on or by February 13, 2006. However, the Superintendent failed to transmit the certificate by that day, meaning that the emer-

gency language should have been repealed by operation of law on the following day.

IMPACT ON CHILDREN: Children who are recipients of child protective services or who are identified as being at-risk of abuse, neglect, or exploitation based on a referral from a qualified professional in a legal, medical, or social services agency, or an emergency shelter receive first priority for subsidized child care services. Prior to SB 1104, families receiving subsidized child care based on this criteria were exempt indefinitely from income eligibility requirements and family fees. Subsequent to the passage of SB 1104, at-risk and CPS families will continue to receive first priority for child care; however, SB 1104 places new time limits on eligibility and family fee exemptions.

Prior to SB 1104, a family who was receiving subsidized child care services on the basis of a child being at-risk of abuse, neglect, or exploitation was eligible to receive subsidized child care services for up to six months. Before the end of the six-month period, a new referral could be obtained and child care services could continue. As a result of SB 1104, a family who is receiving child care on the basis of a child being at-risk is now limited to receiving up to three months of subsidized child care. A qualified professional from a legal, medical, or social service agency, or an emergency shelter will no longer be able to issue a new referral to extend the provision of child care services beyond three months. However, child care services will continue to be provided if a county child welfare agency certifies that the child is receiving child protective services and the family requires care or if the family is otherwise eligible.

SB 1104 states that a family may receive child care services for up to 12 months if a county child welfare agency certifies that the child is receiving child protective services and the family requires care for the child. The 12-month time limit can be extended if the county child welfare agency issues another referral authorizing child care services. The certification process that county welfare agencies currently have in place may continue to be used while the child is receiving child protective services and the family needs child care services. If the child is no longer receiving child protective services and if the family is otherwise eligible, the family may continue to receive child care services and will be required to pay a family fee, when applicable.

SB 1104 states that all families will be subject to paying a fee, except that at-risk families may be exempt from paying fees for the first three months of service, and CPS families may be exempt from paying a fee for twelve months. The combined time period for the fee exemption cannot exceed twelve months.

Limiting a family who is receiving child care on the basis of a child being at-risk of abuse, neglect, or exploitation to just three months of subsidized child care is an unfortunately short-sighted decision. Extending subsidized child care for these families for a longer period provides them with a more meaningful opportunity to make sys-

temic changes that could insulate the child from further risk of abuse, neglect, or exploitation, and that could possibly eliminate future expense *vis-à-vis* the child welfare system. This is particularly true now that California is participating in the Title IV-E Child Welfare Waiver Demonstration Capped Allocation Project (CAP). On March 31, 2006, the US Department of Health and Human Services approved California's Title IV-E Waiver proposal, which will allow counties to spend Title IV-E funds on both eligible and non-eligible children and families, and provide payments for services that are not currently allowed under Title IV-E regulations. Under the current system, funding must go toward administrative costs and placement in foster and group homes. The goal of the waiver is to allow more children to stay in their own homes, by funding prevention and treatment services for the children and their families, and to decrease the reliance on out-of-home care. Twenty counties will be allowed to participate in the CAP. Children in these participating counties will benefit from the greater access this regulation package provides to child care services.

Family Child Care Home Reporting Requirements and Family Child Care Consumer Awareness Information

On July 1, 2005, DSS published notice of its intent to adopt new sections 102416.2 and 102416.3, and amend sections 102419 and 102423, Title 22 of the CCR, to require licensees to notify parents/authorized representatives and DSS of any unusual incident or injury to any child while in care in a licensed family child care home. Specifically, the new language provides that when any of the following events occur during the operation of a family child care home, a report shall be made to DSS by telephone or fax during DSS' next business day between 8:00 a.m. and 5:00 p.m., and a written report shall be submitted to DSS within seven calendar days following the occurrence of such an incident/injury:

- the death of any child in care from any cause;
- any incident or injury to any child that requires professional medical treatment;
- any act of violence that occurs while children are in care, such as a physical altercation between adults or teenagers, as well as altercations between children in care resulting in any injury;
- any instance where a child in care is missing, even if the child is later found safe;
- any physical, sexual, or emotional abuse of any child in care;
- fires or explosions occurring in or on the premises of the family child care home;
- epidemics or suspected outbreaks of communicable diseases involving two or more children;
- poisonings; or
- catastrophes.

Information provided by the licensee shall include the child's first name, middle initial, date of birth, sex, and date

of admission; the child's or parent's primary language; date and time the incident or injury happened; the date that the parent(s)/authorized representative(s) were notified of the incident or injury; a description of how the incident or injury happened and name of the child(ren) or adult(s) who may have been involved, as well as a description of steps taken to prevent the same type of injury from occurring in the future; the name and telephone number of any doctor or other health care provider who examined the child; and any agency notified, person contacted, date of the contact, and the telephone or fax number of that agency or person.

Whenever a child in the licensee's care has suffered any injury or has been subjected to any act of violence, or has been involved in any event that is required to be reported to DSS (see above), the licensee shall report the unusual incident, injury, act, or event to the parent(s)/authorized representative(s) of the child no later than the same business day.

The new language also provides that prior to making alterations or additions to a family child care home or grounds, the licensee must notify DSS of the following proposed changes:

- conversion of a garage (either attached or detached) into a "child care" room;
- room additions to the family child care home;
- installation of in the ground or above the ground swimming pools, spas, fish ponds, decorative water feature, fountains, or other bodies of water;
- construction of exterior deck or porches;
- construction of play equipment, including swing sets and climbing structures;
- changes in "off limits" areas of the family child care home.

DSS may require the licensee to obtain an inspection by the local building inspector to ensure that no hazard to the health and safety of children exists as a result of the alteration, addition, or construction.

DSS held a public hearing on these proposed changes on August 17, 2005. At this writing, the changes await review and approval by OAL.

IMPACT ON CHILDREN: The portion of this rule-making action regarding the reporting of injuries or acts of violence implements AB 685 (Wayne) (Chapter 679, Statutes of 2001), sponsored by the San Diego County Board of Supervisors at the recommendation of a county task force convened in the wake of a young boy's death while in the care of a licensed family day care provider. The injury-reporting provisions were amended in to help overcome the difficulty in assessing the level of danger and nature of risk that children face in licensed child care in the absence of data. These provisions were intended to provide DSS and the Legislature with data on injuries, in order to assist the state in its efforts to ensure the safety of children in state-licensed child care. This type of data could reveal patterns in terms of types of injuries or types of facilities or circumstances that most often lead to injuries.

Section 102416.2(b) requires a licensee to report changes in household composition, including “adults moving in and out of the home.” The intent of this section is to help ensure that criminal background checks are completed for a specified group as required by Health and Safety Code section 1596.871(b) to obtain the mandated safety clearance; this section outlines a detailed process for obtaining security clearance for “any person, other than a child, residing in a facility.” Specifically, it requires that a person who intends to reside in the home provide fingerprints and a statement signed under penalty of perjury regarding any prior criminal conviction prior to their residence. The proposed section 102416.2(b) does little to help clarify or aid in the implementation of this requirement.

Neither the statute nor the proposed regulation defines “reside” for the purpose of obtaining a background check. This lack of definition leaves the discretion to the providers to determine when a person in the house would qualify as “residing in the facility” and may create opportunities where DSS and the licensee disagree about when the licensee has a new resident. Instead of restating the requirements of Health and Safety Code section 1596.871(c), the proposed regulation should require further clarification of what constitutes “residing.” Child advocates prefer establish a short timeframe (e.g., two weeks) that triggers the reporting requirement, as the opportunity for harm to a child increases with time.

According to DSS’ Initial Statement of Reasons, section 102416.3(a)(2) “establishes the Department’s authority to require a licensee to obtain an inspection by a building inspector or a fire clearance.” Health and Safety Code 1596.82 already allows DSS “to contract with state, county, or local agencies to assume specified licensing, approval, or consultation responsibilities.” Thus, the proposed regulation appears redundant to existing statute.

It is also redundant of the local building permitting and inspection process, which require permits for many types of home alterations or additions and includes inspections. The Initial Statement of Reasons recognizes the existence of this mechanism by noting that many facility alterations have been completed without the required permits. However, the proposed regulations add another burdensome oversight layer that appears unnecessary. CAI agrees with DSS that ensuring proper construction contributes to the health and safety of the children in the facilities. However, the Department may want to consider establishing a process to ensure that the licensee has undertaken the proper steps at the local level. For example, it could require that a licensee provide documentation that any necessary permits have been obtained from the local jurisdiction for projects. DSS could then be assured that the proper steps have been taken to address building requirements, but would not require the Department to decide what changes would require inspection. This responsibility would properly remain at the local level.

Criminal Record Clearance/Exemption and *Gresher v. Anderson*

On January 27, 2006, DSS published notice of its intent to amend sections 80019, 80019.1, 80054, 87219, 87219.1, 87454, 87819, 87819.1, 87854, 88019, 101170, 101170.1, 101195, 102370, 102370.1, and 102395, Title 22 of the CCR, in order to make changes to the criminal record clearance provisions, the criminal record exemption provisions, and the penalties provisions.

Under the proposed changes, to request a criminal record exemption, a licensee or license applicant must submit information that indicates that the individual meets the requirements of section 80019.1(c)(4). DSS will notify the licensee or license applicant and the affected individual, in concurrent, separate notices, that the affected individual has a criminal conviction and needs to obtain a criminal record exemption. The notice to the affected individual shall include a list of the conviction(s) that DSS is aware of at the time the notice is sent, and will list the information that must be submitted to request a criminal record exemption. Also, individuals may request a criminal record exemption on their own behalf if the licensee or license applicant, among other things, chooses not to employ or terminates the individual’s employment after receiving notice of the individual’s criminal history, or removes the individual who resides in the facility after receiving notice of the individual’s criminal history. Exemption denial notices shall specify the reason the exemption was denied.

DSS held a public hearing on these proposed changes on March 15, 2006. At this writing, the changes await review and approval by OAL.

IMPACT ON CHILDREN: This regulatory package implements recent statutory changes, as well as the First District Court of Appeal holding in *Gresher v. Anderson* (2005) 127 Cal. App. 4th 88, a proceeding that questioned DSS’ handling of the process for exempting certain community and child care workers from the ban on employment imposed on those with criminal convictions. The court concluded that DSS’ process was unduly restrictive in a number of respects, and specifically ordered that DSS permit certified family home employees to seek exemptions on their own behalf; permit terminated employees to seek exemptions after their employers receive notice of criminal history, without requiring that the notification have caused the termination; include in the “exemption needed” notice information specifying the convictions to be addressed in an exemption request; stop closing Trustline applications from persons in deferred judgment or pretrial diversion programs; and notify persons denied an exemption of the basis for the denial in terms sufficiently specific to permit a reasonably informed decision on whether to pursue an administrative appeal.

Thus, these changes primarily benefit adults with criminal convictions and those who are in deferred judgment status or participating in pretrial diversion programs, by helping facilitate their ability to engage in community and

child care work. It remains to be seen if relaxing these standards will have a detrimental effect on the children involved in those settings or if, as hoped, they will increase the number of individuals available to provide quality child care to children.

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

On April 30, 2004, DSS published notice of its intent to amend—on a permanent basis—sections 80044, 80045, 80066, 80070, 84063, 87344, 87345, 87566, 87570, 87571, 87844, 87866, 87870, 88069.7, 88070, 89119, 89182, 89244, 89245, 89370, 89566, 101200, 101201, 101217, 101221, 102391, and 102392, Title 22 of the CCR, to give DSS Community Care Licensing (CCL) staff the express authority to copy client or facility documents, or to remove them if necessary for copying, thus, emphasizing the licensing program's authority to audit and inspect facilities, and to copy facility records on demand during normal business hours. The proposed regulations also contain safeguards that prohibit the licensing staff from removing emergency or health-related information (which is separately defined for each type of facility), unless other copies of those documents are available, and set out standards for the safe removal and timely return of records to facilities. Specifically, the regulations require the licensing staff to create a list of records to be removed, sign and date the list upon removal, leave a copy of the list with the facility administrator, and return the records undamaged and in good order within three business days. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 20 and Vol. 5, No. 1 (2004) at 18.)

Update: On May 9, 2005, OAL approved DSS' adoption of these changes.

EDUCATION

New Rulemaking Packages

California High School Exit Examination

On February 16, 2006, the Board adopted, on an emergency basis, new sections 1207.1 and 1207.2, and amendments to sections 1204.5, Title 5 of the CCR, regarding the California High School Exit Examination (CAHSEE) regulations. Amendments to section 1204.5 provide that eligible adult students shall have up to three opportunities per year to take the section(s) of the examination not yet passed and may elect to take the examination during these opportunities.

New sections 1207.1 and 1207.2 implement SB 517 (Romero) (Chapter 3, Statutes of 2005), urgency legislation that was enacted as part of the settlement in *Chapman v. Board of Education, et al.*, Alameda County Case No. 2002-049636. These provisions set forth a one-year exemption of the requirement to pass the CAHSEE for students with disabilities in the class of 2006 who satisfy certain requirements.

On March 17, 2006, the Board published notice of its intent to adopt these provisions on a permanent basis; a public hearing is scheduled for May 3, 2006. The Board must transmit a certificate of compliance to OAL by July 14, 2006, or the emergency language will be repealed by operation of law on the following day.

IMPACT ON CHILDREN: The *Chapman* lawsuit was originally brought to court in 2001, challenging the CAHSEE as an invalid and discriminatory test for students with disabilities. The plaintiffs, students with disabilities throughout the state who must pass the CAHSEE to receive a high school diploma, alleged that defendants failed to provide an alternate assessment for students with disabilities. Under the terms of settlement reached on August 26, 2005, a procedure is established for certain students with disabilities in the class of 2006 to be excused from the requirement of passing the CAHSEE as a condition of receiving a high school diploma.

The other part of this regulatory action benefits adults seeking to pass the CAHSEE. Previously, adult students had just two opportunities per year to take the portion(s) of the CAHSEE not yet passed. However, the Department received substantial feedback from the adult education community that many adult students are in circumstances that present an urgent need to obtain a high school diploma. Allowing them to take the exam three times per year should assist them in meeting this goal.

Program to Reduce Class Size in Two Courses in Grade 9

Education Code sections 52080–52090 establish the Program to Reduce Class Size in Two Courses in Grade 9 (“Grade 9 CSR”), under which funding is apportioned to school districts that limit the size of classes in specified courses to an average of 20 students per teacher (and no

more than a maximum of 22 students in any individual class). Education Code section 52084(h) calls for the Board of Education to adopt regulations implementing Grade 9 CSR. In particular, the regulations must address the pupil enrollment that may be certified for apportionment purposes under Grade 9 CSR.

On March 18, 2005, the Board published notice of its intent to adopt sections 15140 and 15141, Title 5 of the CCR, to define certain terms and provide for the certification of enrollment necessary to properly apportionment funds for Grade 9 CSR.

Among other things, the new language provides that the term “student to teacher ratio” means the school-wide average number of students per certificated teacher for all participating Grade 9 CSR classes, regardless of the subject. Each participating school must have a student to certificated teacher ratio no greater than 20 to 1, with no more than 22 pupils in any participating class. Students who are recognized as being in grades 10, 11, or 12, but who are nonetheless enrolled in participating classes are to be included in the total number. The result is rounded to 2 decimal places. A result of 20.49 or less will be rounded down to 20, and a result of 20.50 or greater will be rounded up to 21. Any school with a ratio of 20.50 or greater is not eligible to receive funding.

On May 3, 2005, the Board held a public hearing on this rulemaking package, and subsequently adopted it. On August 1, 2005, these changes were approved by OAL.

IMPACT ON CHILDREN: These revisions implement the Morgan-Hart Class Size Reduction Act of 1989, which authorized the reduction of class sizes in grades nine through 12, inclusive, in the subject areas of English, mathematics, social studies, and science. Regrettably, that Act has never been fully funded, and the Legislature subsequently enacted SB 12 (O’Connell) (Chapter 334, Statutes of 1998), to provide for a new class size reduction program in grade 9. Among other things, SB 12 provides \$135 per unit of full time equivalent enrollment per school for up to two 9th grade classes in English, mathematics, science, and social studies (as specified) which are required for graduation; requires that one of the two courses be English; and requires that the courses average 20 pupils each, not to exceed 22 pupils each.

Although most class size reduction evaluation and research has focused on efforts in the primary grades, it generally supports the efficacy of such efforts. However, more effort must be made to implement CSR in schools serving minority and low-income students, and to ensure that there are sufficient facilities and qualified teachers to handle such implementation.

Grant Program for Healthy Start

The Healthy Start Support Services for Children Act seeks to overcome barriers to healthy productive lives for children in need of assistance by creating a learning environment that is optimally responsive to the physical, emotional, and intellectual needs of each child; fostering inter-

agency collaboration and communication at the local level to more efficiently and effectively deliver human support services to children and their families; encouraging the full use of existing agencies, professional personnel, and public and private funds to ensure that children are ready and able to learn, and to prevent duplication of services and unnecessary expenditures; and encouraging the development of a local interagency oversight mechanism that includes a records system to evaluate cost and effectiveness, and the development of a process of self-assessment of those records and the way in which they are used, to improve the effectiveness of the services.

On May 20, 2005, the Board published notice of its intent to amend sections 11900, 11905, 11915, 11920, 11925, 11930, and 11935, Title 5 of the CCR, to provide necessary technical clean-up of inaccuracies in current regulations implementing Healthy Start. The proposed amendments also remove unneeded reformatting requirements; provide a more realistic timeline for appeals, which will ensure that grant funds reach local education agencies in a timely manner; add guidance for the awarding of grants; remove consultation requirements regarding appeals with the Healthy Start Council; reestablish the intent of the Legislature for a competitive request for applications process; and add federal confidentiality requirements for student records and medical records.

The Board held a public hearing on these revisions on July 5, 2005, and subsequently adopted the rulemaking package. On October 19, 2005, OAL approved these revisions, which took effect on November 18, 2005.

IMPACT ON CHILDREN: According to the Department of Education, Healthy Start evaluation results show a strong initiative that offers positive support and guidance for students and families, especially those most in need. Healthy Start schools show increases in test scores, improvements in children’s classroom behavior, and a greater parent involvement in school activities. The Department credits the Healthy Start program with the achievement of statistically significant school-wide improvements, including the following:

- standardized tests scores for grades one through three increased significantly, as compared to similar schools without Healthy Start;
- middle and high school students most in need showed nearly a 50% increase in grade point averages;
- parent participation increased for all school activities; and
- student mobility was reduced.

The Department also credits Healthy Start for a decrease in school violence, a decrease in violence and child abuse in homes, improvement in self-concept, and a decrease in drug use. According to the Department, for every state dollar provided, Healthy Start returns an estimated \$4 in otherwise untapped local, county, and federal funds. These regulatory amendments increase the viability of the Healthy Start programs.

Student Right to Leave Schoolroom, School Premises

In early 2005, the State Board of Education asked OAL to repeal three provisions in Title 5 of the CCR. Contending that the action would have no regulatory effect, the Board did not engage in the formal rulemaking process of the APA prior to requesting the repeal. The three sections at issue are the following:

- Rule 303, which provides: “A pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school.”

- Rule 304, which provides: “Every pupil shall leave the schoolroom at recess unless it would occasion an exposure of health.”

- Rule 352, which provides: “A pupil shall not be required to remain in school during the intermission at noon, or during any recess.”

In support of its proposed action, the Board opined that sections 303, 304, and 352 are in conflict with Education Code section 44807.5, which provides that the governing board of a school district may adopt reasonable rules and regulations to authorize a teacher to restrict for disciplinary purposes the time a pupil under his/her supervision is allowed for recess. The Board contended that because of the conflict, the regulation sections are invalid as a matter of law, and should be repealed.

On April 19, 2005, OAL disapproved this attempted change, finding that the Board failed to make the required demonstration for the deletion of these rules. Regarding section 303, OAL found there to be no inherent conflict demonstrated between the rule and the cited statute, noting that requiring a pupil to stay in the classroom during recess does not conflict with a requirement that the student remain on the school premises.

OAL found that any potential conflict that may exist between sections 304 and 352 and section 44807.5 could be harmonized by amending the regulations to add an exception for a restriction of the time allowed for recess. OAL concluded that the cure for the potential inconsistency is amendment rather than deletion of the rules. Accordingly, the Board did not make the requisite showing that a deletion of the regulations would not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of the rules.

At this writing, the Board has not commenced the formal rulemaking process to amend these provisions.

IMPACT ON CHILDREN: The three regulations at issue here have been in effect since 1969; section 44807.5 was added to the Education Code in 1981. If there is in fact any conflict between section 44807.5 and the regulations, such would have been true for well over two decades. Child advocates urge the Board to engage in a zealous review of all of its regulations, and update them as needed on a timely basis, in order to provide all children with the optimal educational experience.

Academic Assistance Program

Existing law authorizes the California Educational Facilities Authority to award grants to eligible private colleges to provide a program of academic assistance and services to pupils attending a qualified school, as defined, in order to inform the pupils of the benefits of, and the requirements for, higher education; prepare these pupils for college entrance; or to provide programs, such as academic enrichment and mentoring programs, that advance the academic standing of those pupils. Existing law requires the Authority to develop selection criteria and a process for awarding grants that take into account at least certain factors when selecting recipients and determining grant amounts.

On June 17, 2005, the Authority published notice of its intent to adopt sections 9001, 9005, 9006, 9007, 9025, 9027, 9050, 9051, 9052, 9053, 9054, 9055, 9056, 9057, 9058, 9059, 9060, 9061, 9062, 9063, 9064, 9065, 9066, 9067, 9068, 9069, and 9070 and amend sections: 9020, 9030, 9031, 9032, 9041, and 9043, Title 4 of the CCR, to define terms and adopts standards, an application form, instructions, and procedures for the administration of the Academic Assistance Program. Among other things, the regulations:

- establish selection criteria and a process for awarding grants;

- specify which programs may be funded;

- authorize the Authority to grant maximum awards of \$250,000 to qualified schools for eligible programs that do not exceed the dollar amount of the grant award;

- establish that all eligible private colleges interested in applying for a grant must complete an application;

- specify the time and manner of submitting an application to the Authority;

- detail the information required to be submitted in an application for a grant including financial information, organization information, legal information, information and certification regarding religion, an agreement and certification and a grant agreement;

- detail the manner in which applications will be reviewed, scored and ranked by staff;

- detail the criteria that will be used in evaluating applications including program effectiveness and commitment to success of the program, and program feasibility;

- provide for notifying applicants of their scores and the proposed amount of initial allocation, establish a minimum score required for funding, and allow for incremental grant disbursements;

- establish an appeals process for applicants including the circumstances under which an appeal may be filed, the timing of the appeal, and the review of the appeal by the staff and Authority;

- provide for approval by the Authority of proposed grant awards and notification of approval to recipients;

- specify when the Authority, at its discretion, can award grants, in the event there are remaining grant funds after the first funding round;

- specify when the Authority or the Authority staff may have the discretion to consider a change in use of the grant funds;

- specify the terms and conditions that must be included in the agreement to be executed by the grantee;

- specify the information that must be provided to satisfy this requirement including verification that all other funds, if needed are in place, receipt of an executed grant agreement, and documentation that all conditions of funding have been satisfied;

- specify the documentation and time-frame for the expenditure of grant funds and requires the return of funds to the extent that matching funds were not received;

- specify that allocated grant funds that are returned for any reason are to be distributed to the next highest scoring applicant not receiving a grant allocation or if no such applicant exists or the applicant's project has been abandoned, then distribution will be made at the Authority's discretion in a manner consistent with the goals and spirit of the Act;

- require recipients to retain all program and financial data and to provide audited information to the Authority upon request; and

- clarify the basis of a determination to require a recovery of grant funds for the grantee's failure to implement the program according to specified award terms.

On October 27, 2005, OAL approved the Authority's amendments.

IMPACT ON CHILDREN: These regulations implement SB 1624 (Romero) (Chapter 1081, Statutes of 2002), which authorized the Authority to use up to \$2 million, on a one-time basis, of its fund balance to provide grants to private colleges in order to support programs of academic assistance to middle and high school pupils attending schools meeting specified criteria—typically schools in low-income areas and where the percentage of pupils eligible for admission to either the California State University or University of California is below the statewide average. This worthwhile cause should be rolled out on a permanent basis, and be funded accordingly to have a more meaningful impact on the rate of college application and acceptance in these underperforming middle and high schools.

Reading First Plan

California's Reading First Plan, as approved by the U.S. Department of Education on August 23, 2002, is required to have a clear definition of the term "significant progress" in order to determine which Reading First districts will continue to receive funding and which will be discontinued. On January 20, 2006, the Board published notice of its intent to adopt new sections 11991 and 11991.1, Title 5 of the CCR. These new provisions set forth a measure, the Reading First Achievement Index (RFAI), to determine whether a district is making "significant progress" in improving reading achievement in grades K–3 in Reading First schools.

The board held a public hearing on these changes on March 6, 2006. At this writing, the proposal awaits adoption by the Board, and review and approval by OAL.

IMPACT ON CHILDREN: The No Child Left Behind (NCLB) Act establishes Reading First as the primary national initiative aimed at improving reading in grade K–3 classrooms. California has been approved to receive approximately \$133 million. Most of the funds will be available for competitive grants for eligible school districts to use to improve classroom instruction in reading. Implementation of this definitional regulation will help assure California does not lose access to the important school funding source.

Rural Flexibility — NCLB Requirements

The No Child Left Behind Act (NCLB) requires that all teachers of core academic subjects meet the federal definition of "highly qualified teacher" no later than the end of the 2005–06 school year. Schools that receive Title 1 funds are currently required to hire only teachers that meet the federal definition of "highly qualified teacher." Core academic subjects include English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

While federal law defines the dates for establishing compliance with the law, additional flexibility has been offered for specific single subject credentialed teachers in identified small rural schools. Thus, on January 20, 2006, the Board published notice of its intent to amend sections 6110 and 6112, and adopt new section 6113, Title 5 of the CCR, to establish new flexibility for teachers employed by rural schools, eligible to participate in the Small Rural School Achievement (SRSA) program, to achieve certification as a highly-qualified teacher. Specifically, the changes provide that a teacher hired by a small rural Local Educational Agency (LEA), as defined by the Small Rural School Achievement (SRSA) program, after the end of the 2003–04 school year, to teach multiple subjects must meet NCLB requirements in at least one core academic subject assigned but will have three years from the date of hire to obtain highly qualified status in all other core academic subjects taught.

A teacher hired by a rural LEA, as defined by the SRSA program, before the end of the 2003–04 school year, to teach multiple subjects must meet NCLB requirements in at least one core academic subject assigned but will have until the end of the 2006–07 school year to obtain highly qualified status in all other core academic subjects taught.

In order to use this flexibility, covered LEAs will need to (1) provide high-quality professional development that increases the teachers' content knowledge in the additional subjects they teach; and (2) provide mentoring or a program of intensive supervision that consists of structured guidance and regular, ongoing support so that teachers become highly qualified in the additional core academic subject(s) they teach.

The Board held a public hearing on these proposed changes on March 6, 2006, and subsequently adopted

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

IMPACT ON CHILDREN: In theory, the idea of ensuring that teachers be “highly qualified” in the subjects taught is a good one. However, putting that idea into practice has not been a success, for a variety of reasons. In August 2005, a widely published article by Ben Feller of the Associated Press reported that although most states say that more than 90% of their teachers are highly qualified, this claim is greeted skeptically because of questions over how the states define quality and how they collect their data. The article noted the following criticisms of the “highly qualified” teacher certification process:

- The Education Trust, which advocates for poor and minority children, found many state standards are “so lax as to include virtually every teacher in the state, regardless of actual demonstration of content knowledge.”

- The nonpartisan Education Commission of the States said most states do not use objective criteria, creating a “trap door” for teachers to escape the intent of the law.

- The independent Center on Education Policy has cited lenient standards as one reason that states and districts report such high numbers of highly qualified teachers.

- The National Center on Teacher Quality said many states have inflated teachers' competency by giving them credit for mentoring or committee work of years ago.

While this increased flexibility will allow rural district to hire teachers in rural areas without risk of losing eligibility for funding under NCLB, it remains to be seen if this will actually benefit children by decreasing class size (a proven benefit to academic achievement).

Additionally, while improving California's ability to meet NCLB standards, these new regulations do little do assure the actual high quality of teachers based on their individual classroom performance and their ability to teach their student population. Advocates continue to push for outcome measures based on individual performance rather than qualification standard based merely on a formulaic rubric.

School Community Violence Prevention Grant Program

Each year, the Department of Education and the Office of the Attorney General identify via competitive application processes those school sites in California that are in greatest need of intensive school safety programs and fund those programs from the state budget appropriations established for the purpose. The schools with greatest need for intensive school safety programs are those in which there are circumstances such as escalating gang or other youth violence, lack of preparedness for crisis situations such as terrorist threat or natural disaster, or in which student fears of interpersonal violence are interfering with the learning process.

In enacting AB 825 (Firebaugh) (Chapter 871, Statutes of 2004), the Legislature consolidated all of the state's school safety competitive grant programs into one school

safety consolidated competitive grant program, intended to accomplish the purposes of the previous competitive grant programs; that program will be called School Community Violence Prevention (SCVP).

In order to implement the program on an expedited basis, the Department adopted emergency regulations in January 2006. Specifically, sections 11987, 11987.1, 11987.2, 11987.3, 11987.4, 11987.5, 11987.6, and 11987.7, Title 5 of the CCR, specify application submission rules, criteria for scoring applications and awarding grants, allowable/non-allowable uses of grant funds, annual reporting requirements for grant recipients, and the manner in which grant recipients will be reimbursed for program expenditures.

- Grants may be awarded for up to \$500,000 spread across a grant period of up to five years. Grants shall not be renewable for the same school site.

- Applications will be scored on the following four elements: demonstration of need, strength of collaborative process, quality of the proposed violence prevention plan program, and reasonableness of budget.

- Funding for administrative personnel, other than the project coordinator position(s), will not be approved. Allowable budget items are for personnel who provide direct services to students, as well as for associated training, services, program materials, and supplies.

- The funds made available for the SCVP program shall be used to supplement, not supplant, existing school safety programs.

A certificate of compliance must be transmitted to OAL by May 19, 2006 or the emergency language will be repealed by operation of law on the following day

IMPACT ON CHILDREN: The SCVP program consolidates six previously existing school violence prevention programs: (1) Safe School Planning and Partnership; (2) School Community Policing; (3) Gang-Risk Intervention; (4) Safety Plans for New Schools; (5) School Community Violence Prevention; and (6) Conflict Resolution. In the Budget Act of 2005, \$16 million was appropriated to fund these grants. Unfortunately, there was no provision in AB 825 for this program to receive annual funding increases; thus, any increases for growth and cost of living will be provided at state option through the annual Budget Act.

Results from a recent California student survey revealed the following facts:

- In the twelve-month period prior to the survey, nearly 25% of students, across grades, reported that they had been harassed or bullied on school property at least once because of their race/ethnicity, gender, religion, sexual orientation, or disability.

- 21% of 7th graders, 27% of 9th graders, and 29% of 11th graders had seen a weapon at school, and 8–9% had been threatened or injured by one.

- 15–19% of students across grades found schools unsafe or very unsafe.

While advocates commend the state for putting all of its

school violence prevention efforts into one comprehensive program, advocates now urge the state to fully fund this comprehensive program at levels that keep up with increases in student enrollment and inflation.

Physical Fitness Test

On September 16, 2006, the Board published notice of its intent to amend sections 1040 to 1047, Title 5 of the CCR, regarding the administration of the physical performance test that is required of each pupil in grades 5, 7 and 9 by Education Code section 60800.

The purpose of the proposed regulations is to guide school districts and schools in the administration of the Physical Fitness Test (PFT), including but not limited to definitions, test administration, data requirements and testing variations, accommodations and modifications for students with exceptional needs. Among other things, the revised language states the following:

- During the annual assessment window, the governing board of each school district maintaining grades 5, 7, and 9, or any one or more of such grades, shall administer to each pupil in those grades the physical performance test, FITNESSGRAM®, designated by the Board. This includes pupils who attend schools that are on a block schedule and whose pupils may not be enrolled in physical education classes during the annual assessment window. All pupils in grades 5, 7 and 9 shall only take the test once during the annual assessment window.

- School districts shall test all pupils in alternative education programs conducted off the regular school campus, including, but not limited to continuation schools, independent study, community day schools, and county community schools.

- No test shall be administered in a home or hospital except by a test examiner. No test shall be administered to a pupil by the parent or guardian of that pupil.

- Pupils shall be tested in each fitness component included in the PFT unless exempt by the pupil's IEP or Section 504 plan.

- Districts may provide an alternative date for make-ups based on absence or temporary physical restriction or limitations (e.g., recovering from illness or injury).

- For valid results, districts shall use the test administration manual provided for the test designated by the Board.

- On or before November 1 of each school year, the superintendent of each school district, county office of education, and independent charter school may designate from among its employees a District Physical Fitness Test Coordinator. The District Physical Fitness Test Coordinator responsibilities include, but are not limited to, responding to correspondence and inquiries from the contractor in a timely manner and as provided in the contractor's instructions; determining school district and individual school test and test material needs; overseeing the administration of the PFT to pupils; overseeing the collection and return of all test data to the contractor; ensuring

that all test data are received from school test sites within the school district in sufficient time to satisfy the reporting requirements; and ensuring that all test data are sent to the test contractor by June 30 of each year.

- Each school district shall provide the contractor of the PFT the California School Information Services student identification number for each pupil tested for purposes of the analyses and reporting. The demographic information is for the purpose of aggregate analyses and reporting only. School districts shall provide the same information for each pupil enrolled in an alternative or off-campus program, or for pupils placed in nonpublic schools, as provided for all other pupils.

- Results shall be provided to each pupil after completing the test. The results may be provided orally or in writing.

- Each pupil with an IEP or Section 504 plan shall be given as much of the test as his or her condition will permit.

The Department staff, on behalf of the Board, held a public hearing on these proposed changes on November 2, 2005, and subsequently adopted the changes. At this writing, the amendments await review and approval by OAL.

IMPACT ON CHILDREN: The PFT includes six physical fitness tasks:

- (1) Aerobic capacity is perhaps the most important indicator of physical fitness and assesses the capacity of the cardiorespiratory system by measuring endurance.

- (2) Body composition results provide an estimate of the percent of a student's weight that is fat in contrast to the "fat-free" body mass made up of muscles, bones, and organs.

- (3) Abdominal strength and endurance are important in promoting good posture and correct pelvic alignment. Strength and endurance of the abdominal muscles are important in maintaining lower back health.

- (4) Trunk extension and flexibility is related to lower back health and alignment.

- (5) Upper body strength and endurance tests measure the strength and endurance of the upper body and is related to maintenance of correct posture. It is important to have strong muscles that can work forcefully and/or over a period of time.

- (6) Overall flexibility measures joint flexibility which is important to functional health.

Most of the students tested in 2005 did not meet all six fitness standards. Twenty-five percent of the students in grade five, 29 percent in grade seven, and 27 percent in grade nine met all six fitness standards. According to the Department of Education, six years of data show that the majority of California students at all three grade levels are not meeting the standards for the fitness areas tested. Although the most recent three years of data indicate that there is approximately a three percent increase in the percentage of students achieving the healthy fitness zone for all six fitness areas, there is still much work to do to ensure high levels of fitness for all students in California. Both

males and females and students from all ethnic or racial backgrounds could benefit from a greater emphasis on all areas of physical fitness, especially aerobic capacity, body composition, upper body strength, and flexibility. The increased clarification regarding the administration of the PFT will help California identify where more concentration is needed with respect to the physical fitness of our children.

Charter School Regulatory Actions

(1) Non-Classroom Based Instruction in Charter Schools/Virtual Schools. On May 20, 2005, the Board published notice of its intent to adopt new section 11963.5 and amend sections 11704, 11963.2, 11963.3, 11963.4, 11963.5, and 11963.6, Title 5 of the CCR, regarding non-classroom based instruction in charter schools and virtual schools. Among other things, the changes would establish an alternative to the existing method for determining the pupil-teacher ratio; authorize multi-year funding determinations; make clarifying changes to the determination of funding request forms and calculations; make technical changes that include removal of language no longer in effect, renumbering, and typographical errors; and establish a policy for review and approval of funding determination requests submitted by nonclassroom-based virtual or online charter schools.

For example, new language in section 11963.5 would provide that a virtual or on-line charter school is one in which at least 80% of teaching and student interaction occurs via the Internet. A virtual or on-line nonclassroom-based charter school may receive approval of a funding determination with no maximum pupil-teacher ratio if the charter school has and maintains an 8 or above Academic Performance Index (API) rank in either its statewide or similar schools ranking and has no less than a 6 in the other of these two rankings. In order to be funded pursuant to the above, a virtual or on-line charter school, must demonstrate that:

- The school has met its overall and subgroup API growth targets.

- Instructional expenditures are at least 85% of the overall school budget. A substantial portion of these expenditures (at least 25% of the charter school's general purpose entitlement and categorical block grant as defined in Education Code section 47632) are spent on technology that directly benefits students and teachers and results in improved student achievement.

- Computer-based instruction and assessment is provided to each student and includes the use of an on-line instructional management program, which at a minimum includes standards-based guided lessons, lesson plans, initial testing of students, periodic assessment of student achievement, and the use of other measurements of student progress over a period of time.

- Teachers are provided with technology tools and print media, which at a minimum must include: standards-aligned instructional materials, computer, printer, monitor, Internet service, telephone, staff development

that provides for the monitoring of student progress, and a means of electronic communication for frequent student contact.

- All students are provided an individualized learning plan that is based on initial testing of the students and that is monitored either remotely or in person, by the teacher to evaluate student progress.

- All students are provided access to a computer, Internet service, printer, monitor, and standards-aligned materials based on Board-adopted academic content standards for each grade level and for each subject studied.

- All students eligible for special education supports and services receive those supports and services in accordance with their individualized education program.

- Charter school admission practices will not favor high performing students or recruit a student population that is of a higher socioeconomic group or lower racial or ethnic representation than the general population of the county or counties served. Admission practices not reflective of the county or counties served shall be cause for denial by the State Board of Education under this section.

On July 5, 2005, the Board held a public hearing on these proposed changes, which it subsequently adopted. On December 6, 2005, OAL approved these changes.

(2) Charter School Facilities Incentive Grants. In 2002, the voters passed Proposition 47, which allocated \$100 million for school construction for charter schools. In 2004, the voters passed Proposition 55, which allocated an additional \$300 million for charter schools. The program created as a result of the two propositions is the Charter School Facilities Program (Education Code section 17078.52, *et seq.*). By statute, the California School Finance Authority (CSFA) plays a significant role in determining whether charter schools are eligible to receive funding pursuant to the program's requirements.

In 2004, the U.S. Department of Education approved a grant award to CSFA pursuant to the State Charter School Facilities Incentive Grants Program; CSFA had applied for the grant as a supplement to the funding provided pursuant to Propositions 47 and 55. The grant provides for over \$49 million to be awarded over a five-year period for the purposes of funding per-pupil facilities aid programs for California charter schools. Grant funds may be applied toward a charter school's annual cost of rent, lease, mortgage or debt service payments for facilities or toward the purchase, design and construction costs of acquiring land and constructing or renovating a facility.

Pursuant to the federal rules governing the grant, \$9.85 million must be allocated during each of five consecutive federal fiscal years. Because the first funding round began on June 28, 2005, CFSA adopted emergency regulations on June 27, 2005, governing the grant application and selection process. On September 23, 2005, CFSA published notice of its intent to adopt these provisions on a permanent basis. Among other things, the regulations provide that any applicant shall be eligible to apply for a grant if all of the following conditions are met:

■ An approved charter has been awarded and is in place and current at the time of application.

■ The charter school is in good standing with its chartering authority and is in compliance with the terms of its charter at the time of application submission. CSFA reserves the right to contact the chartering authority directly seeking written verification that the school is in good standing and in compliance with the terms of its charter.

■ The charter school has completed at least one school year of instructional operations.

■ The charter school has not been awarded an apportionment through the state's Charter School Facilities Program.

■ The charter school is not a current recipient of funding through this grant program.

■ At least 80% of the instructional time offered by the charter school shall be at the school site, and the charter school shall attain an average daily attendance rate of at least 80% based on the school's most recent CBEDS report.

■ The charter school is established pursuant to Education Code section 47600, *et seq.*, and also meets the federal definition of charter school as defined in section 5210(1) of the Elementary and Secondary Education Act of 1965 (20 USCA section 7221(i)), as amended by the No Child Left Behind Act of 2001.

■ The charter school admits students by lottery in the event more students want to attend the school than the school can accommodate.

The regulations also provide that grant funds must be used to pay current and future years' cost of renting or leasing a facility, for up to a three-year period. Awards may not be used to reimburse a charter school for costs incurred for any school year prior to the year in which the grant is awarded. Grant funds may not be applied toward a school district's costs of providing a charter school with a facility.

No individual grant award that is used toward the annual cost of rent, lease, mortgage or debt service payments for existing or new facilities may exceed \$250,000 per year, with a maximum grant period of up to three years. No individual grant award that is used toward the purchase, design and construction, costs of land and facilities, may exceed \$500,000 per year, with a maximum grant period of up to three years.

On March 24, 2006, OAL approved CFSA's permanent adoption of these provisions.

IMPACT ON CHILDREN: A charter school is a public school, and it may provide instruction in any of grades K–12. It is usually created or organized by a group of teachers, parents and community leaders or a community-based organization, and it is usually sponsored by an existing local public school board or county board of education. Specific goals and operating procedures for the charter school are detailed in an agreement (or charter) between the sponsoring board and charter organizers.

A charter school is generally exempt from most laws governing school districts, except where specifically noted in the law. California public charter schools are required to

participate in the statewide assessment test, called the STAR (Standardized Testing and Reporting) program. The law also requires that a public charter school be nonsectarian in its programs, admission policies, employment practices, and all other operations and prohibits the conversion of a private school to a charter school. Public charter schools may not charge tuition and may not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability.

Currently, the following facts are true regarding charter schools in California:

■ In 2005–06, there were 575 charter schools operating in California.

■ Approximately 190,000 students are currently enrolled in charter schools.

■ Approximately 83% of operating charter schools are start-up schools, and 17% are conversion schools.

■ Approximately 75% are site-based, and 25% are non-classroom-based or combination site-based and non site-based.

■ The largest Public Charter Schools Grant Program was awarded to California for the 2004–07 grant cycle, resulting in approximately 250 new charter schools.

■ Student achievement among educationally and economically disadvantaged students in California public charter schools is improving faster than in non-charter public schools, according to the studies from the Hoover Institute at Stanford University (2003) and the School of Education at California State University, Los Angeles.

■ Charter schools are public education choices in 48 of the 58 counties in California.

■ One in 20 schools in California is a charter school; one in 50 students in California attends a charter school.

As charter schools continue to grow in popularity, vigilant oversight is necessary to ensure that children are receiving appropriate instruction that is comparable to, if not superior to, that provided in traditional public schools.

Special Education—Highly Qualified Teachers

See Special Needs section, *supra*.

Special Education—Hearing Officers

See Special Needs section, *supra*.

Update on Previous Rulemaking Packages Charter School Facilities Program

The Charter School Facilities Program provides funding to qualifying entities for the purpose of establishing school facilities for charter school pupils. On July 9, 2004, the California School Finance Authority (CSFA) published notice of its intent to amend sections 10152 through 10162, and adopt sections 10163 and 10164, Title 4 of the CCR, to address recent legislative changes and to clarify several issues that arose during the first round of funding applications. (For background information on this rulemaking

package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 21.)

Update: On November 8, 2004, DDS transmitted a Certificate of Compliance to OAL, which filed it on December 23, 2004.

California High School Exit Examination

In order to receive a high school diploma, a student completing grade twelve or adult student must pass the California High School Exit Examination, which tests basic language-arts and mathematics knowledge. On July 23, 2004, the California Board of Education published notice of its intent to amend sections 1200, 1203, 1204.5, 1206, 1207, 1207.5, 1209, 1210, 1211, 1211.5, 1215, 1215.5, 1216, 1217, and 1225, Title 5 of the CCR, to make global, technical changes to conform to other existing regulations and to ensure consistency across school districts. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 21.)

Update: On May 19, 2005, OAL approved the Board's amendments. However, on February 8, 2006, a group of high school seniors and their parents filed a lawsuit in San Francisco Superior Court, seeking an injunction prohibiting the state from denying diplomas to seniors who have satisfied all graduation requirements except the exit exam. Among other things, the plaintiffs claim that many students who have repeatedly failed the test have not had a fair opportunity to learn the material because they are more likely to attend overcrowded schools and have teachers without proper credentials, and that the state failed to fairly analyze alternatives to the exit exam.

Approximately 15–20% of high school seniors have not yet passed the exit exam, including many students with impressive grade point averages.

Standardized Testing and Reporting (STAR) Program

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

On July 23, 2004, CDE published notice of its intent to amend sections 850, 851, 852, 853, 853.5, 854, 855, 857, 858, 859, 861, 862, 863, 864, 864.5, 865, 866, 867, 867.5,

868, and 870, Title 5 of the CCR, to revise the existing STAR program. (For background information on this rule-making package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 23.)

Update: On August 22, 2005, OAL approved CDE's amendments, which took effect on September 21, 2005.

Definition of Significant Growth— II/USP and HPSG

Under the Immediate Intervention/Underperforming Schools Program (II/USP), the Superintendent of Public Instruction, with the approval of the Board, is required to identify schools that failed to meet their Academic Performance Index (API) growth targets and have an API score below the 50th percentile in the previous school year relative to other schools; a number of potential consequences may result from a school's underperformance. Under the High Priority Schools Grant Program (HPSG), if after 24 months a school has not met its growth target in each year, it is subject to review by the Board; such a review may include an examination of the school's progress relative to reports submitted to CDE.

On September 17, 2004, the Board published notice of its intent to adopt sections 1030.5 and 1030.6, Title 5 of the CCR, to specify standards to determine eligibility for continued participation in these programs by establishing a distinction between a school that fails to achieve any growth and one that achieves its growth target. The proposed regulations also establish criteria to determine if a school demonstrates "significant growth" for those participating schools that do not have a valid API score. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 24.)

Update: On July 28, 2005, OAL approved the Board's amendments, which took effect on August 27, 2005.

Statewide Charter Schools

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

Regulatory Law Reporter, Vol. 5, No. 2 (2004) at 25.)

Update: On June 22, 2005, OAL approved the Board's amendments.

Supplemental Education Services Providers

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

On September 24, 2004, the Board published notice of its intent to amend section 13075 and adopt sections 13075.1, 13075.2, 13075.3, and 13075.4, Title 5 of the CCR, to describe the responsibilities of prospective providers, and provide that approved providers have to ensure that eligible students who are attending Title I-funded schools in year two and above of program improvement status receive appropriate supplemental educational services. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 26.)

Update: On May 6, 2005, OAL approved the Board's amendments.

Uniform Complaint Procedures & Nondiscrimination and Educational Equity

On November 19, 2004, CDE published notice of its intent to amend sections 4600, 4610, 4611, 4620, 4621, 4622, 4630, 4631, 4632, 4633, 4640, 4650, 4651, 4652, 4660, 4661, 4662, 4663, 4664, 4665, 4670, 4671, and adopt sections 4680, 4681, 4682, 4683, 4684, 4685, 4686, and 4687 to Title 5 of the CCR, to make numerous changes regarding the system of processing complaints of unlawful discrimination and alleged violations of federal and state laws or regulations for those activities and programs that receive state or federal funding. (For background information on this rulemaking package and *Williams v. State*, No. 312236 (San Francisco Superior Court), see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 27.)

Update: On December 29, 2005, OAL approved CDE's regulatory package.

Withholding Funds—Special Education Mandates

On May 21, 2004, the Board published a notice of its intent to adopt sections 3088.1 and 3088.2, Title 5 of the CCR, to establish procedures consistent with federal and

state law that enable the California Department of Education to withhold funding from local educational agencies (LEAs) that do not comply with applicable law. The proposed regulations will allow noncompliant LEAs to continue receiving funding if progress is being made toward compliance with special education mandates. On July 14, 2004, the Board released a modified version of these proposed sections for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 30 and Vol. 5, No. 1 (2004) at 22.)

Update: On January 10, 2005, OAL approved these regulatory changes, which took effect on February 9, 2005.

California English Language Development Test (CELDT)

Under existing regulations, English language proficiency is assessed through the California English Language Development Test (CELDT), which is generally administered to any student whose primary language is other than English. On May 21, 2004, the Board of Education published its notice of intent to amend sections 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516, 11516.5, and 11517, and adopt new section 11516.6, Title 5 of the CCR, to clarify what is required of school districts to properly administer the CELDT; these changes are required under Education Code sections 313 and 60810 *et seq.*, in order to be in compliance with federal Title III No Child Left Behind Act accountability standards. On July 14, 2004, the Board released a modified version of this rulemaking package for an additional fifteen-day public comment period. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 31 and Vol. 5, No. 1 (2004) at 25.)

Update: On June 9, 2005, OAL approved the Board's regulatory package.

Defining Persistently Dangerous Public Schools

On May 21, 2004, the Board published notice of its intent to adopt sections 11992, 11993, and 11994, Title 5 of the CCR, to clarify and provide guidance on the implementation of the statewide policy definition for designating persistently dangerous schools. On September 15, 2004, the Board released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. Among other things, the revised package expanded the discussion of how incidents by former students were to be reported, defined the term "incident" when pertaining to a firearm violation by a non-student, and set forth how a local educational agency may contest CDE's determination that one or more of its schools is persistently dangerous. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2

(2004) at 32 and Vol. 5, No. 1 (2004) at 26.)

Update: On June 23, 2005, OAL approved the Board's rulemaking package, which took effect on July 23, 2005.

CHILD PROTECTION

New Rulemaking Packages

Foster Youth Personal Rights

On July 1, 2005, DSS published notice of its intent to amend section 83064, 83072, 84022, 84072, 84172, 86022, 86072, 88022, 89372, and 89379, Title 22 of the CCR, regarding foster youth personal rights. Currently, community care facilities regulations list personal rights accorded to children in out-of-home placement, as specified in Welfare and Institutions Code section 16001.9. AB 458 (Chu) (Chapter 331, Statute of 2003) and SB 1639 (Alarcon) (Chapter 668, Statutes of 2004) further amended section 16001.9 by adding additional personal rights:

■ AB 458 accords foster children the right to have fair and equal access to all available services, placement, care, treatment and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status. This statute provides specific anti-discrimination policies protecting foster care youth statewide and ensures consistent implementation throughout the state.

■ SB 1639 accords foster children who are 16 years old or older the right to have access to postsecondary educational and vocational opportunities available and financial aid information for those programs. Foster youth face numerous barriers to educational and training opportunities, including the lack of information about postsecondary education and financial aid opportunities. This personal right will benefit foster youth by increasing access to higher education and training information and reducing informational barriers.

DSS' proposed regulations incorporate the provisions of AB 458 and SB 1639 by amending the personal rights sections in group home, small family home, community treatment facility, transitional housing placement program, and foster family home regulations. DSS held a public hearing on the proposed changes on August 17, 2005; at this writing, the changes await review and approval by OAL.

IMPACT ON CHILDREN: Among other things, the proposed changes provide that for children 16 years of age or older, the licensee shall develop a plan for making accessible information regarding specified vocational and post-

secondary educational options. The information may include, but is not limited to admission criteria for universities, community colleges, trade or vocational schools and financial aid information for these schools; informational brochures on postsecondary or vocational schools/programs; campus tours; internet research on postsecondary or vocational schools/programs; and school-sponsored events promoting postsecondary or vocational schools/programs.

Providing older teens with access to this information is clearly important, but it does not go far enough. Responsible parents do not simply ensure that their children have access to this information—instead, they engage in a much more involved process that might involve talking about options, visiting colleges and trade schools, helping the teen complete financial aid applications, etc.

Family Connections and Foster Family Agency Reference Checks

On July 29, 2005, DSS published notice of its intent to amend sections 83068.2, 84068.2, 88001, 88022, 88031, 88068.2, 89405, and 89468, adopt new sections 88054, 88066.2, and 88066.3, and repeal sections 88069.7, 88069.8, Title 22 of the CCR. Among other things, the changes would do the following:

■ These amendments establish requirements for foster family agencies to conduct background checks on applicants for certification to operate certified family homes, address confidentiality and liability issues related to these checks, and authorize DSS to assess civil penalties for failure to provide specified reports.

■ The proposed regulations provide sanctions for failure to report certifications and decertifications and establish reference check procedures that will not result in civil liability or violations of confidentiality laws.

■ The U.S. Department of Health and Human Services Children's Bureau has identified concerns about the ability of children in group homes and placed through foster family agencies to maintain family connections. In response, DSS developed a Program Improvement Plan that included steps to be taken to ensure that foster children would be able to maintain these connections. One of these steps was to specify, in licensing regulations, the responsibilities of staff in group homes and foster family agencies to ensure that children maintain family connections. The proposed regulations establish requirements more specific than those in existing regulations for group home and foster family agency staff to ensure that this occurs. In the interest of consistency for foster children, the proposed regulations would extend these requirements to all licensed children's residential facilities.

DSS held a public hearing on these proposed changes on September 14, 2005; at this writing, the regulatory package awaits review and approval by OAL.

IMPACT ON CHILDREN: While supportive of the substance of this regulatory proposal, child advocates requested that the regulations provide greater clarity in the implementation of promoting family connections.

Specifically, sections 83068.2 (d), 84068.2 (e), 88068.2 (e) and 89468 (g) identify the requirement that foster family homes, group homes and foster family agencies must ensure that connections are maintained between children placed in their care and the children's family and extended family. This requirement is directly derived from the Program Improvement Plan developed in response to the U.S. Department of Health and Human Services Children's Bureau Report on California's Child and Family Services Review.

However, the proposed amendments to these regulations offer no guidance as to the frequency with which these connections must be maintained. In order to maintain the benefit of these family connections, children need regular and frequent contact with their family and extended family members. CAI believes the regulations should be amended to require that "unless specifically restricted by court order, the licensee shall ensure that connections are maintained between the child and the child's family and extended family members at least weekly in accordance with the needs and services plan." This further delineation of a specific timeframe will give a realistic framework and substantive guidance regarding how foster care providers can promote the relationship between foster children and their family and extended family members as contemplated by the proposed rule change.

Biennial Rate Application Requirement

On July 29, 2005, DSS published notice of its intent to amend sections 11-400, 11-402, 11-403, and 11-406 of the MPP, to set the rate classification level for a group home program and the rate category for a foster family agency on a biennial rather than annual basis, according to a schedule established by DSS. The regulations also revise the rate application/request due date and rate effective date, revise the penalty provisions, revise the due dates related to "good cause" extensions, and add three definitions for clarity. The following describes the major components of this regulatory action:

- The regulations define the rate application as a "complete rate application" and identify the specific documentation that constitutes a complete rate application. The rate effective date and the penalty provisions are based on "complete rate applications". Because the rates are now set for a two-year period, it is important that the rate application contain all the required and up-to-date documentation needed to set the rate.

- Group home and foster family agency providers will be required to submit rate applications at a time determined by the DSS based upon their program number and the corporate accounting fiscal year. The rate application renewal process will be based on an odd/even system. For example, for all providers whose first four program numbers end in an odd number (ex. 2005.00.01), the rate application renewal will be due in an odd year and require data for a two-year period. Alternately, for all providers whose first four program numbers end in an even number (ex. 2006.00.01), the rate application renewal will be due in an

even year and require data for a two-year period. All rate application forms have been modified to collect data based on the provider's corporate fiscal year.

- Due dates for complete rate applications have been changed to after the end of the corporation's fiscal year rather than May 1st or July 1st. This was done to ensure that all information needed for submission by all providers is available. The DSS Foster Care Rates Bureau will issue letters to providers informing them of the application process and the documentation required.

- The effective date of the rate will be the first day of the second full month following the rate application due date. For example: the due date for the complete rate application is January 1st. Since January is not counted the second full month following January is March. The effective date of the rate in this example is March 1.

- The approval letter from the State Attorney General's Charitable Trust Section which was required as a verification of review and approval of shelter costs, including self-dealing transactions, has been deleted. Self-dealing transactions are no longer authorized. Providers will be "ineligible to receive an AFDC-FC rate after that date if they have entered into any self-dealing lease transactions for group home shelter costs".

- There has been a slight revision of the due dates for timely submission of a good cause request for rate applications. The expansion of the time period for submission of a good cause request accommodates providers who make a good cause request farther in advance than the previous five day requirement.

- The penalty procedures for a late or incomplete application were changed to maintain consistency with the biennial rate application process. The existing penalty procedure was predicated on the allocation of a cost-of-living adjustment (COLA) provided by the Legislature each fiscal year. Because of the change to a biennial requirement, the existing penalty procedure created an inequity among providers depending on when submission of the application is required and whether a COLA is provided. This new penalty procedure is not contingent upon a COLA and continues to promote program integrity.

- Audit procedures have been modified to accommodate the biennial rate application process. Since data reporting has been changed to include data for the previous two-year period based on the corporation's fiscal year, the non-provisional audit period will be based on one year of the corporation's reported fiscal year. Program records must be maintained for a minimum of five years and made easily accessible to any DSS staff conducting program audits. Additionally, any nonprovisional audit conducted on programs that have not been established on a biennial basis will be conducted in accordance with the regulations in effect on January 1, 2005.

On August 1, 2005, DSS amended these sections on an emergency basis. The Department conducted a public hearing on these changes on September 14, 2005; on January

12, 2006, OAL approved DSS' adoption of these amendments on a permanent basis.

IMPACT ON CHILDREN: While it is not directly relevant to the instant rulemaking action, child advocates have been urging policymakers for years to meaningfully increase family foster home rates. In 1991, family foster home rates nationwide were 20% below the direct costs of a child as measured by the Department of Agriculture—with the California disparity somewhat greater. From 1991–98, no COLA increase was granted, placing compensation almost 40% below costs and constricting supply. In 1998, a modest 9% increase was approved, with small COLAs of 2.36% keeping compensation even in 1999, 2000 and 2001. The rates remain approximately 30% below out of pocket costs. Compensation to families for foster care is estimated at less than half of the costs of raising a typical child.

Payment levels per child for foster care vary with the age of a child, with the lowest rates paid for children 0–4 years of age, and increasing for each four-year age group to those from 15–20 years of age—set approximately 30% higher. The rates paid vary much more dramatically between family foster care and group home alternative placements. Not only are group home compensation levels at seven times those extant for family foster care, but adjusting for inflation, foster homes rates have declined in real spending terms, while group homes have increased markedly, reflecting the more extensive and sophisticated political organization of the group homes.

Criminal Record Clearance/Exemption and *Gresher v. Anderson*

On January 27, 2006, DSS published notice of its intent to amend sections 80019, 80019.1, 80054, 87219, 87219.1, 87454, 87819, 87819.1, 87854, 88019, 101170, 101170.1, 101195, 102370, 102370.1, and 102395, Title 22 of the CCR, in order to make changes to the criminal record clearance provisions, the criminal record exemption provisions, and the penalties provisions.

Under the proposed changes, to request a criminal record exemption, a licensee or license applicant must submit information that indicates that the individual meets the requirements of section 80019.1(c)(4). DSS will notify the licensee or license applicant and the affected individual, in concurrent, separate notices, that the affected individual has a criminal conviction and needs to obtain a criminal record exemption. The notice to the affected individual shall include a list of the conviction(s) that DSS is aware of at the time the notice is sent, and will list the information that must be submitted to request a criminal record exemption. Also, individuals may request a criminal record exemption on their own behalf if the licensee or license applicant, among other things, chooses not to employ or terminates the individual's employment after receiving notice of the individual's criminal history, or removes the individual who resides in the facility after receiving notice of the individual's criminal history.

Exemption denial notices shall specify the reason the exemption was denied.

The changes would also provide that the following persons in homes certified by licensed foster family agencies are exempt from the requirement to submit fingerprints:

(A) Adult friends and family of the certified foster parent, who come into the home to visit for a length of time no longer than one month, provided they are not left alone with the foster children. However, the certified foster parent, acting as a reasonable and prudent parent, as specified, may allow his or her adult friends and family to provide short-term care to the foster child and act as an appropriate occasional short-term babysitter for the child.

(B) Parents of a foster child's friends when the child is visiting the friend's home and the friend, certified foster parent or both are also present. However, the certified foster parent, acting as a reasonable and prudent parent, may allow the parent of the foster child's friends to act as an appropriate short-term babysitter for the child without the friend being present.

(C) Individuals who are engaged by any certified foster parent to provide short-term babysitting to the child for periods not to exceed 24 hours. Certified foster parents shall use a reasonable and prudent parent standard in selecting appropriate individuals to act as appropriate occasional short-term babysitters.

Also, prior to being alone with or having supervisory control of children, all foster family agency personnel shall obtain a California criminal record clearance or exemption as specified in Health and Safety Code section 1522(a)(4)(E). Additionally, all individuals subject to criminal record review pursuant to Health and Safety Code section 1522 shall declare whether he/she has been arrested for any crime against a child, spousal cohabitant abuse or for any crime as provided in 80019.1(m).

DSS held a public hearing on these proposed changes on March 15, 2006. At this writing, the changes await review and approval by OAL.

IMPACT ON CHILDREN: This regulatory package implements recent statutory changes, as well as the First District Court of Appeal holding in *Gresher v. Anderson* (2005) 127 Cal. App. 4th 88, a proceeding that questioned DSS' handling of the process for exempting certain community and child care workers from the ban on employment imposed on those with criminal convictions. The court concluded that DSS' process was unduly restrictive in a number of respects, and specifically ordered that DSS permit certified family home employees to seek exemptions on their own behalf; permit terminated employees to seek exemptions after their employers receive notice of criminal history, without requiring that the notification have caused the termination; include in the "exemption needed" notice information specifying the convictions to be addressed in an exemption request; stop closing Trustline applications from persons in deferred judgment or pretrial diversion programs; and notify persons denied an exemption of the basis for the denial in terms sufficient-

ly specific to permit a reasonably informed decision on whether to pursue an administrative appeal.

Thus, these changes primarily benefit adults with criminal convictions and those who are in deferred judgment status or participating in pretrial diversion programs, by helping facilitate their ability to engage in community and child care work. It remains to be seen if relaxing these standards will have a detrimental effect on the children involved in those settings. Advocates hope that by adding the prudent parent standard into the regulations, these changes will help create a more home-like environment for children in foster care placements.

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

(See Child Care section, *supra*)

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

On October 31, 2003, DSS amended—on an emergency basis—sections 11-400, 11-410, 31-002, and 31-206, adopted sections 30-501, 30-502, 30-503, 30-504, 30-505, 30-506, 30-507, 30-900, 30-901, 30-902, 30-903, 30-904, 30-905, 30-906, 30-907, 30-908, 30-909, 30-910, 30-911, 30-912, 30-913, 30-914, 30-915, 30-916, 30-917, 30-918, 30-919, 30-920, and 31-236, and repealed and adopted section 31-525 of the MPP, addressing four separate but related elements: the Independent Living Program (ILP), the Transitional Independent Living Plan (TILP), the Transitional Housing Placement Program (THPP), and the Transitional Housing Program-Plus (THPPlus). Also on October 31, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. On April 29, 2004, DSS readopted these changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 32, Vol. 5, No. 1 (2004) at 30, and Vol. 4, No. 2 (2003) at 41.)

Update: On December 10, 2004, OAL approved DSS' permanent adoption of these changes.

Family Reunification Child Support **Referral Requirements**

AB 1449 (Keeley) (Chapter 463, Statutes of 2003) required the Department of Child Support Services (DCSS), in consultation with DSS, to establish and promulgate, by October 1, 2002, specified regulations by which the local child support agency may compromise an obligor's liability for public assistance debt in cases where the parent separated from or deserted a child who consequently became the recipient of aid under the AFDC-FC or

CalWORKs programs, if specified conditions are met, and DCSS determines that compromise is necessary for the child's support. On August 1, 2003, DSS published notice of its intent to amend sections 31-206 and 31-503 of the MPP, to implement its portion of AB 1449.

On May 20, 2004, DSS released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. On July 1, 2004, DSS released a second modified version of its rulemaking proposal for an additional fifteen-day public comment period. Following that public comment period, DSS submitted the rulemaking file to OAL for review. However, on September 13, 2004, OAL disapproved the regulations on the grounds that they failed to comply with the consistency and clarity standards contained in Government Code section 11349.1. On December 1, 2004, DSS released a third modified version of its rulemaking proposal. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 33, Vol. 5, No. 1 (2004) at 31, and Vol. 4, No. 2 (2003) at 45.)

Update: On February 16, 2005, OAL approved DSS' permanent adoption of these changes.

JUVENILE JUSTICE

New Rulemaking Packages **Collection of DNA Specimens**

On January 31, 2005, the Department of the Youth Authority (DYA) adopted, on an emergency basis, new sections 4141 and 4141.1, Title 15 of the CCR, to implement Proposition 69, as passed by the voters in the November 2004 election, which mandates that all wards and parolees under the jurisdiction of DYA, after having been convicted of, found guilty of, having pled no contest to, or having been found not guilty by reason of insanity, of any felony offense, or whose records indicate a prior conviction for such an offense, or any juvenile adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense, shall provide biological specimens to DYA for submission to the Department of Justice (DOJ) for its deoxyribonucleic acid (DNA) and Forensic Identification Database and Data Bank Program.

Among other things, section 4141 would require that all wards under the jurisdiction of the DYA must provide one buccal swab sample, two right thumb print impressions, and full right and left full palm print impressions; the collection of specimens, samples, and impressions must take place within five working days of arrival at a reception center clinic and/or intake site; the specimens, samples, and impressions shall be collected only by designated medical, custody, or parole staff and/or local law enforcement using a DOJ approved collection kit in accordance with the

requirements and procedures set forth by the DOJ, and forwarded to the DOJ as soon as administratively practicable; only medical staff trained and certified to draw blood shall draw blood; blood samples shall be drawn in accordance with medical standards; and any ward or parolee refusing to give any or all of the specimens, samples, or impressions after he/she has received written notice that he/she is required to provide specimens, samples, and impressions, is guilty of a misdemeanor and shall also be subject to sanctions pursuant to the Disciplinary Decision-Making System.

Proposed section 4141.1 provides that the use of reasonable force shall not be authorized without the prior written authorization from the Superintendent or designee, and that authorization shall include information that reflects the fact that the offender was asked to provide the requisite specimen, sample, or impression as required by law, and that he/she refused to do so; the use of reasonable force shall be preceded by efforts to secure voluntary compliance; if the use of reasonable force to obtain DNA includes a room extraction, the extraction shall be videotaped; and if the use of reasonable force is required in the collection of the required specimen, samples and impressions, a blood sample will be collected.

On March 11, 2005, DYA published notice of its intent to adopt these provisions on a permanent basis. On June 1, 2005, DYA readopted the provisions on an emergency basis. Pursuant to Penal Code section 295(h)(2), these regulations are exempt from the Administrative Procedure Act's rulemaking requirements.

IMPACT ON CHILDREN: The regulations provide for the "use of reasonable force" under specified circumstances, defining that term as the force that an objective, trained, and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain compliance with the requirements of the DNA database law. Although the regulations provide that the use of reasonable force shall be preceded by efforts to secure voluntary compliance, they fail to define what those efforts must entail. It is possible to imagine scenarios where language barriers, cultural differences, poor educational backgrounds, or simply the lack of maturity on the part of a juvenile might lead to the use of force that otherwise would not be necessary if appropriate safeguards were in place vis-à-vis obtaining voluntary compliance.

Update on Previous Rulemaking Packages Religious Services to Wards

On July 16, 2004, CYA published notice of its intent to permanently amend section 4751 and adopt sections 4750 and 4750.1, Title 15 of the CCR, to ensure that wards of the state receive appropriate religious freedom. Among other things, the sections provide that the facility superintendent must provide all wards with access to a religious service or alternate religious service at least once a week, unless the ward is on temporary detention or administrative lock-down, assigned to a special management program, serving

disciplinary decision-making system room restrictions, attending mandated treatment groups, attending case conferences, attending institutional classification committee hearings, attending Youth Authority Board hearings, attending assigned school classes, or if a staff member of the facility determines that a ward presents a safety risk to a religious service and obtains a manager's approval. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 5, No. 2 (2004) at 34.)

Update: On January 25, 2005, OAL approved CYA's adoption of these changes, which took effect on February 24, 2005.

AGENCY DESCRIPTIONS

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

California Department of Child Support Services.

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

California Department of Developmental Services.

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

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

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

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

DMH regulations appear in Title 9 of the CCR. DMH's website address is www.dmh.ca.gov.

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

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

Division of Juvenile Justice, Department of Corrections and Rehabilitation. Until 2005, the California Youth Authority (CYA) was responsible for providing a range of training and treatment services, as well as parole supervision, for youthful offenders. In a massive reorganization of California corrections in 2005, the CYA became the Division of Juvenile Justice (DJJ) under the Department of Corrections and Rehabilitation. As part of

the state's juvenile justice system, the DJJ works closely with law enforcement, the courts, prosecutors, probation, and a broad spectrum of public and private agencies concerned with and involved in the problems of youth. DJJ's enabling act is found at section 1710 et seq. of the Welfare and Institutions Code; DJJ's regulations appear in Title 15 of the CCR. DJJ's website address is www.cya.ca.gov/DivisionsBoards/DJJ.

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* for 2004–05 and 2002–03 are currently available at www.cachildlaw.org.

RULEMAKING

GLOSSARY

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

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

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

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

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

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

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

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

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

Judicial Declaration: A decision or opinion rendered by a court declaring the legal status of an agency regulation. Any interested person may request this declaration of a superior court.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sufficiently Related Changes: If a state agency proposing to adopt a regulation determines that, as a result of comments received during the 45-day comment period, the text of the proposed regulation should be modified, it may do so as long as it provides an additional fifteen-day comment period. A fifteen-day comment period is authorized if the changes to the text are “sufficiently related” to the original text proposed. “Sufficiently related” means that a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted. Changes that are more substantive require the agency to start the process anew and provide an additional 45-day comment period.

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



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