



mates for re-integration into society; and direct the Department of Alcohol and Drug Programs to evaluate the substance abuse counseling and treatment capabilities in all California boot camp programs and develop a model intensive program that can secure maximum benefits within available time.

The Commission also determined that the present structure of the boot camp process in California does not ensure that offenders receive adequate treatment, rehabilitation, and job or training placement. Accordingly, the Commission recommended that the state direct the appropriate agency to include in the state comprehensive boot camp plan a three-phase model structure that emphasizes placement of graduates in community-based services, vocational education programs, and job training facilities; create juvenile and adult vocational training facilities available to graduates of public and private boot camp and work/experience-intensive programs; and enhance access to resources by funding a computerized consolidation of listings and descriptions of private-sector community services across the state.

Finally, the Commission found that the role of the private sector in creating alternative sentencing and aftercare programs has been restricted in California by inadequate and inappropriate regulations. Thus, the Commission recommended that the state direct the Department of Social Services to promulgate a new category of regulations for private youth correctional/education/experiential camps in California.

Little Hoover Commission Biennial Report 1993-1994, released in January, highlights many of the Commission's efforts on the following nine key topics on which the Commission has focused during the past decade: children's services, crime, the economy, education, elder care, the environment, general government, health, and transportation. Among other things, the Commission noted that its efforts have resulted in the following accomplishments:

- the creation by the Governor of a Cabinet-level Secretary of the Office of Child Development and Education to coordinate children's services;
- the expansion of successful programs that provide services to runaway/homeless youth;
- requirements for a more rigorous review of homes where foster children will be placed;
- reducing good-time credit for violent felons;
- encouraging the use of alternative sentencing for non-violent criminals;

- modifying the Inmate Bill of Rights to give the Department of Corrections more effective control over prisoners;

- the creation of a more effective process for the state to step in when a school district expends funds irresponsibly;

- adoption of initial steps to streamline the school facility construction process;

- the creation of an ombudsman function to provide independent review of skilled nursing facilities and help consumers of those facilities; and

- the creation of a restructured California Integrated Waste Management and Recycling Board to replace the previous landfill-oriented solid waste management board.

OAL Completes Commission-Requested Regulatory Determination. In May 1990, the Commission filed a request for a regulatory determination with the Office of Administrative Law (OAL), asking whether five Department of Education (DOE) "advisory bulletins" are regulations and are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act (APA). The Commission's request was an outgrowth of its February 1990 report on California public elementary and secondary education in which it—among other things—criticized the Department of Education for the use of underground regulations and recommended that the Attorney General file a lawsuit against the Department "to prevent further violations of the Administrative Procedure Act" by the Superintendent of Public Instruction. [10:2&3 CRLR 50-51] On December 22, OAL issued 1994 Determination No. 1 (Docket No. 90-021) in response to the Commission's request. Specifically, the Commission asked whether the following advisories constitute regulations under the APA:

- Legal Advisory No. 2-89, alleged to compel "local school districts to reject 'Channel One' and other similar television news programs containing advertising by threatening to delete the portion of the time spent viewing such programs from the districts' certifications as to days and minutes of instruction..." (the "Channel One Advisory");

- Fiscal Management Advisory 89-04, which "purports to limit the discretion of local school districts by requiring the districts to restrict to a maximum of twenty hours the amount of time a student may work each week" (the "Work Permit Advisory");

- Two related Program Advisories: Number 89/9-2, dated October 12, 1989, and Number 89/9-5, dated November 6, 1988, which "expressly purport to formulate standards to interpret the supplemen-

tary grants program created by legislation implementing Proposition 98" (the "Supplemental Grants Advisories"); and

- Program Advisory 87/8-2, dated August 26, 1987, which "provides 'advice' concerning the use of categorical program funding after the 'sunset' of the provisions in the authorizing legislation regarding such use" (the "Categorical Funding Sunset Advisory").

Among other things, OAL concluded that parts of the Program Advisories and the Fiscal Management Advisory are not regulations, but that each of these Advisories contain some provisions which are regulations; also, OAL determined that the Legal Advisory rule prohibiting state reimbursement to local school districts for time pupils spend viewing Channel One commercials is a regulation. (See agency report on OAL for related discussion.)

DEPARTMENT OF CONSUMER AFFAIRS

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The Department of Consumer Affairs (DCA) oversees the activities of 37 administrative agencies which regulate 180 diverse professions, occupations, and industries. The primary function of DCA and its constituent agencies is to protect consumers from incompetent, dishonest, or impaired practitioners.

Most of the multi-member boards under DCA's jurisdiction are relatively autonomous of DCA control. However, the DCA Director is authorized to review and reject regulatory changes proposed by all DCA agencies; only a unanimous vote of the agency's board will override the Director's rejection. Additionally, the Department may intervene in matters regarding its boards if probable cause exists to believe that the conduct or activity of a board, its members, or its employees constitutes a violation of criminal law.

DCA maintains several divisions and units which provide support services to its constituent agencies, including a Legal Unit whose attorneys advise DCA boards at meetings and regulatory hearings; a Division of Investigation whose investigators gather evidence in complaint cases filed against the licensees of some DCA agencies; a Legislative Unit which assists agencies in drafting language for legisla-



tion and regulations affecting DCA agencies and their licensees; an Office of Examination Resources (formerly the Central Testing Unit) whose psychometricians analyze and assist in validating licensure examinations used by DCA agencies; and a Budget Office whose technicians assist DCA agencies in assessing their fiscal status and preparing budget change proposals for legislative review.

In addition to its functions relating to its various boards, bureaus, and examining committees, DCA is also charged with administering the Consumer Affairs Act of 1970. In this regard, the Department educates consumers, assists them in complaint mediation, and advocates their interests before the legislature, the courts, and its own constituent agencies.

The DCA Director also maintains direct oversight and control over the activities of several DCA bureaus and programs, including the following:

• **Bureau of Automotive Repair**—Chief: James Schoning; (916) 255-4300; Toll-Free Complaint Number: (800) 952-5210. Established in 1971 by the Automotive Repair Act (Business and Professions Code section 9880 *et seq.*), DCA's Bureau of Automotive Repair (BAR) registers automotive repair facilities; official smog, brake and lamp stations; and official installers/inspectors at those stations. BAR's regulations are located in Division 33, Title 16 of the California Code of Regulations (CCR). BAR's other duties include complaint mediation, routine regulatory compliance monitoring, investigating suspected wrongdoing by auto repair dealers, oversight of ignition interlock devices, and the overall administration of the California Smog Check Program, Health and Safety Code section 44000 *et seq.*, which provides for mandatory biennial emissions testing of motor vehicles in federally designated urban nonattainment areas, and districts bordering a nonattainment area which request inclusion in the Program. BAR licenses approximately 16,000 smog check mechanics who will check the emissions systems of an estimated nine million vehicles this year. Testing and repair of emissions systems is conducted only by stations licensed by BAR.

• **Bureau of Security and Investigative Services**—Chief: James C. Diaz; (916) 445-7366. The Bureau of Security and Investigative Services (BSIS) regulates six industries: private security services (private patrol operators and armored contract carriers) (Business and Professions Code section 7580 *et seq.*), repossessors (Business and Professions Code section 7500 *et seq.*), private investigators (Business and Professions Code

section 7512 *et seq.*), alarm company operators (Business and Professions Code section 7590 *et seq.*), firearms and baton training facilities (Business and Professions Code section 7585 *et seq.*), and locksmiths (Business and Professions Code section 6980 *et seq.*). BSIS' purpose is to protect the health, welfare, and safety of those affected by these industries. To accomplish this, the Bureau regulates and reviews these industries by its licensing procedures and by the adoption and enforcement of regulations. For example, BSIS reviews all complaints for possible violations and takes disciplinary action when violations are found. The Bureau's primary method of regulating, however, is through the granting or denial of initial/renewal license or registration applications.

• **Bureau of Electronic and Appliance Repair**—Chief: Curt Augustine; (916) 445-4751. Created in 1963, the Bureau of Electronic and Appliance Repair (BEAR) registers service dealers who repair major home appliances, electronic equipment, cellular telephones, photocopiers, facsimile machines, and equipment used or sold for home office and private motor vehicle use. Under SB 798 (Rosenthal) (Chapter 1265, Statutes of 1993), BEAR also registers and regulates sellers and administrators of service contracts for the repair and maintenance of this equipment. BEAR is authorized under Business and Professions Code section 9800 *et seq.*; its regulations are located in Division 27, Title 16 of the CCR. The Electronic and Appliance Repair Dealer Registration Law requires service dealers to provide an accurate written estimate for parts and labor, provide a claim receipt when accepting equipment for repair, return replaced parts, and furnish an itemized invoice describing all labor performed and parts installed.

• **Bureau of Home Furnishings and Thermal Insulation**—Chief: K. Martin Keller; (916) 574-2040. The Bureau of Home Furnishings and Thermal Insulation (BHFTI) regulates the home furnishings and insulation industries in California. The Bureau's mandate is to ensure that these industries provide safe, properly labeled products which comply with state standards. Additionally, BHFTI is to protect consumers from fraudulent, misleading, and deceptive trade practices by members of the home furnishings and insulation industries; BHFTI is also responsible for toy safety testing for the state of California. The Bureau is established in Business and Professions Code section 19000 *et seq.*

BHFTI establishes rules regarding furniture and bedding labeling and sanitation. The Bureau enforces the law by con-

ducting extensive laboratory testing of products randomly obtained by BHFTI inspectors from retail and wholesale establishments throughout the state. To enforce its regulations, which are codified in Division 3, Title 4 of the CCR, BHFTI has access to premises, equipment, materials, and articles of furniture. The Bureau may issue notices of violation, withhold products from sale, and refer cases to the Attorney General or local district attorney's offices for possible civil penalties. BHFTI may also revoke or suspend a licensee's registration for violation of its rules.

• **Tax Preparer Program**—Administrator: Jacqueline Bradford; (916) 324-4977. Pursuant to Business and Professions Code section 9891 *et seq.*, the Tax Preparer Program registers approximately 19,000 tax preparers in California. The Program's regulations are codified in Division 32, Title 16 of the CCR. Registrants must be at least eighteen years old; have a high school diploma or pass an equivalency exam; and must have completed sixty hours of instruction in basic personal income tax law, theory, and practice within the previous eighteen months or have at least two years' experience equivalent to that instruction. Prior to registration, tax preparers must deposit a bond or cash in the amount of \$5,000 with the Program. Members of the State Bar, accountants regulated by the state or federal government, and those authorized to practice before the Internal Revenue Service are exempt from the Program's registration requirement.

MAJOR PROJECTS

Governor Appoints New DCA Director. In mid-January, Governor Wilson appointed Marjorie M. Berte as DCA Director during his second term. Berte, who served as Wilson's Insurance Advisor during his first term, will continue to serve in that capacity in addition to taking on the DCA Director's responsibilities. Berte is a 1974 graduate of Stanford University, with a bachelor of arts degree in English. Prior to joining state service in 1991, she was a self-employed media relations consultant specializing in strategic planning and policy development; from 1978 to 1988, she served as executive vice-president of the Professional Insurance Agents of California, a nonprofit trade association. Berte's appointment is subject to Senate confirmation.

Berte succeeds Jim Conran, who resigned as DCA Director in March 1994 in order to run for Insurance Commissioner. C. Lance Barnett, Ph.D., who served as interim director of DCA pending Berte's appointment, has returned to his position



as Chief Deputy Director of the Department.

DCA Attempts to Address Legislative Defunding of Cemetery/Funeral Directors Boards. In 1994, the legislature used the budget process to defund DCA's Cemetery Board and the Board of Funeral Directors and Embalmers (BFDE) effective January 1, 1995; SB 2037 (McCorquodale) would have merged the two agencies into a single board and provided the merged board with funding for January 1 through June 30, 1995. Due to the historical failure of both boards to regulate the death services industry in the public interest, the legislature's move was intended to compel the restructuring of the industry's regulation in California. However, SB 2037 was killed by the Senate on the last day of the session because the Assembly reneged on the budget agreement and deleted the merger provision from the bill; the continuation funding provision died with the bill, and both boards were scheduled to close their doors on January 1. [14:4 CRLR 4]

Thus, the state was left in an unusual position: Funeral directors, embalmers, and cemetery brokers are required to be licensed, but California has no agency to perform the licensing function. Further, there is no agency to receive complaints about licensees of the death services industry, investigate them, and enforce state law and regulations by disciplining licensees where appropriate. Throughout the fall, DCA attempted to address the situation by offering to take over the licensing and enforcement programs of both boards pending the legislature's creation of a new entity to handle death services industry regulation; specifically, DCA urged both boards to accept their fate and pass resolutions temporarily delegating their licensing and enforcement authority to the Department. Both boards refused, instead preferring to ask the legislature for a deficiency appropriation pursuant to section 27 of the 1994-95 Budget Act. Department of Finance Director Russell Gould informed the Joint Legislative Budget Committee (JLBC) of his intent to grant the requests. This action prompted Senate Business and Professions Committee Chair Senator Dan Boatwright to write a letter to JLBC Chair Senator Mike Thompson, in which he outlined the history of the boards' defunding through the budget process. Senator Boatwright wrote, "The Cemetery Board's request is simply an attempt to circumvent the Legislature's budget process. I strongly urge you to deny requests from the Cemetery Board [or BFDE] pursuant to Section 27 of the Budget Act." Likewise, JLBC Legislative Analyst Mac Taylor wrote to

Senator Thompson that "[i]n view of the Legislature's actions concerning these boards, it is not appropriate for the administration to use the Section 27 notification process to provide funds that the Legislature specifically denied." In November, Senator Thompson refused to concur in the proposed deficiency funding.

The Cemetery Board ran out of money on December 1. On December 5, DCA Interim Director Lance Barnett transferred the Board's civil service staff to DCA, took possession of Executive Officer Ray Giunta's state car, and disconnected telephone service at the Board's office. BFDE conserved the six months' worth of funding it had been allocated, and—at this writing—remains open with a skeleton staff. (See agency reports on CEMETERY BOARD and BFDE for related discussions.)

It is widely expected that legislation will be introduced in the near future to merge the boards or create a new entity within DCA to regulate the death services industry.

DCA Publishes 1994 Legislative Digest. In January, the Department published its *Consumer Legislative Digest*, a compilation of legislation introduced during 1994 which is significant to DCA, its licensees, and consumers throughout the state. The *Digest* is organized to enable the reader to identify a bill by bill number, subject matter or category, or chapter number of the bill passed by the legislature and signed by the Governor.

BEAR Service Contractor Rulemaking. Following a November 10 public hearing, BEAR adopted new Article 5.5 (sections 2755-2760), Title 16 of the CCR; the new rules implement SB 798 (Rosenthal) (Chapter 1265, Statutes of 1993) by establishing a system for the registration and regulation of service contractors in California. Among other things, the proposed regulations would specify the information and documentation which must be provided to BEAR by an applicant seeking registration as a service contractor; provide a procedure for the registration, as a service contract seller, of a person who is not an obligor on a service contract but sells such service contract on behalf of another person who is an obligor on the service contract; interpret existing statutory law requiring service contractors to demonstrate financial responsibility by, *inter alia*, the establishment of an escrow account equal to 25% of the deferred revenues from service contracts in force or to have a net worth greater than the amount of deferred revenues from service contracts in force; specify records which must be kept by service contractors; specify the

procedure by which service contractors must file their service contract forms with BEAR; and provide that the initial registration and annual renewal fee shall be \$60 for each place of business operated in California by a service contractor. [14:1 CRLR 19-20; 13:4 CRLR 22] At this writing, BEAR staff is preparing the rulemaking file on the proposed regulations for submission to the Office of Administrative Law (OAL).

BAR Rulemaking. Following a November 10 public hearing, BAR adopted proposed regulatory changes to section 3340.30, Title 16 of the CCR. Specifically, BAR proposes to amend subsections (a) and (f) of section 3340.30 to establish a \$65 initial examination fee and renewal examination fee for Smog Check Program technicians; and to delete subsection 3340.30(c), which currently limits technicians to taking BAR's qualification examination no more than three times in any 12-month period. At this writing, the rulemaking file on these proposed changes is pending at OAL.

LEGISLATION

AB 141 (Bowen), as introduced January 13, would prohibit state and local agencies from selling, exchanging, furnishing, or otherwise providing a public record subject to disclosure under the Public Records Act to a private entity in a manner that would result in the record no longer being available under the Act. [A. GO]

AB 142 (Bowen), as introduced January 13, would expressly provide that any agency which has information in an electronic format that constitutes an identifiable public record under the Public Records Act shall, unless otherwise prohibited by law, make that information available in an electronic format when requested by any person. The bill also specifies that the agency may recover its direct costs of duplicating the electronic record. [A. GO]

AB 63 (Katz), as introduced December 19, would—until January 1, 1998—delete BAR's \$450 repair cost limit on emissions control maintenance for specified vehicles, and instead prescribe repair cost limits of \$50 to \$300 for specified classes of vehicles. The bill would restate the \$450 repair cost limit on and after January 1, 1998. [A. GO]

AB 123 (Rainey), as introduced January 12, would create an exception to the definition of "locksmith" in BSIS' enabling act for an agent or employee of a retail establishment that has a primary business other than providing locksmith services. The locksmith services must be limited in scope and performed on the



premises on locks purchased from the retail establishment; in addition, an unlicensed agent or employee of the retail establishment may not represent himself or herself to be a licensed locksmith, redesign or implement a master key system, perform locksmithing services on automotive locks, or possess specified locksmith tools. The bill would also exempt a law enforcement officer who performs locksmith services in the course of his or her professional duties from BSIS' licensing requirements. [A. CPGE&ED]

AB 53 (Murray), as introduced December 15, would establish procedures for the DCA Director, through BSIS, to issue a permit allowing private investigators, private security services licensees, and alarm company operators and agents to carry a pistol, revolver, or other firearm capable of being concealed upon the person in a concealed manner. The bill would provide that on or after January 1, 1997, this procedure is the exclusive means whereby these persons may carry a concealed weapon. This bill would provide procedures for the sheriff or the chief or other head of a municipal department wherein the applicant for a permit resides or maintains a business to object to the issuance of a permit by the DCA Director. This bill would also authorize the DCA Director to adopt and enforce reasonable rules to establish qualifications to be a bodyguard. [A. CPGE&ED]

LITIGATION

On October 7, the Third District Court of Appeal issued its third decision in *Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers*, 28 Cal. App. 4th 1470 (1994). [14:4 CRLR 22] Once again, the court decided several important issues arising under the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*, including the following:

• The court interpreted the "pending litigation" exception to the Act's open meeting requirement, Government Code section 11126(q), which permits state bodies "to confer, and receive advice from, legal counsel," to include the communication of facts (as well as legal advice) from legal counsel, and to include the state body's deliberations and decisionmaking thereon.

• With regard to the Act's procedural requirements accompanying the use of the "pending litigation" exception, the court noted that section 11126(q) requires the state body's legal counsel to prepare and submit to it, preferably prior to the closed session but no later than one week after the closed session, a memorandum stating the

specific reasons and legal authority for the closed session. The court rejected the Board's assertion of a "substantial compliance" defense for failure to comply with these procedures.

• The court also interpreted section 11126(d), which—at the time relevant to this litigation—provided that state bodies may meet in closed session "to deliberate on a decision to be reached based upon evidence introduced in a proceeding required to be conducted pursuant to [the Administrative Procedure Act]." Because the language of the statute expressly contemplated (1) deliberation, (2) decision, (3) evidence, and (4) APA proceedings, the court held that state bodies are not permitted to meet in closed session under section 11126(d) to consider petitions to terminate license probation, for license reinstatement, or to reduce a penalty unless it has previously held an APA hearing to receive evidence on the licensee's rehabilitation. Further, the court held that state bodies may not meet under section 11126(d) to consider proposed disciplinary settlements which involve a stipulated set of facts: "Subdivision (d)...does not permit deliberations to provide cover for receiving and considering evidence in closed session. It is only deliberation, and not the introduction of evidence, which can be conducted in closed sessions pursuant to the subdivision (d) exception." To the extent that evaluation of a proposed settlement is part of the Board's litigation strategy, the court found that it may be reviewed with legal counsel under section 11126(q), but not under section 11126(d). The court noted that several of the Board's arguments for closed sessions to consider stipulated settlements are better addressed to the legislature, because "subdivision (d) simply does not go that far."

• And once again, the court held that the Board's two-member advisory committees are state bodies under section 11121.7, and fully subject to the Act's open meeting requirement. Although two-member advisory committees of a state body appear to be exempt from the open meeting requirement under section 11121.8, the court held, in effect, that when even one member of a state body serves on an advisory committee in his/her official capacity as a representative of the state body, and the state body finances the member's participation, the open meeting requirements of the Bagley-Keene Act "follow" that member and his/her official participation.

On November 7, the Third District denied BFDE's motions for rehearing and for depublishation of its decision. On January 5, the California Supreme Court de-

nied BFDE's petition for review and depublished the Third District's decision, thus negating the precedential impact of five years of litigation.

Malibu Video Systems, et al. v. Kathleen Brown, Treasurer of the State of California, et al., No. CV942093-RMT(EX) (C.D. Cal.), and *Malibu Video Systems, et al. v. Kathleen Brown, et al.*, No. BC082830 (Los Angeles County Superior Court), are still pending; the parties are engaged in discovery. These cases are class actions filed in both state and federal court by Los Angeles attorney Richard I. Fine on behalf of state licensees, alleging that the State of California illegally diverted money from the reserve funds of special-funded agencies in California. "Special-funded agencies" (including all the regulatory programs in DCA) receive funding support not from the general fund but from licensing and other fees imposed on their licensees; those fees are generally passed on by the licensees to the consumers of their services as a cost of doing business. In the Budget Acts of 1991-92, 1992-93, and 1993-94, the legislature included provisions which reduced the reserve funds of special-funded agencies down to three months' worth of operational expenses, and diverted the rest to the general fund. In his lawsuits, Fine claims that these diversions reduced the total amount in special-funded agencies' reserve funds by 46% (from \$1.569 billion in 1991 to \$848.5 million in 1994). Fine alleges that the funds were collected for consumer protection purposes, and that diverting them to help pay the state's deficit both deprives consumers of protection from incompetent and dishonest practitioners and serves to double-tax taxpayers who are consumers of the services of state licensees. [14:4 CRLR 22; 12:4 CRLR 1] At this writing, Fine plans to file another lawsuit challenging similar budget transfers included in the state's 1994-95 budget.

OFFICE OF THE LEGISLATIVE ANALYST

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Created in 1941, the Legislative Analyst's Office (LAO) is responsible for providing analysis and nonpartisan advice on fiscal and policy issues to the California legislature.

LAO meets this duty through four primary functions. First, the office prepares