

Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 2, No. 2 (2000)

HIGHLIGHTS

**Healthy Families
Application Simplified
(see page 10)**

**Comprehensive Statewide Public
Playground Safety Standards Approved
(see page 14)**

**Health and Safety Standards
for Child Care Providers Adopted
(see page 17)**



KEY

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from May 1, 1999 through December 31, 1999; actions on those packages through January 31, 2000; and updates on previously-reported regulatory packages through January 31, 2000.

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

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

BOC:	Board of Control
CCR:	California Code of Regulations
CDE:	California Department of Education
CYA:	California Youth Authority
DDS:	Department of Developmental Services
DHS:	Department of Health Services
DMH:	Department of Mental Health
DSS:	Department of Social Services
MPP:	Manual of Policies and Procedures
MRMIB:	Managed Risk Medical Insurance Board
OAL:	Office of Administrative Law
Parole Board:	Youth Offender Parole Board

Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 2, No. 2 (2000)

CONTENTS

Preface	2
Child Poverty	3
Child Health	8
Special Needs	16
Child Care	16
Education	18
Child Protection	21
Juvenile Justice	27
Agency Descriptions	27
For Further Information	28

PREFACE

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

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

CAI represents children — and only children — in the California Legislature, in the courts, before administrative agencies, and through public education programs. CAI strives to educate policymakers about the needs of children — about their needs for economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and

injury. CAI's mission is to ensure that children's interests are effectively represented whenever and wherever government makes policy and budget decisions that affect them.

The *Children's Regulatory Law Reporter* is funded through grants from The California Wellness Foundation and The Maximilian E. & Marion O. Hoffman Foundation, Inc.

Children's Advocacy Institute Staff

Robert C. Fellmeth, J.D.
Executive Director

Kathryn R. Dresslar
Senior Policy Advocate

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

Kim Parks
Administrative Assistant

Stephanie Reighley
Administrative Assistant

Louise Jones
Administrative Assistant

Copyright © 2000 by the Children's Advocacy Institute.

CHILD POVERTY

New Rulemaking Packages

Child Support Cooperation

On May 28, 1999, DSS published notice of its intent to adopt new section 12-110 of the MPP, to further implement AB 1542 (Chapter 270, Statutes of 1997), which shifted the responsibility for determining if an applicant/recipient of child support services has cooperated with the district attorney and/or the county welfare department in establishing and enforcing child support obligations from the IV-A (TANF/CalWORKs) agency to the IV-D (child support) agency. Specifically, section 12-110 requires the district attorney to have staff available in person or by telephone at the county welfare office during the initial eligibility interview, to obtain information necessary to establish, modify, or enforce child support for the purpose of determining applicant/recipient cooperation. If the applicant/recipient attests under penalty of perjury that he/she cannot provide the necessary information, the district attorney shall make findings as to the reasonableness of the applicant/recipient's attestation, or his/her inability to provide requested information. Prior to the determination of cooperation, the district attorney shall consider the age of the child, the circumstances of conception, the age and mental capacity of the parent/caretaker, and the last time the parent/caretaker had contact with the obligor.

Pursuant to section 12-110, cooperation would include providing the name of the alleged parent or obligor and other information about that person if known to the applicant/recipient, such as address, social security number, telephone number, place of employment or school, and the names and addresses of relatives or associates; appearing at interviews, hearings, and legal proceedings provided the applicant/recipient is provided with reasonable advance notice of the interview, hearing, or legal proceeding, and does not have good cause not to appear; if paternity is at issue, submitting to genetic tests, including genetic testing of the child, if necessary; and providing any additional information known to, or reasonably obtainable by the applicant/recipient, necessary to establish paternity or to establish, modify, or enforce a child support order.

Section 12-110 prohibits the district attorney from requiring an applicant/recipient to sign a voluntary declaration of paternity as a condition of cooperation. Finally, the regulation states that upon determination of failure to cooperate with the district attorney in the enforcement and/or establishment of a support obligation, notice shall be given to the county welfare office so that it may take the next appropriate action.

DSS held a public hearing on this proposed action on July 14 in Sacramento. The rulemaking package was approved by the Office of Administrative Law (OAL) on November 2, 1999, and went into effect on December 2, 1999.

Impact on Children: Consistent with this adopted rule, the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) requires TANF parents to "cooperate" in identifying absent parents liable for child support. And California's implementing CalWORKs statute gives the local county district attorney the authority to determine whether that parent has so cooperated. The adopted rule reinforces the district attorney's authority and does not provide for any due process protections to check erroneous or unfair judgments by a deputy DA. Where cooperation is found to be lacking, the parent's share of TANF may be cut-off. For the benchmark family of a mother and two children, this would represent a cut from just over \$600 per month to \$400 per month. This basic safety net for children was once over \$900 per month in current dollars, and would be imposed at a time of further rent increases. The impact on children of such a cut is momentous, and takes affected families below minimal subsistence levels. Such an impact increases homelessness and implicates undernutrition with well known brain development impacts.

It is unclear from the vagueness of the rule how local prosecutors are to make the apparent unilateral decision that cooperation has been insufficient. If a TANF parent discloses what she knows, is that sufficient? Is the burden on that parent to provide identifying information, and how much? Will it matter if the sexual act conceiving a child was not consensual? That the TANF parent was a minor at the time (making her the victim of statutory rape)? Must affirmative efforts be undertaken to find the absent parent? Will fear that a child's father may be violent or dangerous to the family excuse identification? If the decisions are to be devolved to assigned deputy district attorneys, how will the state maintain some consistency between counties? How will the state deal with the removal of the district attorney as the child support collection authority in legislation effective in January of 2000?

The adopted rules in this area do not address the many questions, uncertainties, and prospective injustices which may drastically affect innocent children caught in the middle of the state's effort to identify absent parents for child support assessment purposes. It is unclear at this time how many parental cut-offs will be authorized based on deputy district attorney judgments, or how erroneous decisions may be challenged outside of problematical legal aid representation. The rule provides for a deputy district attorney conclusion of failure to cooperate without any procedural safeguards (including even the obligation to allow the TANF parent to explain her inability), and without any standards. The county welfare department is simply notified of the decision, without further specification. Presumably, a challenge will crystalize only when the cut is implemented, and will require the affirmative action (and available representation or ability to proceed in pro per) by the TANF parent.

In its broad structure, the arrangement as enacted involves serious constitutional infirmities for the parent who is sanctioned without clear recourse and without standards. The arrangement appears to violate the U.S. Supreme

Court precedent imposing procedural due process requirements to assistance cut-offs, as set forth in *Goldberg v. Kelly* (1970) 397 U.S. 254. It is also unclear how the constitutional right of a child to "safety" under Article I, Section 1 of the California Constitution is met where that child's assistance to below sustenance levels may be accomplished from the unilateral complaint of a prosecutor.

PRA Collection and Distribution

On July 30, DSS published notice of its intent to revise existing child support program regulations regarding district attorneys' distribution of child, family, medical, and spousal support payments collected within the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) distribution hierarchy. Specifically, DSS proposed to amend sections 12-101, 12-108, 12-302, 12-711, 43-203, 43-205, 82-506, 82-508, 82-518, and 82-520 and adopt new sections 12-400 through 12-435 of the MPP; DSS also proposed to repeal sections 25-900 through 25-925 of the Handbook.

According to DSS, prior to welfare reform, district attorneys were required to distribute child, family, medical, and spousal support arrearage payments where a family is not currently receiving TANF aid first to repay public assistance paid to the family, then to pay off arrearages that accrue after the family was no longer on aid (and which will go to the family). Under the PRA, however, states are required to distribute support arrearage payments first to the arrearages that accrue after the family leaves assistance (and which is owed to the family), second to the arrearages that accrued before the family received assistance (also owed to the family), and last to the arrearages that are assigned to the state (to repay assistance paid to the family).

Among other things, this rulemaking change provides step-by-step collection and distribution regulations, setting forth standards for the types and duration of assignment of support rights, the allocation of payments in multiple cases, the distribution hierarchy, the welfare distribution process, the disbursement of payments, and submission of child support program collection, distribution, and disbursement reports to DSS; the changes also specify the audit trail reports that must be maintained by district attorneys.

DSS adopted these changes on an emergency basis on August 12, 1999. The Department subsequently held a public hearing on the changes on September 14-17, 1999; at this writing, DSS has not submitted the permanent regulations to OAL for review and approval.

Impact on Children: The PRA change in the law allows families no longer receiving TANF assistance to receive child support due them before state and federal jurisdictions are fully repaid for their prior TANF support. In general, the new regulations will benefit children in comparison to the impact of prior law. Repayment of public welfare debt is pushed down in priority over the current needs of children. Given the large arrearages owed to the state and federal jurisdictions which are common while families

receive TANF assistance, the shift in priority can be important to involved children. Instead of having to wait for years while an absent parent pays off child support arrearages to the public treasury, the families get what is back-owed to them first. While important for many children, the overall scale of child support collection precludes it from ameliorating child poverty alone. For example, even where arrearages are due the state (e.g., while families are on TANF) the first \$50 in monthly child support is currently retained by the family. Moreover, the average monthly amount received by California's four million children eligible for child support from absent parents (usually fathers) is only \$28 per month per child. While that amount has increased over the last four years from \$17 per month, and while some children may receive several hundred dollars per month or more of needed help, the scale of child poverty and support collection precludes it from being a panacea. (For data and discussion, see Children's Advocacy Institute, *California Children's Budget 1999-2000* (San Diego, CA; 1999) at 2-16 to 2-17, available at www.acusd.edu/childrensissues.) Some child advocates argue that the elevation of family support over state repayment is important because it connects absent fathers with the families they have sired, perhaps developing some sense of paternal commitment where it is in short supply.

Child Support Pass-on Elimination Regulations

Also on July 30, DSS published notice of its intent to amend sections 12-101, 12-108, 12-405, 12-425, 12-430, 43-203, 82-518, and 82-520 of the MPP, to eliminate the pass-on payment in current assistance CalWORKs cases, effective April 1, 2000; pass-on payments are the amount of a current support collection that is in excess of the aid payment made during the month. Among other things, the proposed changes require current support collections that would have been a pass-on payment to be applied to repay the aid payments made to the family in past months which have not been reimbursed; clarify that current support collections in federal foster care cases must be used to recoup only the current assistance payment; and establish the standard that the amount of current support collected is to be applied against both the current assistance payment and any past assistance payment that has not been otherwise reimbursed in nonfederal foster care cases.

DSS held a public hearing on these proposed changes on September 14-17; at this writing, the changes await review and approval by OAL.

Impact on Children: This rule is consistent with the priority change rule implementation discussed above.

Fleeing Felons/Convicted Drug Felons — Food Stamp Program Regulations

The Food Stamp Program is designed to promote the general welfare and to safeguard the health and well-being of the nation's population by raising the levels of nutrition among low-income households. The PRA disqualifies

persons from food stamps who are fleeing to avoid felony prosecution, custody or confinement, or who are violating a condition of parole or probation. The PRA also provides that persons convicted of certain drug-related felonies are to be denied food stamp eligibility; this disqualification is only applicable to convictions which occurred after the date of enactment of the PRA.

On October 1, 1999, DSS published notice of its intent to amend sections 63-100, 63-102, 63-400, and 63-402 of the MPP, to shift the burden of proof regarding fleeing status from the counties to the applicant/recipient felons; add parole or probation violation as a separate cause for ineligibility; add more specificity to the convicted drug felon regulations; clarify the definition of the term "fleeing felon"; and define the term "violation of probation or parole."

DSS held a public hearing on the proposed changes on November 16-18; at this writing, the regulations await review and approval by OAL.

Impact on Children: The area of greatest concern for children is the application of post-1996 drug convictions as a basis for food stamp denial. One of the bases for food stamp benefits for the impoverished was to allow children to receive nutrition notwithstanding parental drug addiction; it is more difficult to black market food stamps at a discount than to divert TANF cash benefits into drug purchases. The number of parents with serious drug or alcohol addiction problems is not insubstantial; it is highly correlated with child abuse/neglect dependency court cases. California currently has almost 120,000 children in foster care, the vast majority born to impoverished parents who are drug-addicted or -involved. (See Children's Advocacy Institute, *California Children's Budget 1999-2000* (San Diego, CA; 1999) at Chapter 8, *passim*, available at www.acusd.edu/childrensissues.) The child welfare system requires "reasonable efforts" to reunify such children with their parents, but drug addiction programs remain oversubscribed and waiting lists are common. No empirical evidence supports the thesis that cutting down food stamp assistance ameliorates drug addiction or child abuse. On the other hand, substantial evidence connects food stamp diminution with nutritional shortfall and serious brain development damage to affected children. The populist appeal of "getting tough" on drug users/merchants here damages vulnerable third parties: innocent children.

If a parent has succumbed to the drug culture, he/she may face serious consequences, including the possible removal of his/her children to assure their protection. However, most children of such parents remain in those families, which are then deprived categorically upon criminal conviction of the parent's share of food stamp benefits where they fall upon hard times financially. This bright-line prohibition on adult food stamp eligibility applies even where the sentence has been served, the debt to society paid, and rehabilitation achieved by that parent. Once again, the cut-off operates under the assumption that cutting food stamps from \$210 in food a month (for a family of three) to \$140 will have no impact on the two children

fed by those respective amounts. As with the TANF "parent only" reduction of from \$600 to \$400 per month in TANF support, that presumption is disingenuous.

CalWORKs Homeless Assistance Program

AB 1111 (Chapter 147, Statutes of 1999) enacted provisions which amended the CalWORKs program; among other things, the bill required DSS to amend its CalWORKs Homeless Assistance regulations. Accordingly, on October 29, 1999, DSS published notice of its intent to amend sections 40-000, 40-009, 44-200, and 44-211 of the MPP, to increase the daily Temporary Shelter allowance from \$30 to \$40 per day; change the once-in-24 months time limit regarding exceptions to once-in-12 months; and allow the county welfare departments to require a recipient to participate in a Homelessness Avoidance Case Plan if a recipient returns a second time within 24 months.

DSS adopted the changes on an emergency basis on November 9, 1999. On December 15, 1999, DSS held a public hearing on the permanent adoption of the changes; at this writing, DSS has not yet submitted the permanent changes to OAL for review and approval.

Impact on Children: The change in homeless assistance from \$30 to \$40 compensates partially for rent inflation over the years since the prior adjustment. However, the extremely limited time period offered for homeless assistance (one month out of twelve) does little to ameliorate the devastating impact of children compelled to live in shelters, out of cars, or on the street. Moreover, assistance is also capped by a maximum of 16 consecutive days (see section 44-211 of the MPP). Further, lifetime allotments allow extremely limited use of the benefit. In fact, the sum expended in California for homeless assistance was \$146.5 million in 1989-90; by 1997-98 that figure had fallen to \$32.7 million.

The number of homeless children has not declined since 1989, but is substantially greater in number. Although child poverty rates have leveled over the past two years, substantial decreases have not yet occurred. Moreover, many of those under the poverty line are much deeper in poverty than has been the case over the past decade, notwithstanding the economic recovery benefitting much of the state's population. (See Children's Advocacy Institute, *California Children's Budget 1999-2000* (San Diego, CA; 1999) at Chapter 2, *passim*, available at www.acusd.edu/childrensissues.)

Child Support Financial Management Services Tax Refund Intercept Regulations

Under the PRA and the federal Office of Child Support Enforcement (OCSE) action transmittal 98-17, dated July 6, 1998, states are mandated to submit weekly additions, deletes, and upward and downward modifications of the child support arrearages owed by a noncustodial parent; these directives require DSS to move from an annual to an ongoing intercept system and are in conflict with the current intercept regulations. Failure to follow the federal directives would cause the Child Support Program in

California's income tax refund intercept systems to be out of compliance with federal requirements.

On October 29, 1999, DSS published notice of its intent to amend sections 12-701, 12-702, 12-703, 12-704, 12-705, 12-706, 12-707, 12-708, 12-709, 12-710, 12-711, 12-712, 12-713, 12-714, 12-715, 12-716, and 12-717 of the MPP, to allow counties to add new cases year round, and to submit upward and downward modifications and deletions. The amendments also include updates to the Child Support Program terminology.

DSS adopted the changes on an emergency basis on November 24, 1999. On December 15, 1999, DSS held a public hearing on the permanent adoption of the amendments; at this writing, DSS has not yet submitted the permanent changes to OAL for review and approval.

Impact on Children: Absent fathers who owe child support may suffer its assessment from tax refunds owed to them by the federal or state jurisdictions. Federal rules now require California to monitor for such payment intercepts more often, which if implemented could add to child support collection, albeit marginally.

Shelter Cost Verification

Currently, state food stamp regulations require that counties verify shelter costs at application, during the certification period when a change in residence by the household has occurred, and at recertification. In addition to housing costs (rent, mortgage payments, etc.), counties are required to verify a household's actual utility expenses if the household wishes to claim expenses in excess of the Standard Utility Allowance (SUA) and the expense would actually result in an income deduction. Households which incur heating or cooling costs separate from their rent or mortgage payments are entitled to the SUA; counties must verify entitlement to the SUA for households that choose it.

Title 7, Code of Federal Regulations, section 273.2(f)(1)(iii) requires verification of a household's utility expenses if the household wishes to claim expenses in excess of the SUA and the expense would actually result in an income deduction. According to DSS, federal regulations do not require verification of any other housing costs, including entitlement to the SUA, at application, during the certification period, or at recertification, unless questionable. Current federal regulations allow states the option of mandating verification of any factors which affect household eligibility and benefit levels for which verification is not otherwise federally mandated; this option may be chosen on a statewide or project area basis, but cannot be imposed on a selective case-by-case basis. Until now, California did not exercise that option. However, on December 3, 1999, DSS issued notice of its intent to amend sections 63-300, 63-504, and 63-505 of the MPP to exercise the federal option to eliminate the statewide mandate for verification of shelter costs, unless questionable, and allow counties the option to mandate verification of these costs on a county-wide basis. Counties that opt to mandate verification of shelter costs will have to comply with regulations governing mandated verification.

DSS' proposed amendments would also delete an outdated portion of the MPP which requires state or federal approval if a county elects to mandate verification of dependent care costs, liquid resources and loans, or household size; according to DSS, those provisions are no longer supported by federal regulations.

On December 21, 1999, DSS adopted the amendments on an emergency basis. On January 19, 2000, DSS is scheduled to hold a public hearing on the permanent adoption of the amendments.

Impact on Children: Much of the "verification process" adds another layer of red tape for parents seeking food stamp assistance to feed their children. While the state has a legitimate interest in preventing fraud, child advocates argue that proof of utility costs (in order to qualify under net income formulae for food stamps) is a gratuitous barrier to entry. Utility costs are reasonably predictable and counties can require verification if levels claimed are atypical. The federal standard maintains the utility verification requirement, which the state must and does here follow.

But federal law now allows relaxation of state verification of non-utility shelter costs. The state has an opportunity to streamline this process to allow easier access to basic nutrition for affected children. However, the proposed rules have regrettably allowed counties the option of continuing paperwork verification barriers to claim predictable shelter costs which are not commonly subject to fraud or abuse, and where the federal jurisdiction no longer requires it. Devolving such decisions to the counties tempts some to create an inhospitable environment for food stamps. While the federal jurisdiction primarily funds these benefits, by discouraging recipients some officials believe it will drive eligible families into other counties and save them TANF and other related funding where the state contribution is more substantial. Child advocates contend that a prime purpose of state rulemaking on this subject is to create a minimum floor to protect child access to the safety net. The proposed rules here fail to do so.

Update on Previous Rulemaking Packages

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

CalWORKs Child Care

On June 29, 1998, DSS adopted sections 47-100, 47-101, 47-110, 47-200, 47-201, 47-220, 47-230, 47-240, 47-260, 47-300, 47-301, 47-320, 47-400, 47-401, 47-420, and 47-440, and repeal of sections 40-107, 40-107.14, 40-107.141, 40-173.18, 44-500 to 44-509, 47-101 to 47-190 (non-inclusive), and 89-700 to 89-740 (non-inclusive) of the MPP, on an emergency basis, to implement changes in child care provided under the CalWORKs program. On December 28, 1998, DSS readopted the changes on an emergency basis. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Special Insert) at 9.)

Update: On August 9, 1999, OAL approved DSS' permanent adoption of these amendments.

CalWORKs Child Support

The CalWORKs statute requires custodial parents to cooperate in the state's effort to collect child support from the non-custodial parent — usually absent biological fathers. On June 24, 1998, DSS amended sections 82-508, 82-510, 82-512, and 82-514 and its repeal of section 82-516 of the MPP, on an emergency basis, to implement the law. On December 22, DSS readopted those changes on an emergency basis. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Special Insert) at 12.)

Update: On June 21, 1999, OAL approved DSS' permanent adoption of these changes, with the exception of the last sentence of section 82-512.3, which OAL determined not to comply with the consistency and clarity standards of the Administrative Procedure Act. The rejected sentence stated that "[t]he claim [that cooperating in child support enforcement efforts would not be in the best interests of the aided child] shall be granted based on physical, sexual or emotional harm only on a demonstration of an impairment that substantially affects the individual's functioning." According to OAL, this sentence adds an additional condition that is not in the authorizing statute, which requires only that the efforts to establish paternity or establish, modify, or enforce a support obligation would "increase the risk of physical, sexual, or emotional harm to the child for whom support is being sought." OAL noted that the regulatory language imposes a higher standard of harm than the statute itself sets, and thus is inconsistent with the statute. Further, OAL found that the sentence is unclear in many respects, such as what the term "substantially affects the individual's functioning" means, what standard will apply in determining whether the effect is "substantial," and what types of impairment might be sufficient to show each kind of harm (emotional, physical, or sexual).

CalWORKs Property Limits

In June 1998, DSS amended sections 42-203, 42-205, 42-207, 42-211, 42-212, 42-215, and 42-221 of the MPP, on an emergency basis, to set new property limits and rules for transfers of assets under CalWORKs. On December 22, 1998, DSS readopted the regulations on an emergency basis. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Special Insert) at 13.)

Update: On August 4, 1999, OAL approved DSS' permanent adoption of the changes.

CalWORKs Welfare-to-Work Provisions

In June 1998, DSS adopted sections 42-702 to 42-780 (non-inclusive), 42-800 to 42-812, 42-1001 to 42-1012, amended sections 42-710 to 42-797 (non-inclusive), and repealed sections 42-711 to 42-809 (non-inclusive) of the MPP, on an emergency basis, to implement CalWORKs-

mandated changes. CalWORKs abolished the previous Greater Avenues to Independence (GAIN) program, which provided training and child care to a small part of the TANF parent population. The new regulations implement the welfare-to-work provisions of CalWORKs that replace GAIN. They are intended to expand welfare-to-work activity from the 10% to 20% of parents participating in GAIN to a remarkable 80% (all parents not among the maximum 20% allowed by federal law for exemption). On December 23, 1998, DSS readopted the regulations on an emergency basis. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Special Insert) at 13.)

Update: On June 21, 1999, DSS readopted these regulations on an emergency basis, and on September 13, 1999, OAL approved DSS' permanent adoption of these changes.

Child Support Collections

In October 1998, DSS adopted, on an emergency basis, new sections 12-401, 12-405, 12-410, 12-415, 12-420, 12-425, 12-430, 12-435, amendments to sections 12-101, 12-108, 12-302, 12-711, 43-203, 82-506, 82-508, 82-518, and 82-520, and the repeal of 43-205 of the MPP; in January 1999, DSS readopted most of the changes on an emergency basis; however, the readoption did not include sections 43-203, 43-205, 82-506, 82-510, 82-518, or 82-520. The emergency action changes the distribution hierarchy of child support payments collected by the county and changes the dates of distribution. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 at 2.)

Update: DSS again readopted these changes, on an emergency basis, on June 11, 1999 and August 12, 1999. On January 18, 2000, OAL approved DSS' permanent adoption of these regulatory changes.

Domestic Abuse Procedures

In December 1998, DSS published notice of its intent to permanently adopt section 42-715, and amend sections 19-004, 40-107, 40-115, 40-131, 40-181, 42-302, 42-701, 42-710, 42-713, and 82-512 of the MPP, to clarify CalWORKs procedures as they differ for qualifying victims of domestic abuse. On December 22, 1998, DSS adopted the regulatory changes on an emergency basis; they became effective on January 1, 1999. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 at 2.)

Update: DSS readopted the rulemaking package, on an emergency basis, on June 30, 1999. OAL approved the permanent regulations on January 31, 2000.

Food Assistance Program

In January 1999, DSS adopted sections 63-031 and 63-411, and amended sections 63-102, 63-403, and 63-405 of the MPP, on an emergency basis, to comply with AB 2779 (Aroner) (Chapter 329, Statutes of 1998), which eliminated the age restriction for the California Food Assistance

Program (CFAP) (food stamps benefits) for legal residents who were in the United States prior to August 22, 1996. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 at 3.)

Update: DSS readopted the rulemaking package, on an emergency basis, on July 28, 1999. At this writing, DSS has not submitted the permanent regulations to OAL.

Time Limit Requirements

In June 1998, DSS adopted section 40-035 and amended sections 42-301, 42-302, and 82-832 of the MPP, on an emergency basis, to implement new time limit requirements for CalWORKs recipients; DSS subsequently readopted the emergency rulemaking package on December 21, 1998. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Special Insert) at 8.)

Update: OAL approved DSS' permanent adoption of these regulatory changes on July 29, 1999.

CalWORKs Grant Structure and Aid Payments

AB 1542 added Welfare and Institutions Code sections 11450.12, 11450.5, and 11451.5, which required DSS to establish a new grant computation formula including disregards (deductions) for disability-based unearned and earned income. In June 1998, DSS adopted section 44-316 and amended sections 44-350, 44-101, 44-102, 44-111, 44-113, 44-133, 44-206, 44-207, 44-315, 44-402, and 89-201 of the MPP, on an emergency basis, to implement the changes. DSS subsequently readopted the rulemaking package, on an emergency basis, on December 23, 1998. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Special Insert) at 9.)

Update: OAL approved DSS' permanent adoption of these regulatory changes on July 30, 1999.

CHILD HEALTH

New Rulemaking Packages

California Children's Services

Medical Eligibility

California's program for physically handicapped children was established in 1927 by the legislative enactment of the Crippled Children's Act. In more recent years, this has become known as the Robert W. Crown California Children's Services (CCS) Act. According to DHS, the CCS program has grown dramatically since its inception. Originally, only surgically correctable physically handicapping conditions were eligible. Medical eligibility was limited to crippling conditions that were visible, such as club foot and post polio limb paralysis, which could be surgically repaired and the children discharged as cured. In the early days of CCS, there were no effective treatment modalities available for most of the

severe medical conditions that affected children. The first appearance of CCS-eligible medical conditions that did not require surgery occurred in the 1940s when a means was developed to prevent the recurrence of rheumatic fever by the prophylactic administration of penicillin. At that time, CCS added rheumatic fever and rheumatic heart disease as eligible medical conditions. This was the first step of what would become the future of the CCS program; that is, to include medical conditions that were not amenable to simple surgical intervention. As time passed, the philosophy and the scope of coverage by CCS was changed from a rehabilitative program that found, repaired, and discharged crippled children, to a program that is committed to the care of children who have life-long, severe, complex, physically handicapping conditions often with very poor prognoses. The same logic used for treating rheumatic fever is still followed by CCS today. As new means are developed to treat other physically handicapping conditions those conditions will also be included in the list of CCS-eligible medical conditions.

The CCS program is determined to continue its purpose of serving children with chronic physical handicaps amenable to medical care. Eligibility requires a disability which limits or interferes with physical function and which can be cured, improved, or stabilized. The current list of CCS-eligible medical conditions includes birth defects, handicaps that are present at birth or develop later, and injuries due to accidents or violence. The conditions are generally, although not always, relatively uncommon, chronic rather than acute in nature, require the care of more than one health professional discipline or specialist, and are usually costly.

Health and Safety Code section 123830 and section 41800, Title 22 of the CCR list certain handicapping conditions which render a child eligible for treatment through the CCS program. Additionally, Section 123830 provides the DHS Director with the authority to establish new eligible medical conditions to be covered by the CCS program. Conditions have been determined eligible over the period of 70 years in response to changes in medical practice which have resulted in new conditions being added when treatment became available for the condition. As the program has further advanced since section 41800 was adopted, the conditions eligible for treatment require modification as new diseases have emerged and changes in medical practice permit further clarification and redefinition of the current regulations. The clarification and redefinition of the new rules are intended to enhance specificity, so that brighter lines will enable applicants and health care providers to gauge eligibility and to promote consistency.

According to DHS, changes to the CCS regulations are critical because of the establishment of Medi-Cal Managed Care Plans and the Healthy Families program. Services to treat a child's CCS-eligible medical condition are carved out from managed care plans for obvious reasons. Managed care operates on a capitated basis (a per person charge), rewarding plans and providers who can "skim the cream" by enrolling healthy populations requiring little

cost. The pressure to cut costs leads to service shortfall for costly CCS patients. Nevertheless, many children from families financially eligible for the CCS program will be receiving health care for other than their CCS-eligible condition, including preventive and primary care services, from a managed care plan. In both programs, Medi-Cal and Healthy Families, the responsibility for paying for treatment services for the CCS-eligible condition of the child, who is enrolled in the managed care plan, rests with the CCS program rather than the managed care plan. In the absence of clear designation of responsibility, and because of confusion or misinterpretation of a child's medical eligibility for CCS, a child who is eligible for CCS services may have treatment delayed while responsibility is determined for providing or paying for the medical care. A delay or inaccessibility to critically needed medical services puts the child at risk of permanent disability or death.

On May 6, 1999, DHS—on an emergency basis—repealed section 41800, and adopted new sections 41508, 41509, 41510.2, 41510.4, 41515.1, 41515.2, 41516.3, 41517.3, 41517.5, 41517.7, 41518.2, 41518.3, 41518.4, 41518.5, 41518.6, 41518.7, 41518.8, 41518.9, 41800, 41811, 41815, 41819, 41823, 41827, 41831, 41832, 41835, 41839, 41844, 41848, 41852, 41856, 41864, 41866, 41868, 41870, 41872, and 41876, Title 22 of the CCR. According to DHS, these new regulations clearly specify which medical conditions are eligible for treatment through the CCS program. Among other things, the regulations do the following:

- ◆ Section 41800 provides that medical eligibility for the CCS program, as specified in sections 41811 through 41876, shall be determined by the CCS program medical consultant or designee through the review of medical records that document the applicant's medical history, results of a physical examination by a physician, laboratory results, radiologic findings, or other tests that support the diagnosis of the eligible condition.

- ◆ Section 41827 provides that CCS applicants with a mental disorder, whose application is based upon such a disorder, shall not be medically eligible for the CCS program. Further, CCS applicants with mental retardation, whose application is based upon such disease, shall not be medically eligible for the CCS program.

- ◆ Section 41832 identifies those conditions which would qualify CCS applicants as medically eligible for participation in the CCS Medical Therapy Program.

- ◆ Section 41835 identifies eye conditions which would qualify CCS applicants as medically eligible for participation in the CCS program.

- ◆ Section 41839 identifies diseases of the ear and mastoid process which would qualify CCS applicants as eligible for participation in the CCS program for diagnostic services to determine the presence of a hearing loss.

- ◆ Section 41844 identifies diseases of the circulatory system which would qualify CCS applicants as medically eligible for participation in the CCS program.

- ◆ Section 41848 identifies diseases of the respiratory system which would qualify CCS applicants, with chronic conditions of the lower respiratory tract, as eligible for participation in the CCS program.

- ◆ Section 41852 identifies diseases of the digestive system which would qualify CCS applicants as eligible for participation in the CCS program.

- ◆ Section 41856 identifies diseases of the genitourinary system which would qualify CCS applicants as medically eligible for participation in the CCS program.

- ◆ Section 41864 identifies diseases of the skin and subcutaneous tissues which would qualify CCS applicants as medically eligible for participation in the CCS program.

- ◆ Section 41866 identifies diseases of the musculoskeletal system and connective tissue which would qualify CCS applicants as medically eligible for participation in the CCS program.

- ◆ Section 41868 identifies congenital anomalies which would qualify CCS applicants as medically eligible for participation in the CCS program.

- ◆ Section 41872 identifies accidents, poisonings, violence, and immunization reactions which would qualify CCS applicants as medically eligible for participation in the CCS program.

On May 28, 1999, DHS published notice of its intent to adopt these regulations on a permanent basis. On September 7, 1999 and December 23, 1999, DHS again re-adopted the regulations on an emergency basis; DHS must submit the permanent rulemaking package to OAL by April 21, 2000, or the emergency language will be repealed by operation of law.

Impact on Children: The new and more specific list of qualifying diseases will exclude many children currently considered eligible for CCS services. Rather than an overall functional definition (e.g., "a condition which is seriously disabling and which is amenable to medical treatment to cure or to substantially mitigate future disability"), the "list" approach serves to exclude many who qualify under the CCS program's declared intent, but which will be excluded because the causative diagnosis is not "on the list." The exclusion of mental disorders occurs in the context of meager funding for child mental health services, and of a dramatic increase in the number of such disabled children — many of whom are amenable to medical treatment (e.g., drug and/or diet therapies with close monitoring).

This shift from "you are included if you have a qualifying problem" to "you are included if you are on this limited list" will deprive tens of thousands of California's

disabled children of regular medical monitoring and treatment to give them a reasonable chance for permanent health and a contributive life. They will instead have to depend upon a managed care system which eschews their inclusion as costly, and which reflects economic incentives to deny or limit services.

The limitation of CCS inclusion is joined by another problem which DHS' rules fail to address. Compensation levels for CCS have not increased with inflation and are presently at the bottom of the nation, notwithstanding California's disproportionately high provider rents, equipment, and other costs. Providers who treat the CCS population generally do so at an out-of-pocket loss, reducing annually the supply of providers available to these children. Given the legislative mandate that compensation be sufficient to provide needed services, California may be in violation of current law.

EPSDT Home Nursing Service Rates

On August 10, 1999, DHS amended section 51051 and adopted new section 51532.1, Title 22 of the CCR, on an emergency basis, to set forth Early Periodic Screening and Diagnosis Treatment (EPSDT) supplemental services reimbursement rates paid to home health agencies (HHAs) and certain nurses approved as EPSDT supplemental services providers. According to DHS, providers have expressed an unwillingness to provide in-home services, particularly nursing services, at current levels of reimbursement. In-home nursing services for persons under age 21 are necessary to meet the requirements of federal and state law to correct or ameliorate defects and physical and mental illnesses and conditions discovered during the EPSDT screening services whether such services are covered under the State Plan. Further, the Social Security Act requires that payments be consistent with efficiency, economy, and quality of care and "sufficient to enlist enough providers so that care and services are available," at least to the extent that such care and services are available to the general population in the geographic area.

Section 51532.1 is intended to assure continued access to EPSDT in-home nursing services provided by HHAs and certain nurses, by raising reimbursement rates. Rates were developed from wage data provided by the California Association of Health Services and the Office of Statewide Health Planning and Development.

In order to be eligible for reimbursement, registered nurses and licensed vocational nurses who provide in-home nursing services directly to an EPSDT beneficiary, not as employees of an HHA, must be approved as EPSDT supplemental services providers, pursuant to section 51242(d), Title 22 of the CCR, and act within the scope of their practice under the direction of the patient's physician.

On August 27, 1999, DHS published notice of its intent to adopt the changes on a permanent basis; the Department received public comments on the proposal until October 12, 1999. On December 7, 1999, DHS transmitted the per-

manent regulations to OAL, which approved them on January 14, 2000.

Impact on Children: The rate increases authorized by the new rule change will assist some children currently denied in-home services. However, the increase is insufficient to markedly change incentives or to restore supply to adequate levels. Arguably, the newly-adopted levels remain in violation of the statutory standard.

Healthy Families Program — Simplified Application

On May 26, 1999, DHS amended sections 2699.6500, 2699.6600, 2699.6605, 2699.6607, 2699.6611, 2699.6625, and 2699.6629, Title 10 of the CCR, on an emergency basis, to simplify the eligibility and enrollment processes for the State Children's Health Insurance Program (CHIP) and the Healthy Families/Medi-Cal for Children Program. On July 2, 1999, DHS published notice of its intent to amend these sections on a permanent basis.

As way of background, DHS noted that in August 1997, the federal government established a new program, the State Children's Health Insurance Program (CHIP), by adding Title XXI to the Social Security Act. The purpose of the new program is to provide health services to uninsured, low-income children. The program is targeted to serve children whose family's income, although low, is too high to qualify for the Title XIX Medicaid Program, called Medi-Cal in California. CHIP offered the states the option of expanding Medicaid coverage, establishing a new program through a managed care health insurance model, or doing a combination of Medicaid and the new model. Insurance Code Section 12693.33 encourages MRMIB and DHS to develop, if feasible, a joint Healthy Families Program/Medi-Cal application and enrollment form. MRMIB and DHS complied with this directive in implementing the new program for July 1, 1998. However, because of the differences between the two programs, and the two program's extensive requirements for determining income eligibility, the joint application was, initially, a long and fairly complicated document. MRMIB received feedback from applicants, application assistance organizations, and various groups representing the interests of health access for low income families, that the long joint application had become a barrier to program enrollment. MRMIB and DHS convened an Application Revision Workgroup in October 1998 to review and challenge the assumptions made in developing the first application, and produce a shorter, more user friendly application that still met the state and federal eligibility verification requirements of both programs. The Workgroup consisted of MRMIB and DHS staff, HFP contractors, members from the HFP Advisory Panel, Region IX of the U.S. Department of Health and Human Services, the enrollment contractor (EDS Corporation), county eligibility staff, health care providers and various advocacy groups. The Workgroup succeeded in reducing the joint application to only 4 pages, and made several

suggestions to simplify the eligibility and enrollment processes for both programs. MRMIB revised the HFP regulations to conform to the simplified application, the new form, and the revised HFP eligibility and enrollment processes. Highlights of the simplified application process include:

- ◆ Income levels for eligibility are now determined by the program rather than the applicant. Program staff will use the income documentation provided by the applicants.
- ◆ Income documentation using paycheck stubs is limited to one pay period, rather than one month's worth of paycheck stubs.
- ◆ Applicants are allowed more time to turn in all lawful residency documentation for applicant children. Children will be let into the program on an interim basis, to give applicant parents enough time to collect the documentation.
- ◆ Health plan provider choice is made optional at the time of application.
- ◆ The amount of information necessary for annual eligibility review is reduced. Previously, this required completing another full application.
- ◆ Applicants are allowed twenty days, rather than ten days, to submit missing information, before the application is rejected as incomplete.
- ◆ The flow of the joint application from the HFP enrollers to county welfare offices is improved, if an applicant indicates an interest in applying for Medi-Cal when family income is too low for HFP eligibility.
- ◆ The application assistance payment form is combined with the program application. This will significantly reduce the paperwork necessary for the receiving the \$50 and \$25 payments made to application assistants, for successfully enrolling and requalifying families.
- ◆ In accordance with a request by the Office of Administrative Law, the March 1999 edition of the program application, which implements the simplified application process, is being incorporated by reference.

MRMIB is also updating the regulations to conform to federal policy on not using an absent parent's income to determine eligibility, to assure that income counting is treated equally in both HFP and Medi-Cal for Children. This update is part of the new application process. MRMIB is also taking this opportunity to clarify the types of information that application assistants may provide to applicants on participating health plans. These changes, which were made at the behest of insurance agents, will clarify existing standards while preventing steerage to any one of the health plans.

DHS held a public hearing on the proposed changes on August 18, 1999, in Sacramento. On September 17, 1999, MRMIB submitted the permanent changes to OAL, which approved them on October 28, 1999.

Impact on Children: The reduction of the application form from its initial 28-page iteration to four pages will enable more children to receive coverage; that coverage is estimated to save \$5 for every \$1 expended. Children cost approximately one-fifth the amount per person to cover medically as do senior citizens, all of whom receive substantial medical coverage.

Child advocates argue that the form change, while laudable, is the rearranging of deck chairs on a sinking ship. The federal jurisdiction has made available to California \$850 million per year for at least five years to provide health coverage to most of California's children. At the start of 1999, about 20% of the state's children were uncovered: they lived enough above the poverty line to be ineligible for Medi-Cal, but their parents' employers did not provide medical coverage for them. It is the children of the working poor who would benefit from Healthy Families. Most of the cost to cover children up to 200% to 250% of the poverty line in California is covered by the federal program. Only about 15% to 20% of the state's currently uncovered children live above that income level. Hence, the Children's Advocacy Institute has proposed a system of "presumptive eligibility," under which all children are covered — period. After treatment and in due course parents will certify their income level and some may be assessed charges accordingly. Why deny services to 85% of those who are uncovered (amounting to less than 5% of the state's children) because that small number may get medical services their parents can afford? Given the numbers, let children in now and assess costs later where appropriate, rather than the continued erection of social service-style barriers to care (forms, waiting, qualification, proof, enrollment, designation, payment, *et al.*).

In contrast to that approach, the state has not been adding significantly to medically-covered children. The reduction in TANF roles from a combination of factors (rebounding economy, welfare system contraction) has caused hundreds of thousands of children to leave not only TANF payments, but Medi-Cal coverage as well, notwithstanding their continued eligibility for it or for Healthy Families coverage. This reduction in coverage has approximately matched the slow rate of Healthy Families enrollment. In fact, as late as the middle of 1999, after more than one year of Healthy Families sign-ups, the state had fewer medically-covered children than before the program started. (For discussion, see Children's Advocacy Institute, *California Children's Budget 1999-2000* (San Diego, CA; 1999) at 4-1 to 4-5, 4-23 to 4-33, available at www.acusd.edu/childrensissues.) California is on schedule to return most of the federal money to Washington unspent, and will reduce medically-covered children by a fraction of the number eligible for such coverage.

Healthy Families Program — Rural Health Demonstration Projects

On August 5, 1999, MRMIB amended sections 2699.6500 and 2699.6600 and adopted new section

2699.6804, Title 10 of the CCR, to improve access to health, dental, and vision services for children residing in rural areas through Rural Demonstration Projects. Insurance Code section 12693.91 authorizes MRMIB to develop and administer Rural Demonstration Projects in rural areas that are likely to contain a significant level of uninsured children, including seasonal and migratory worker dependants. The purpose of the Projects is to fund rural collaborative health care networks to alleviate unique problems of access to health care in rural areas. To accomplish this, MRMIB will provide additional funding to current Healthy Families Program contractors through a competition, review, and award process. The contractors who are awarded projects will make their services available to persons living in rural areas who do not have geographic access to health care, and to special populations, such as seasonal and migratory worker dependents.

On September 3, MRMIB published notice of its intent to adopt these changes on a permanent basis; the Board held a public hearing on October 20, 1999 to receive comments on the proposal. On October 29, 1999, MRMIB submitted the permanent changes to OAL, which approved them on December 3, 1999.

Impact on Children: The pilot projects are likely to assist some children in obtaining medical coverage, including the children of migratory workers who are at special risk. However, pilot projects routinely flourish for several years, only to disappear without measurement of efficacy and more statewide "roll-out" where warranted. Moreover, the pilot projects occur in the context of a somewhat weaker infrastructure of rural clinics and health care providers upon which this population depends. The managed care structure has included many of these providers, but others not so advantaged are now subject to reduced compensation and the possible diversion of needed business volume over to designated managed care providers. Rather than the pilot projects which are ubiquitous in California politics, child advocates would prefer the systemic assurance of supply and incentives by the existing suppliers of these services.

Healthy Families Program — Family Value Package Pricing

On August 8, 1999, MRMIB amended sections 2699.6500, 2699.6800, and 2699.6809, Title 10 of the CCR, on an emergency basis, to implement changes to the Healthy Families Program and allow families to have a greater choice of plan combinations, and of health and dental plans within the combinations. According to MRMIB, this will improve the program's attractiveness and saleability, and encourage more low income families who are uninsured to purchase health care for their children.

The Healthy Families Program enabling legislation established the family value package and community provider plan concepts as ways for giving subscriber families financial incentives, through lower family contributions, for selecting the lower cost family value package in a county, and an even greater discount incentive for select-

ing health plans MRMIB has designated as being community provider plans. Community provider plans are those health plans with the highest number of traditional and safety net providers included in their Healthy Families network. Traditional and safety net providers have a demonstrated history of serving low income populations. The federal government put a cap on the amount of contributions that can be charged to families, which, in effect, disallowed the legislative intent of charging the difference in price between family value package plans and higher cost plans. Therefore, plans which are selected to participate in the program must meet MRMIB's family value package premium cost threshold. The Board has revised, through a prior regulation change, its definition of family value package to include the standard that a plan must cover at least 85% of a county's population, geographically, through its provider network, to be used in the calculation for family value package. This was to assure that participating families will be able to pick family value package combinations that serve a broad population in the county. In practice the original definition of family value package unduly restricted plan choice, especially dental plans.

Therefore, MRMIB is now proposing to further change the definition of family value package to assure a greater choice of health and dental plans combinations (currently MRMIB has only one statewide vision plan contractor, so there is no immediate impact on vision plan choice). This is done by stating that any plan combination that includes at least one plan that is available within a combination that is within the family value package threshold, can be included as a family value package to be offered by the program. MRMIB believes this will further meet legislative intent, as expressed in Insurance Code section 12693.37, to ensure that subscribers have a variety of choice in selecting coverage.

MRMIB is also revising section 2099.6800, to allow for plans to offer different prices to the Board within a geographic region, at the individual county level. This will also increase the choice of available health and dental plans, by allowing MRMIB to allow plans to offer lower prices to be included in the family value package of a particular county, without having to lower the price for the whole region, which plans are sometimes not able to do without sacrificing network quality.

The above changes impact the family contribution fees for participating in the program. With wider family value package choice, the family will no longer need to pay the difference, currently up to three dollars per child to select a combination with a discounted community provider plan, who does not meet the family value package standard. Under the change, all combinations selected by MRMIB will meet the family value package pricing standard. Therefore, MRMIB proposed to repeal the provision, in section 2699.6809, which requires families to pay the difference. According to MRMIB, this will provide a greater incentive to pick plan combinations which have the designated community provider plan, and further encourage use of traditional and safety net providers in the program.

On September 3, MRMIB published notice of its intent to adopt these changes on a permanent basis; the Board held a public hearing on October 20, 1999 to receive comments on the proposal. On November 2, 1999, MRMIB submitted the permanent changes to OAL, which approved them on December 1, 1999.

Impact on Children: The new regulations will benefit children by allowing parents more flexibility in arranging for health care for their children. However, they do not directly address the underlying problem of fragmentation. The parents of impoverished children currently face a MRMIB regulator covering Healthy Families, the Department of Health Services covering Medi-Cal (with a traditional role by the Department of Social Services), a separate CCS program for some children, and regulation of other managed care providers (HMOs, PPOs) by the Department of Insurance and the Corporations Commissioner (soon to surrender to yet another department). A parent can have three different children in three different programs administered by three different and largely uncoordinated state agencies. And her children can move, based on their age and condition, and her income, into different programs as time passes. This fragmentation is addressable by presumptive eligibility, discussed above, which can supersede the existing barrier-oriented programs. Child advocates contend that the "bottom up" control which is facilitated by the new MRMIB rules (and which they support) need to supersede and be generalized among all of the agencies overseeing child health-related services.

Pediatric Day Health Care

Welfare and Institutions Code section 14132.10 requires DHS to establish pediatric day health care services as a Medi-Cal covered benefit through the filing of emergency regulations. The pediatric day health care program is intended to provide a community-based resource to the continuum of care for children with medically fragile conditions who live at home with their families. Pediatric day health care services are provided in a licensed pediatric day health and respite care facility; such services include nursing care and developmentally appropriate activities that promote the physical and psychosocial well-being of Medi-Cal eligible individuals under 21 years of age who are medically fragile and who live with their parent, foster parent, or legal guardian.

On November 26, 1999, DHS published notice of its intent to adopt new sections 51242.1 and 51532.3 and amend sections 51184, 51242, and 51340.1, Title 22 of the CCR, on an emergency basis, to specify the requirements for facility participation; establish the admission criteria and professional health care personnel standards; specify utilization control requirements; and establish a reimbursement rate for pediatric day health care services.

Among other things, new section 51242.1 provides that the facility shall collaborate with and involve the child's parent, foster parent, or legal guardian in the decision

making process for all care planning and provision of interventions and treatment at the facility and in the child's home. Such collaboration shall be provided by the director or personnel delegated by the director, and shall involve, at a minimum, a conference with the child's parent, foster parent, or legal guardian to be held quarterly, or more frequently as indicated by the needs of the child or parent, foster parent or legal guardian, to provide, at a minimum, a written status report on the plan of treatment of the child at the facility, and information on the interventions and treatments specified in the child's plan of treatment. The collaboration must also involve a written report of the day's events provided to the parent, foster parent or legal guardian at the conclusion of each day of attendance specifying information including but not limited to treatments provided and when they were provided; medications administered, including amount, time and route of dosage; nutritional intake, including amount, time and route of intake; developmental activities; and contact with the attending physician. The section also provides that each facility shall accept and retain only those beneficiaries for whom it can provide adequate, safe, therapeutic and effective care as determined by the attending physician and documented in the child's individualized plan of treatment.

New section 51532.3 provides that the hourly rate of reimbursement for pediatric day health care Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services shall be \$26.74. Payment for pediatric day health care services shall be limited to labor costs for nursing services and authorized developmental programs and equipment, medications, and supplies for emergency purposes.

OAL approved the emergency rulemaking package on November 10, 1999; DHS must transmit a certificate of compliance to OAL by March 9, 2000, or the emergency language will be repealed by operation of law on the following day.

Impact on Children: The new collaboration requirements and compensation levels will assist children eligible for pediatric day health care.

Update on Previous Rulemaking Packages

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

EPSDT Lead Contamination Detection

On April 13, 1999, DHS adopted section 51532.2, and amended sections 51242, 51340, and 51340.1, Title 22 of the CCR, on an emergency basis, to provide payment for onsite inspections for Medi-Cal eligible children diagnosed with lead poisoning. On April 30, 1999, DHS published notice of its intent to permanently adopt the sections. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 4.)

Update: On August 5, 1999, DHS readopted the changes on an emergency basis. On December 1, 1999, DHS submitted the permanent changes to OAL, which approved them on January 12, 2000.

Healthy Families Program Simplified Application

On December 25, 1998, MRMIB amended sections 2699.6500, 2699.6600, 2699.6607, 2699.6629, 2699.6805, and 2699.6809, Title 10 of the CCR, on an emergency basis, to implement changes in the Healthy Families program. On January 1, 1999, MRMIB published notice of its intent to permanently adopt the emergency regulations. On May 24, 1999, MRMIB again adopted the sections on an emergency basis. Among other things, the rulemaking action simplifies the eligibility and enrollment processes for the Children's Health Insurance Program (CHIP) and the Healthy Families/Medi-Cal for Children Program. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 5.)

Update: On September 17, 1999, MRMIB submitted the permanent changes to OAL, which approved them on October 28, 1999.

Required Immunizations

Health and Safety Code sections 120325 through 120475 require children to receive certain immunizations in order to attend public and private elementary and secondary schools, child care centers, family day care homes, nursery schools, day nurseries, and development centers. On February 19, 1999, DHS amended sections 6020, 6035, and 6075, Title 17 of the CCR, on an emergency basis, to conform with statutory requirements and to bring California in line with current national recommendations. Among other things, DHS added new immunization requirements for entry into the seventh grade. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 8.)

Update: On May 26, 1999, DHS submitted the permanent changes to OAL, which approved them on June 30, 1999.

Medi-Cal Rate Increase

AB 1656 (Ducheny) (Chapter 324, Statutes of 1998) authorizes additional Medi-Cal funding to increase reimbursement rates for providers. On March 12, 1999, DHS amended sections 51503, 51505.1, 51509, 51509.1, and 51527, Title 22 of the CCR, on an emergency basis, to comply with the legislation. The regulatory changes establish the Medi-Cal reimbursement rates for physician, hospital outpatient department, and ambulance transportation services. Prior to the amendments, Medi-Cal reimbursement for children was less than that for adults, because rates were based on twenty-year-old Relative Value Studies (RVS); the amended sections provide funding to increase children's rates for a specific set of physician office visit procedures to at least equal

the rates paid for adults. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 8.)

Update: On August 10, DHS re-adopted the changes on an emergency basis. On December 2, 1999, DHS submitted the permanent changes to OAL, which approved them on January 13, 2000.

Medi-Cal Specialty Mental Health Services

AB 757 (Polanco) (Chapter 633, Statutes of 1994) enacted laws for the provision of specialty mental health services to beneficiaries of Medi-Cal. On November 1, 1997, the Department of Mental Health (DMH) adopted new sections 1810.100 *et seq.*, Title 9 of the CCR, on an emergency basis, to implement AB 757. The new regulations implemented the second phase of Mental Health Managed Care, providing 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. The new sections were readopted on an emergency basis on March 2, 1998, and again on June 17, 1998. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Fall 1998) at 6.)

Update: DMH's deadline for submitting a Certificate of Compliance to OAL, to effect the permanent adoption of these sections, was extended to July 1, 2000, pursuant to the Budget Act of 1999 (Chapter 50, Statutes of 1999), Item 4440-103-0001(4), which provides that these emergency regulations shall remain in effect until July 1, 2000, or until the regulations are made permanent, whichever occurs first.

Playground Safety

SB 2733 (Rosenthal) (Chapter 1163, Statutes of 1990) requires the adoption of minimum safety standards for all public playgrounds in California. Among other factors, SB 2733 specifies that the regulations must be at least as protective as the public playground safety guidelines published by the U.S. Consumer Product Safety Commission (CPSC), a recognized authority in the field of playground safety. SB 2733, which has been codified in Health and Safety Code sections 115735 *et seq.* (formerly sections 24450 *et seq.*), specifically required DHS to consult with specified agencies and private entities, and to adopt playground safety regulations by January 1, 1992.

DHS failed to promptly initiate the regulatory process; in fact, two years after the deadline, DHS still had not complied with its mandated duty. Therefore, in 1994, the Children's Advocacy Institute (CAI), on behalf of petitioners Maia Barrow, her guardian ad litem Steve Barrow, and the California Public Interest Research Group (Cal-PIRG), petitioned for a writ of mandate in Sacramento County Superior Court (Case No. 379538). The writ sought a ruling forcing DHS to adopt playground safety regulations as required by SB 2733. In March 1995, Judge Tom Cecil issued a peremptory writ of mandate ordering DHS to "immediately on

receipt of this writ to comply with your duty under Health and Safety Code sections 24450 *et seq.* to adopt playground safety regulations. You are expected to proceed in good faith to adopt regulations in a timely manner." In the summer and fall of 1995, DHS convened a "SB 2733 Playground Regulations Advisory Work Group." On October 13, 1995, DHS notified the court that it would draft and submit the required public playground safety regulations to DHS' Internal Office of Regulations by January 31, 1996, and would thereafter submit an emergency regulations package to OAL by March 31, 1996. DHS failed to meet either deadline.

CAI subsequently filed a motion to enforce the judgment, threatening possible contempt of court proceedings against DHS officials. In June 1998, the court ordered DHS to adopt the regulations on or before March 1, 1999. On September 18, 1998, DHS finally published notice of its intent to permanently adopt sections 65700 through 65755 (inclusive), Title 22 of the CCR. After a public hearing and subsequent revision, DHS adopted the regulations and submitted them to OAL on April 14, 1999. OAL disapproved the regulations on May 24, 1999, however, on the grounds that DHS failed to meet the authority and clarity standards of the APA. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 9.)

Update: In November 1999, DHS submitted a revised regulatory package to OAL for review and approval; on December 22, 1999, OAL approved the regulations, which took effect on January 1, 2000.

Prenatal Care for Immigrants and Unqualified Aliens

The federal PRA prohibits states from providing state and local public benefits, including non-emergency pregnancy-related services, to persons who are non-qualified aliens and certain other aliens. Prior to the enactment of the PRA, federal law required states to provide services for the treatment of emergency medical conditions, including emergency labor and delivery services, to any alien otherwise eligible for Medi-Cal regardless of whether that person could document his or her immigration status. And since 1988, California has used state-only Medi-Cal funds to provide non-emergency pregnancy-related services to women without satisfactory immigration status as described in federal law. 42 U.S.C. § 1396b(v). With the enactment of the PRA, federal law now prohibits states from providing certain public benefits, including non-emergency pregnancy-related services, to ineligible persons as described above, unless the state enacts a law after the PRA enactment date that affirmatively provides for such eligibility.

In 1996, DHS added section 50302.1 to Title 22 of the CCR, on an emergency basis, to specify who is eligible to receive non-emergency pregnancy-related services; amend the Manual of Criteria for Medi-Cal Authorization, effective July 1997; and incorporate by reference section 51003, Title 22 of the CCR. These regulatory changes were intend-

ed to implement the requirements of the PRA and deny services to persons who are ineligible under federal law.

Lawsuits were immediately filed by several groups challenging the validity of the regulations, and contending that the use of the emergency rulemaking process by DHS — under which regulations may be adopted without notice or comment — violates the Administrative Procedure Act (APA). A San Francisco Superior Court judge subsequently held that the state's required compliance with the new federal law did not justify the issuance of emergency regulations; the court issued a preliminary injunction barring DHS from enforcing the emergency regulations. As a result, DHS dropped the emergency rules and commenced the ordinary rulemaking process as required by the APA for non-emergency (permanent) regulations.

However, in August 1997, the First District Court of Appeal vacated the trial court's order and remanded the matter to the trial court with instructions to deny the request for the preliminary injunction. The appellate court found that DHS did not abuse its discretion in finding that an emergency existed in light of the passage by Congress and the signing by the President of the PRA. Although DHS prevailed, it did not readopt the changes as emergency regulations because conclusion of the non-emergency regulatory process was near.

On December 20, 1996, DHS published notice of its intent to adopt new section 50302.1, Title 22 of the CCR. Following several public comment periods and numerous revisions, DHS submitted the regulatory changes to OAL on November 13, 1997; OAL approved them on December 1, 1997. The effective date of the new regulation was to be January 1, 1998 for new applicants and February 1, 1998 for the existing caseload. However, several ongoing legal challenges delayed implementation of the regulations beyond those dates. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 1, No. 2 (Fall 1998) at 8.)

Update: SB 1107 (Cedillo) (Chapter 146, Statutes of 1999) provides that any alien who is otherwise eligible for Medi-Cal but who does not meet specified requirements relating to residency status, is eligible for medically necessary pregnancy-related services, thus ensuring prenatal care for undocumented individuals. The regulatory changes discussed above were repealed on October 5, 1999.

Healthy Families Program

On December 14, 1998, MRMIB amended sections 2699.6500, 2699.6600, 2699.6607, 2699.6611, 2699.6629, 2699.6805, and 2699.6809, Title 10 of the CCR, on an emergency basis, to implement several changes in the Healthy Families program; those changes included definitions and provisions for the family value package and the determination of family contributions, participating health plans, income disregards eligibility and application clean-up, and application assistance payments. On January 1, 1999, MRMIB published notice of its intent to permanently adopt the changes. MRMIB accepted public comment

until February 17, 1999, and held a public hearing in Sacramento on the same date. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 5.)

Update: On May 6, 1999, OAL approved DHS' permanent adoption of these changes.

SPECIAL NEEDS

Update on Previous Rulemaking Packages

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

Personnel Standards for Nonpublic Schools and Agencies

SB 989 (Polanco) (Chapter 944, Statutes of 1996) directed the Board of Education to adopt regulations setting personnel standards for individuals employed by nonpublic schools and agencies. In July 1997, the Board adopted sections 3060-3064, and amended sections 3001 and 3051, Title 5 of the CCR, on an emergency basis. These emergency regulations specify the personnel standards for individuals employed by nonpublic, nonsectarian schools and agencies for each type of service that local educational agencies are required by federal and state law to provide to pupils with disabilities. The regulations are divided into two principal sections — one setting the standards for specialized instruction, and the other setting the standards for related services. The Board readopted these sections on an emergency basis in November 1997, April 1998, August 1998, December 1998, and March 1999. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 13.)

Update: On July 23, 1999, the Board transmitted the permanent regulations to OAL, which approved them on September 1, 1999.

CHILD CARE

New Rulemaking Packages

Child Care Data Collection Privacy Notice and Consent Form

On December 29, 1999, the California Department of Education (CDE) amended sections 18070 and 18081, Title 5 of the CCR, on an emergency basis. As amended, section 18070 provides, among other things, that a child development contractor shall provide a copy of the Child Care Data Collection Privacy Notice and Consent Form to any head of a family unit at the time of enrollment, and shall obtain a signed copy of that form indicating the head of household's decision whether to authorize or not authorize release of his/her social security number for the purposes of data collection and program management; section 18070 also requires that each signed Child Care Data Collection Privacy Notice and Consent Form be retained by the contractor.

As amended, section 18081 provides, among other things, that child development contractors shall establish and maintain an application for services, a signed Child Care Data Collection Privacy Notice and Consent Form, and the following records as applicable to determine eligibility and need in accordance with specified statutes: documentation of total countable income, employment, training, parental incapacity, a child's special needs, homelessness, and seeking permanent housing for family stability; and written referral from a legal, medical, or social services agency or emergency shelter for children receiving protective services for abuse, neglect, or exploitation or at risk of abuse, neglect, or exploitation.

The emergency amendments became operative on January 1, 2000; CDE must transmit to OAL a certificate of compliance by May 1, 2000, or the emergency language will be repealed by operation of law on the following day.

Impact on Children: Child care providers collect intimate information about families in order to gauge eligibility for CDE child development programs. That information includes family income and economic circumstances, special needs, *et al.* CDE programs subject to this rule are designed to include "cognitive development" as an integral part of care. In contrast, Department of Social Services programs have historically focused on the collateral benefit of reducing welfare rolls by allowing parents to work, which has at times contributed to a "warehousing" approach to care. The clarification of confidentiality encourages participation, which benefits involved children.

Child Care and Development Facilities Financing Program

As part of the Thompson-Maddy-Ducheny-Ashburn Welfare-to-Work Act of 1997 (Chapter 270, Statutes of 1997, codified at Education Code sections 8277.5 and 8277.6), the legislature established the Child Care and Development Facilities Loan Guaranty Fund and the Child Care and Development Facilities Direct Loan Fund, and mandated that the Department of Housing and Community Development administer the funds and establish regulations for implementing and managing the funds. The purpose of the funds is to guarantee or make private sector loans to sole proprietorships, partnerships, proprietary and nonprofit corporations, and local public agencies for the purchase, development, construction, expansion, or improvement of licensed child care and development facilities.

On April 16, 1999, the Department adopted sections 8250, 8251, 8252, 8253, 8254, 8255, 8256, 8257, 8258, 8259, 8260, 8261, 8262, 8263, 8264, 8265, 8266, 8267, 8268, 8269, 8270, 8271, 8272, and 8273, Title 25 of the CCR, on an emergency basis, to implement this legislation. Among other things, the emergency regulations set forth the following provisions:

◆ To be eligible to receive a guaranteed loan, direct loan, or microloan (a loan of not more than \$25,000 for a term of not more than 10 years), the proposed project must meet two threshold criteria: (1) Upon completion of the

proposed project, more than 50% of the children to be served shall come from households with incomes not exceeding 75% of the loan median income, as specified; and (2) the proposed project shall create new child care and development capacity, or preserve capacity that would otherwise be lost without the loan guaranty, direct loan, or microloan.

◆ To be eligible to receive a guarantied loan, direct loan, or microloan, the proposed project or applicant must also meet one of the following program priorities: (1) More than 50% of the capacity being created or preserved shall be for any combination of (a) infant care for children from birth to 3 years of age, (b) after school care for children from 5 to 14 years of age, (c) non-traditional operating hours care, or (d) serving special needs children; (2) the applicant currently operates a facility on or adjacent to a public school, the facility has lost capacity at the school as a result of the class size reduction program, and the proposed project will replace the lost capacity; (3) the applicant is currently under contract with the Department of Education to administer state and federally-funded child care and development programs; or (4) more than 50% of the capacity that will be created or preserved by the proposed project will serve children from "Welfare-to-Work" families.

◆ As a condition of receiving a loan guaranty, direct loan, or microloan, a successful applicant shall agree in writing to (1) provide licensed child care and development services in the facility being assisted with the loan guaranty or direct loan for a period of 20 years, or 10 years in the case of a microloan, or the term of the loan guaranty, direct loan, or microloan, whichever is shorter; and (2) waive any claims against, and to indemnify and hold harmless, the State of California, including the Department and its contractors, from and against any and all claims, costs, and expenses stemming from operation and maintenance of the facility being assisted with the loan, or the environmental degradation of the site upon which the facility is located.

The Department readopted the regulations on an emergency basis on October 13, 1999. On December 24, 1999, the Department published notice of its intent to adopt the regulations on a permanent basis, and will hold a public hearing on the proposal on February 9, 2000.

Impact on Children: These pending rules could be of special importance given now pending legislation to authorize up to \$1 billion in bond revenue for child care construction. As discussed in the health section above (CPR training requirements and increased maximum number of children allowed in family day care), the state lacks both an adequate supply of child care for the demand extant, and most importantly, the supply diminution is stark in rural and inner city neighborhoods. The large sums committed for child care increases have not provided available slots for those attempting to leave welfare rolls, and especially for those who do work. The working poor are last in line for child care subsidy, and large numbers are in danger of falling back onto public support, or into intractable poverty without child care assistance.

Increased child care investment has not been directed at areas where the demand is the greatest. These rules are intended to direct increased capacity into the inner city and rural areas where children are caught in the catch-22 imposed on their parents. Public safety net support is limited and will be cut-off, requiring full-time employment. Full-time employment is unworkable without child care. Child care is cut off within two years of job acquisition. (So-called "transitional" child care, or "stage 2" in the current nomenclature, is limited to an assured two years; waiting lists are long for "stage 3" child care, provided for the working poor. For more details, see Children's Advocacy Institute, *California Children's Budget 1999-2000* (San Diego, CA; 1999) at Chapter 6, *passim*, available at www.acusd.edu/childrensissues.) The new rules continue to focus on the "welfare to work" movement, without consideration of the cut-off of child care assistance at the two-year mark and its consequences on parents compelled to leave their jobs and on children who suffer from safety net reductions. However, the geographic location of the two populations is understandably coextensive. Hence, although the rules continue the regrettable omission of the plight of the working poor attempting to remain above the poverty line without public support, it may assist that critical and increasing population.

Training Standards for Child Care Providers

On April 23, 1999, the Emergency Medical Services Authority published notice of its intent to adopt sections 100000.6, 100000.7, 100000.8, 100000.9, 100000.10, 100000.14, 100000.16, and 100000.33, amend sections 100000.1, 100000.2, 100000.3, 100000.4, 100000.5, 100000.11, 100000.12, 100000.13, 100000.15, 11111.17, 100000.18, 100000.19, 100000.20, 100000.21, 100000.30, 100000.31, 100000.32, 100000.34, and 100000.35, and repeal section 100000.18, Title 22 of the CCR, to amend the First Aid Standards for Child Day Care Providers regulations, which specify training standards and training program approval requirements.

Among other things, the changes do the following:

- ◆ define the term "approved training program" or "approved program" as a training program that is approved by the EMS Authority to provide pediatric first aid, CPR, and/or preventive health and safety training to child care providers;
- ◆ define the term "preventive health and safety" as the course required for child care providers that encompasses study in recognition, management, and prevention of infectious diseases, including immunizations, and prevention of childhood injuries among children in child care facilities;
- ◆ provide that the training requirements for pediatric first aid and CPR for child care providers may be satisfied by maintaining current certification in pediatric first aid and CPR;
- ◆ provides that current certification is demonstrated by possession of a current pediatric first aid course completion card issued either by the American Red Cross or by a

training program that has been approved by the EMS Authority, and a current pediatric CPR course completion card issued either by the American Red Cross or the American Heart Association, or by a training program that has been approved by the EMS Authority;

- ◆ require that retraining in pediatric first aid and CPR shall occur at least every two years;

- ◆ provide that only instructors who possess a current pediatric first aid and CPR card shall teach approved child preventive health and safety training program courses, and require that all child preventive health and safety instructors shall have completed a minimum of 24 hours of child preventive health and safety training, as specified, within twelve months prior to beginning to teach an approved program;

- ◆ provide that the course content for preventive health and safety training shall include instruction to result in competence in topics and skills such as the prevention of infectious diseases (including sanitation and hygiene, childhood immunizations, maintenance of health records and forms, and infectious disease policies), child injury prevention (including risk of injury related to developmental stages, procedures to reduce the risks of Sudden Infant Death Syndrome and Shaken Baby Syndrome, regular assessments for the safety of indoor and outdoor child care environments and play equipment, transportation of children during child care, and child abuse resources), nutrition, environmental sanitation, air quality, food quality, water quality, children with special needs, and earthquake and emergency preparedness;

- ◆ reduce fees for the review and approval of training programs from \$500 per program review every two years to \$240 per program review every two years; and

- ◆ increase from 12 to 14 the maximum number of children that a family child care home may supervise, increase from 7 to 14 the maximum number of children which a large family child care home may supervise, and increase from six to eight the number of children which a small family child care home may supervise.

The Authority held a public hearing on the proposed changes on June 7, 1999, and adopted the changes on an emergency basis on June 29, 1999. On October 25, 1999, the Authority transmitted the permanent regulations to OAL, which approved them on December 8, 1999.

Impact on Children: First mandated by child care legislation in 1992 (AB 962 (Alpert) (Chapter 35, Statutes of 1992)), effective implementing rules are belatedly here adopted. The rules themselves are generally sensible, and will benefit children by assuring basic pediatric CPR skills among many who spend most of the day with children, who will on serious occasions require their use. The increased number of children authorized for family day care will not benefit children. It is authorized by legislation based on welfare-reform driven concern to increase child care supply. However, the increase in capacity will not seriously address

that problem — which derives from the location of providers in the suburbs and the increased demand in inner cities and rural settings. It will result in less attention paid to the larger number of children served by the same number of adults (see child care related rule changes discussed above).

EDUCATION

New Rulemaking Packages

Charter Schools — Satisfactory Progress

AB 544 (Chapter 34, Statutes of 1999) established parameters for a pupil's eligibility for generating charter school apportionments and authorized charter school apportionments for pupils over 19 years of age under specific circumstances. Specifically, to remain eligible for generating charter school apportionments, a pupil over 19 years of age shall be continuously enrolled in public school and make satisfactory progress toward award of a high school diploma. The legislation directed the Board to adopt regulations, on or by January 1, 2000, defining the term "satisfactory progress."

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

On November 26, 1999, the Board published notice of its intent to adopt the changes on a permanent basis; it held a public hearing on the proposed changes on January 13, 2000. The Board must transmit to OAL a certificate of compliance by March 17, 2000, or the emergency language

will be repealed by operation of law on the following day.

Impact on Children: A substantial number of California high school students are unable to complete high school in the scheduled four years. Although the number of "drop outs" has diminished to approximately 13%, a substantial number require additional time or special schooling to obtain a high school diploma or its equivalent. With an end to "social promotion" and increased accountability and testing now being implemented, the importance of public education for a substantial population over the age of 18 assumes increased importance. The growth of an international economy where manual labor jobs are increasingly provided outside of the United States makes high school graduation — as well as some higher education — essential for future employment of today's children.

These rules specify conditions for charter school options serving this important population. To the extent they stimulate additional educational opportunity for this population, children and youth will benefit.

Charter Schools — Independent Study Programs

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

On December 23, 1999, OAL approved the emergency adoption of sections 11700.1 and 11704, but disapproved the adoption of new section 11705. According to OAL, section 11705 fails to meet the consistency requirement of the Administrative Procedure Act. Specifically, OAL found that section 11705 is not consistent with Education Code section 47612.5, which went into effect on January 1, 2000, and which the Board intended to implement with this proposed emergency rulemaking. Section 47612.5 provides, among other things, that a charter school that provides independent study shall comply with Article 5.5 and implementing regulations adopted thereunder. Within Article 5.5 is section 51745(e), which provides that no course included among the courses required for high school graduation shall be offered exclusively through independent study. OAL found that section 11705, by deeming charter schools to be alternative schools for purposes of high schools graduation requirements, would allow charter schools to not provide classroom instruction as an option to independent

study. Accordingly, OAL concluded "that proposed regulation section 11705 does not meeting the 'consistency' standard of the APA because its intended effect is to exempt charter schools from complying with the independent study requirement of section 51745, subdivision (e), which is inconsistent with the statutory mandate of section 47612.5 of the Education Code...."

The Board published notice of its intent to adopt all three sections, on a permanent basis, on December 24, 1999; it is scheduled to hold a public hearing on the proposals on February 10, 2000. For the two sections which OAL approved on an emergency basis, the Board must transmit a certificate of compliance to OAL by May 2, 2000, or the emergency language will be repealed by operation of law on the following day.

Impact on Children: These rules are intended to reconcile the tension between charter school experimentation and minimum requirements generally applicable to public education. They allow charter schools greater license to provide independent study education (separate and apart from classroom instruction). The impact of such flexibility will turn on the efficacy of the alternatives employed. Where charter schools avoid classroom instruction and pocket the attendant cost savings without a substitute teaching strategy, the education of those students may suffer. However, charter schools are designed to be reviewed for efficacy, and given the increased use of testing (from which they are not exempt), substantial flexibility may be warranted. However, the state has failed to implement large scale, independent testing of the experimental techniques intended for charter schools so that the system as a whole may benefit from its successes, and as important, so future rules may be adopted to prohibit those education methodologies which clearly do not work by any objective measure.

Experienced Out-of-State Credentialed Teachers

Education Code section 44274.2 provides that elementary, secondary, and special education out-of-state trained teachers with five years of experience may qualify for a five-year preliminary credential and establishes specific requirements for the professional clear credential. Education Code section 44274.4 provides that elementary and secondary out-of-state trained teachers with three years of experience may qualify for a three-year preliminary credential and establishes specific requirements for the professional clear credential. Currently, there are no regulations that address these issues.

Sections 44274.2 and 44274.4, which became effective on September 18, 1998, allow experienced, out-of-state trained teachers to qualify for California certification without completing many of the statutory requirements needed by individuals prepared in California or those inexperienced teachers from outside of California. Those qualifying for the Multiple and Single Subject Teaching Credentials based on Education Code sections 44274.2 and 44274.4 are exempt from the following requirements:

methods of developing English language skills, including reading; provisions and principles of the U.S. Constitution; subject matter competence, fifth year of study; health education; special education; and computer education. Those qualifying for the Education Specialist Instruction Credentials based on Education Code section 44274.2 are exempt from the following requirements: methods of developing English language skills, including reading; provisions and principles of the U.S. Constitution; subject matter competence; non-special education pedagogy; and supervised field experience in general education.

On July 16, 1999, the Commission on Teacher Credentialing published notice of its intent to adopt new sections 80048.3.1 and 80413.3, Title 5 of the CCR, to set forth the necessary requirements and clarify the definitions used when issuing the credentials under these statutes. The Commission held a public hearing on the proposal on September 2, 1999, and subsequently submitted the rulemaking package to OAL, which approved it on December 16, 1999; the new regulations went into effect on January 15, 2000.

Impact on Children: Classroom reduction for grades kindergarten through third was implemented over a short two-year period from 1996-97, resulting in a sudden demand for teachers which cannot be met through normal qualification standards. At the same time, the infusion of large numbers of new teachers, often in mobile classrooms and with disruption of other grades, does not always benefit involved children. Smaller class size is important, but an effective, trained, and inspired teacher is even more important. Instead of rationally and systematically lowering class size in planned stages over a five- to ten-year period, California public officials have opted for a see-saw approach. First, allowing class sizes to rise to the second largest in the nation through a process of educational neglect. Then, as a part of political posturing, infusing sudden large scale capital into the dramatic reduction for children in four grades, and moving the state up to 40th among the 50 states in class size. The Davis administration has now fallen back into the neglect pattern, with only token class room reduction at two grade levels.

Child advocates and educators argue for a long-range plan to reduce class size substantially and inexorably in a planned and staged process. Such a strategy allows the many other elements associated with more classes to coalesce around the effort, including the capital and construction needs of the schools, and the increase in qualified and trained teachers.

These rules reflect a trade-off between smaller classes and less qualified teachers which need not be the Hobson's choice. Hopefully, they will reflect a temporary condition which will be ameliorated by prudent planning and appropriate revision to assure quality teachers.

Emergency Permits

Education Code section 44300 provides that the Commission on Teacher Credentialing may issue or renew emergency teaching or specialist permits in

accordance with regulations adopted by the Commission. On December 11, 1998, the Commission published notice of its intent to amend sections 80023.1, 80024.1, 80024.2, 80024.3, 80024.3.1, 80024.3.2, 80024.4, 80024.5, 80024.6, 80024.7, 80024.8, 80026, 80026.1, 80026.4, and 80026.6, Title 5 of the CCR, to amend the requirements for emergency teaching permits, and provide guidance to permit holders for earning a credential. Among other things, the amendments strengthen the requirements necessary for an emergency permit by requiring that an applicant receive a grade of "C" or better in all course work for the emergency permit. The Commission held a public hearing on the proposal on February 4, 1999; it subsequently submitted the proposed amendments to OAL, which approved them on November 11, 1999.

Impact on Children: See comment above.

Update on Previous Rulemaking Packages

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

Charter School Certification

On February 8, 1999, the Board of Education adopted sections 11965 through 11968 (inclusive), Title 5 of CCR, on an emergency basis, to provide guidelines for charter school certification and authorization. Specifically, the proposed regulations provide a definition of "private school," clarify the charter school certification requirement, and clarify the procedures to be used for appealing denials. On February 19, 1999, the Board published notice of its intent to permanently adopt the regulations. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 15.)

Update: OAL approved the permanent regulations on July 28, 1999.

Class Size Reduction in Grade 9

SB 12 (O'Connell) (Chapter 334, Statutes of 1998) created the Program to Reduce Class Size in Two Courses in Grade 9 (Class Size Program), which provides school districts with \$135 per full-year enrollment per student for each class reduced to an average enrollment of 20 pupils. School districts may choose up to two courses in grade 9 to be included in the program. However, the courses must count toward the completion of graduation requirements in English, mathematics, science, or social studies, and one of the courses must be English. On October 15, 1998, the Board of Education adopted sections 15140 and 15141, Title 5 of the CCR, on an emergency basis, to provide guidance for school districts implementing the Class Size Program by defining and clarifying the terminology used in Education Code sections 52084 and 52086, and by specifying the information required for enrollment. On October 23, 1998, the Board published notice of its intent to permanently adopt the regulations. However, on March

18, 1999, OAL disapproved the proposed regulations for failing to meet the clarity standard of the Administrative Procedure Act. OAL stated that the regulations failed to clearly indicate whether a school district would receive funding under the program for 10th, 11th, and 12th grade students who attended a 9th grade course, and that the rulemaking record did not show that the Department of Finance concurred in the Board's analysis of costs that may be attributable to the regulations. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 15.)

Update: On October 7, 1999, the Board readopted sections 15140 and 15141 on an emergency basis; however, on October 18, 1999, OAL again disapproved the emergency rulemaking action, reiterating its original finding that the rulemaking record did not show that the Department of Finance concurred in the Board's analysis of costs that may be attributable to the regulations.

On October 22, 1999, the Board published notice of its intent to permanent adopt sections 15140 and 15141; however, on November 5, 1999, the Board published notice of its withdrawal of that proposed rulemaking. At this writing, no further action has been taken.

Substitute Teaching Authorization

Education Code section 44225(e) requires the Commission on Teacher Credentialing to determine the scope and authorization of credentials, ensure competence in teaching and other educational services, and to establish sanctions for the misuse of credentials and the mis-assignment of credential holders. On January 8, 1999, the Credentialing Commission published notice of its intent to adopt sections 80025.3, 80025.4, and 80069.1, and amend sections 80067, 80068, and 80069, Title 5 of the CCR, to clarify issues in substitute teaching. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 19.)

Update: OAL approved the rulemaking changes on December 15, 1999, and they will take effect on January 15, 2000.

Teacher Credential Requirements

Education Code section 44225(e) provides that the Credentialing Commission may grant an added authorization to a credential holder who has met certain minimum requirements. On December 18, 1998, the Credentialing Commission published notice of its intent to amend section 80499, Title 5 of the CCR, to add additional required training to obtain an authorization at a new level. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 19.)

Update: OAL approved the rulemaking changes on January 10, 2000, and they will take effect on February 9, 2000.

Education Technology Staff Development Program

AB 1339 (Knox) (Chapter 844, Statutes of 1998) establishes the Education Technology Staff Development Program to provide funds for in-service training of teachers, administrators, and instructional staff to incorporate educational technology in daily instruction. To qualify for funds of up to twenty dollars per pupil in grades four to eight, school districts must certify that they have sufficient computer equipment and Internet access in each classroom for instructional purposes, among other requirements. On March 23, 1999, the Board of Education adopted section 11970, Title 5 of the CCR, on an emergency basis, to clarify the requirements that school districts must meet in order to receive educational technology staff development funding. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 19.)

Update: OAL approved the permanent adoption of section 11970 on August 31, 1999; the section took effect on September 29, 1999.

CHILD PROTECTION

New Rulemaking Packages

Child Welfare Services Community

Treatment Facilities

Health and Safety Code section 1502(a)(8) defines a community treatment facility (CTF), which provide an alternative to out-of-state or acute placement and state hospitalization for seriously emotionally disturbed children and adolescents. On October 27, 1999, DSS amended, on an emergency basis, sections 31-002, 31-205, 31-206, 31-320, 31-406, and 31-420 of the MPP, to establish placement standards for CTFs. The emergency regulations establish the criteria and responsibilities for county social workers and probation officers when considering or making placements of children in CTFs.

Among other things, the changes clarify which children are eligible to receive services in a CTF; require the social worker to include in the assessment document the conditions that are met that allow a child to be placed in a CTF; require the social worker or probation officer to include in the case plan a schedule of monthly visits to a child placed in a CTF; require the social worker or probation officer to include in the case plan why the placement in a CTF is the most appropriate placement selection; require the social worker or probation officer to include in the case plan how the criteria for a child to remain in a CTF is met, as specified; prohibit a social worker or probation officer from making a visit to a child placed in CTFs less often than monthly; require a social worker or probation officer to visit a child in a CTF at least once each calendar month; preclude any exceptions to the required monthly visit by a social worker or probation officer to a child in a CTF; spec-

ify that the social worker or probation officer is responsible for obtaining additional documentation prior to placement of a child in a CTF; specify that the social worker or probation officer is responsible for assuring the conditions for placement of a child in a CTF are met prior to placement; specify the acceptable forms of consent to treatment that are necessary for a child to be placed and treated in a CTF; specify the admission and consent to treatment requirement for a child who is a ward or dependent of the juvenile court; specify the admission and consent to treatment requirement for a child under conservatorship; specify the admission and consent to treatment requirement for a child under the age of 14 whose parent(s) has custody and control; specify the admission and consent to treatment requirement for a child 14 years of age or older whose parent(s) has custody and control; specify the requirements of involuntary placement of a child in a CTF; and include CTFs as another foster care placement alternative for a social worker or probation officer.

On October 29, 1999, DSS published notice of its intent to adopt these changes on a permanent basis; the Department held a public hearing on the proposal on December 15. At this writing, DSS has not submitted the permanent regulations to OAL for review and approval.

Impact on Children: Community treatment facilities are intended to be a local and less expensive alternative for treatment of seriously emotionally disturbed (SED) children than many of the current alternatives, particularly certain well publicized out-of-state programs. The rules include important safeguards to assure documentation by the probation officer or social worker so assigned to support the qualification of the facility chosen.

DSS Assumption of Complaint Investigation Responsibility from FFAs

Foster family agencies (FFAs) have historically been responsible for complaint investigations of their certified family homes. SB 933 (Chapter 311, Statutes of 1998) amended Health and Safety Code section 1538 to require DSS to assume responsibility for complaint investigations of certified family homes no later than June 30, 1999. As a result, regulatory changes were necessary to specify that DSS is responsible for the complaint investigations of certified family homes and that certain foster family agency responsibilities continue.

On June 28, 1999, DSS adopted new section 88063, amended sections 88018, 88022, 88044, 88045, 88061, 88064, 88065, 88069.7, and 88087, and repealed sections 88031, 88050, and 88051, Title 22 of the CCR, on an emergency basis, to implement DSS' assumption from FFAs of complaint investigation responsibility for certified family homes. Among other things, the revised regulations provide that, if any of the following incidents occur in a certified family home or in the foster family agency, the foster family agency shall report it to DSS by the Department's next working day during the normal business hours by telephone or fax: any suspected physical or psychological

abuse of any child; death of any child from any cause; any injury to any child that requires treatment by a health care practitioner; any unusual incident or child absence that threatens the physical or emotional health or safety of any child; epidemic outbreaks; poisonings; catastrophes; fires or explosions that occur in or on the premises; or complaints associated with a certified family home's or foster family agency's compliance with applicable licensing laws and regulations.

On July 30, 1999, DSS published notice of its intent to permanently adopt these changes; the Department held a public hearing on the proposals on September 14-17, 1999. At this writing, OAL has not yet approved DSS' permanent adoption of these sections.

Impact on Children: The rule changes are intended to tighten reporting to state DSS of problems warranting investigation within the family foster care system. A number of well-reported deaths of children in family foster care settings in recent years have helped to spur public attention to foster care quality. Although the reporting and tight deadlines in these proposed rules are supported by child advocates, the regulations do not address the underlying problems, including the increasing incidence of serious child abuse, and the serious lack of family foster care supply. Local juvenile courts have limited options in the placement of children pulled from their homes due to abuse or neglect. Although adoptions and personal attention follow from family foster care placements, more children are placed in institutional settings, or are crowded into the small number of family foster care providers currently extant. (For further discussion and data, see Children's Advocacy Institute, *California Children's Budget 1999-2000* (San Diego, CA; 1999) at 8-1 to 8-12, available at www.acusd.edu/childrensissues/.)

The problems associated with these proposed rules would be more effectively addressed by SB 949 (Speier) currently pending in the California Legislature. This major overhaul of family foster care would create an office of family foster care supply to enhance the number of families for the placement of abused children, create enhanced standards, a certification process, and an increase in compensation for supply and quality improvement, among other changes. Child advocates argue that addressing the problem up front is preferable to a prompt report to the state of injuries and deaths *post hoc*.

Foster Care Overpayment

Welfare and Institutions Code section 11466.24, added by SB 1823 (Chapter 733, Statutes of 1998), provides that a county shall collect an overpayment, discovered on or after January 1, 1999, made to a foster family home, an approved home of a relative, or an approved home of a nonrelative legal guardian, for any period of time in which the foster child was not cared for in that home, unless any of the following conditions exist, in which case a county shall not collect the overpayment: (1) the cost of the collection exceeds that amount of the overpayment that is

likely to be recovered by the county; (2) the child was temporarily removed from the home and payment was owed to the provider to maintain the child's placement; (3) the overpayment was exclusively the result of a county administrative error or both the county welfare department and the provider were unaware of the information that would establish that the foster child was not eligible for foster care benefits; or (4) the provider did not have knowledge of, and did not contribute to, the cause of the overpayment.

Section 11466.24 directs DSS to develop regulations for recovery of overpayments made to any foster family home, approved home of a relative, or approved home of a non-relative legal guardian. According to the statute, the regulations shall prioritize collection methods, including voluntary repayment agreement procedures and involuntary overpayment collection procedures. These procedures shall take into account the amount of the overpayment and a minimum required payment amount. Section 11466.24 also requires that a provider may request an informal hearing to contest an overpayment determination.

On September 3, 1999 DSS published notice of its intent to amend section 45-101 and adopt new sections 45-300, 45-304, 45-305, and 45-306 of the MPP, to implement section 11466.24. Among other things, the regulations provide the following:

- ◆ When information indicates that an overpayment may have occurred, the county shall review the eligibility factors to determine what the correct grant amount should have been; if an overpayment is discovered, determine whether any of the specified factors preclude overpayment recovery; if none of the factors preclude recovery, calculate the overpayment; determine from whom the overpayment may be recovered; and determine the appropriate recovery method and the amount to be recovered.
- ◆ A county shall not collect interest on the repayment of an overpayment.
- ◆ A county shall not notify a provider or institute recovery procedures where it has been more than one year since the initial determination of an overpayment.
- ◆ If a provider is willing to voluntarily repay the assessed overpayment, the county shall sign a written agreement with the provider indicating the amount of the overpayment and delineating the repayment schedule.
- ◆ Involuntary repayment procedures shall only be used when a provider has refused to enter a voluntary repayment agreement or has failed to comply with the terms of a voluntary repayment agreement.

On October 20, DSS held a public hearing on the proposed sections; at this writing, the regulations await review and approval by OAL.

Impact on Children: These rules reflect the reality of current undercompensation of family foster care providers. They currently receive less than one-eighth the monthly compensation of group homes or other institutional

providers, and do not cover their direct costs of care for children who often need special attention. In such a setting, county attempts to recoup overpayments (e.g., based on a child visiting another person for a period of time) can be counterproductive to the interests of involved children (see comment above concerning inadequate supply of family foster care providers). The rules allow some latitude to forego such collections.

Group Home Administrator Certification

On September 22, 1999, DSS adopted, on an emergency basis, new sections 84064.2, 84064.3, 84064.4, 84064.5, 84090, 84090.1, 84090.2, 84091, 84091.1, 84091.2, 84091.3, and 84091.4, and amendments to sections 80001, 84001, 84018, 84061, 84064, 84065, 84066, and 84164 of the MPP, regarding group home administrator certification. These Community Care Licensing (CCL) regulations implement the provisions of Health and Safety Code Section 1522.41, which was added by SB 933 (Chapter 311, Statutes of 1998). As required by SB 933, these regulations were developed in consultation and collaboration with the Group Home Administrator Certification Workgroup comprised of county placement officials, provider organizations, the state Department of Mental Health, and the state Department of Developmental Services.

Currently, there is no certification program for administrators of group home facilities. SB 933 requires that all administrators of a group home facility successfully complete a DSS approved certification program prior to employment. Certification programs currently exist for administrators of adult residential facilities and residential facilities for the elderly, and DSS has considered the experience garnered in the administration of those programs as a factor in the development of the group home certification regulations. According to DSS, the certification program is expected to enhance the skills and knowledge of administrators and better enable them to meet the needs of children in group homes.

Specifically, section 84018 specifies the information to be submitted by the applicant for a group home license verifying the administrator's qualifications and certification; section 84061 provides for specified reporting requirements whenever there has been a change in administrators; section 84064 provides that all group homes shall have a certified administrator and specifies the procedure for achieving compliance in the event a facility is without a certified administrator; section 84064.2 specifies that all administrators of group homes must be certified, provides specified exemptions for persons employed as administrators on December 31, 1999, and specifies the conditions and process for approval of initial administrator certification; section 84064.3 specifies the conditions and process for renewal of an administrator's certification; section 84064.4 specifies the grounds and appeal procedure for denial or revocation of an administrator's certificate; section 84064.5 specifies the conditions for forfeiture of an

administrator's certificate; section 84065 specifies that any person willfully making a false representation as being a facility manager is guilty of a misdemeanor; section 84066 specifies that the licensee's personnel records must contain documentation that the administrator has met the certification requirements; section 84090 specifies the conditions and process for approval of initial certification training programs; section 84090.1 specifies the grounds and appeal procedure for denial of a request for approval of an initial certification training program; section 84090.2 specifies the grounds and appeal procedure for revocation of approval of an initial certification training program; section 84091 specifies the conditions and process for approving requests by vendors for renewal of continuing education training programs; section 84091.1 specifies the conditions and process for approval of courses offered by approved vendors of continuing education programs; section 84091.2 provides for administrative review of denial of course approval; section 84091.3 specifies the grounds and process of appeal for denial of a request for approval of a continuing education training program; section 84091.4 specifies the grounds and process of appeal for revocation of a continuing education training program; and section 84164 specifies that the certification requirements do not apply to administrator of community treatment facilities.

On October 1, 1999, DSS published notice of its intent to adopt these changes on a permanent basis; at this writing, the final regulations await review and approval by OAL.

Impact on Children: Enhancing the quality of group home settings is a high priority for child advocates. The proposed rules begin such an effort at a minimal level. Group home compensation currently averages above \$2,500 per month per child. However, at the same time, average pay for group home service providers is substantially lower than for teachers or other professionals with child related tasks. Using an incentive based "certification" process to increase the quality of administrators has strong support among child advocates and educators.

Group Home Board of Directors Responsibilities

SB 933 (Chapter 311, Statutes of 1998) mandated DSS to require as a condition of licensure that a group home have each member of its board of directors sign a statement acknowledging that he/she has read DSS' publication for group home board of directors. This publication, which is also a mandate of SB 933, must be developed and distributed to all group home boards of directors to educate them on their statutory responsibilities and to provide an overview of DSS' regulations governing group homes. In addition, this statute requires the board of directors to conduct at least quarterly meetings and specifies minimum information to be discussed and reflected in the minutes of board meetings.

California has approximately 1,689 licensed group home facilities, of which about 1,380 are licensed for six or fewer children. The majority of the licensed group home

facilities are governed and operated by people who have no experience as a board member. Many of these individuals do not have a clear understanding of the role and responsibilities of board members. Therefore, DSS concurs with the legislature that group home boards of directors need to be provided guidelines about their responsibilities and to become accountable for their actions or the lack thereof. It is important to the success of a group home and the health and safety of residents that its board of directors play an active role in overseeing the operations, and perform their duties in good faith and in the best interest of the group home and the children. According to DSS, it is necessary to have regulations stipulating the boards of directors' responsibilities and licensee requirements that promote the health and safety of children in group homes.

Currently, the group home regulations do not inform a corporate licensee that they are expected to operate as a legitimate nonprofit corporation which is not owned and operated by individuals but is governed by a board of directors for the benefit of the public. Many group home licensees do not understand this distinction. There have been cases of group home licensees using the facility's monies to benefit themselves and thereby failing to provide adequate care to the foster care children placed in their group homes.

Accordingly, on June 21, DSS adopted new sections 84002, 84040, and 84063, and amended sections 84018 and 84061, Title 22 of the CCR, to establish the responsibilities and requirements of boards of directors and licensees. Among other things, the regulations set forth the following provisions:

- ◆ The board of directors shall be active in ensuring accountability and perform at a minimum, the following responsibilities: establish and approve policies and procedures governing the operation of the group home; approve and monitor the corporation's operating budget; assess and maintain the level of funds necessary to cover the costs of operating the group home; review and approve the facility's emergency intervention plan, as specified; employ an administrator who meets the requirements of section 84064, Title 22 of the CCR; complete a written statement describing the duties delegated to the administrator, and provide a copy of that statement to the administrator and maintain a copy in the facility's file; require that the chief executive officer, administrator, or a designee be present at all board of directors meetings during which the operation or the policies of the group home are discussed; conduct board of directors meetings at least on a quarterly basis to review and discuss the group home's operation and documents, as specified, and based upon the review, ensure that the group home complies with all applicable regulations; ensure that minutes are kept for all board of directors meetings and retained as a permanent record; ensure that all minutes of board of directors meetings are available for review by the licensing agency; and submit copies of all corporate documents to the licensing agency at the time

documents are submitted to the Secretary of State.

On July 30, 1999, DSS published notice of its intent to adopt these regulatory changes on a permanent basis. The Department held public hearings to receive comments on the proposed amendments on September 14-17, 1999. On December 1, 1999, DSS transmitted the permanent regulations to OAL, which approved them on January 12, 2000.

Impact on Children: The applicable statute and these implementing rules are intended to increase accountability from group home providers through the informed involvement of their corporate directors. It is doubtful that the notices here provided will have a systemic impact on children placed in such group homes, however, the rules are supported because of the potential for a member of a board of directors to provide a potential check on abusive or improper management practices.

Group Home Staff and Manager Training

SB 933 (Chapter 311, Statutes of 1998) made broad changes to the foster care system in California, with a focus on group homes. The law embodies the recommendations of the Group Home Task Force, convened by the legislature to address issues raised in a series of articles published by *The Sacramento Bee* commencing April 1998, which alleged that DSS' "fragmented and ineffective" oversight of group homes allowed waste, mismanagement, fraud, and theft. The *Bee* further concluded that group home staff are often "untrained to deal with mentally, physically and emotionally troubled youths...."

Group home regulations require child care staff receive 20 hours of continuing education training during the first 18 months of employment and during each three years thereafter. Regulations also require an unspecified amount of on-the-job training hours. At this time, persons acting as facility managers are not required to complete additional training. The regulations do not mandate specific training topics, and allow each Community Care Licensing Division District Office to approve training courses and trainer qualifications.

To foster statewide consistency and to ensure group home staff are appropriately and adequately trained, SB 933 required DSS to adopt standardized training emergency regulations in consultation with the Department of Mental Health and the Department of Developmental Services, county placement officials, and provider organizations. DSS convened the 24-member Group Home Education and Training Workgroup in October, November, and December 1998, and January 1999 to develop recommendations for the emergency regulations.

The recommendations contained in the workgroup summary, completed in March 1999, are incorporated into emergency regulations which DSS adopted on June 28, 1999. Specifically, DSS adopted emergency amendments to sections 84018, 84065, 84066, 84072.1, 84072.2, 84165, and 84265, Title 22 of the CCR. Among other things, the revised regulations:

- ◆ require the inclusion of the facility manager training

plan in the application for a group home license;

- ◆ require additional training for individuals performing the duties and responsibilities of the facility manager;

- ◆ inform licensees of new requirements for the development, maintenance, and implementation of written training plans for child care staff;

- ◆ require training plans to be appropriate for the client population served by the group home and the education level and qualifications of child care personnel;

- ◆ require licensees to amend the child care staff training plan as necessary to meet the needs of child care staff and the client population;

- ◆ inform licensees that child care staff training plan amendments must be submitted to DSS within 10 days;

- ◆ specify which persons are considered new child care staff who must complete a minimum of 24 hours of training before they are allowed to perform certain duties;

- ◆ inform licensees that new child care staff cannot be responsible for supervising children, or be left alone with children, until they have completed the initial 8 hour training; and

- ◆ require that licensees make available to all newly-hired group home personnel an employee training handbook, and specify the contents of that handbook.

On July 30, 1999, DSS published notice of its intent to adopt the amendments on a permanent basis; the Department held public hearings on the proposals on September 14-17, 1999. At this writing, the permanent regulations await review and approval by OAL.

Impact on Children: The enhanced training requirements imposed by these rules are likely to benefit children. However, the rules fail to address the imbalance between the substantial compensation paid for group home foster care and the low pay of those actually providing services to affected children. Arranging incentives and pay distribution to attract more qualified professionals (compelled "trickle down") may be more effective than adding training elements. However, child advocates support the rules here adopted.

Provisional Licenses for Group Homes

On July 1, 1999, DSS adopted, on an emergency basis, new sections 84030, 84030.1, 84031, 84031.1, and 84031.2, Title 22 of the CCR, to implement provisions of SB 933 (Chapter 311, Statutes of 1998) which require that all group homes operate with a provisional license during the first twelve months of operation while DSS conducts a comprehensive evaluation of the group homes' operations. Under this provisions, all group home applicants will be closely monitored by DSS licensing program analysts to ensure full compliance with stringent licensing provisions for group homes. The comprehensive reviews will include, among other things, a thorough review of the physical plant

and grounds; an extensive review of facility, client, and staff records; an assessment of the facility program statement; disciplinary policies and procedures; the emergency intervention plan; and visitation policies.

On July 30, 1999, DSS published notice of its intent to adopt the regulations on a permanent basis. The Department held a public hearing on the proposal on September 14-17, 1999. On December 3, 1999, DSS transmitted the permanent regulations to OAL, which approved them on January 14, 2000.

Impact on Children: The provisional license approach implemented by these rules is supported by most child advocates. Starting operations in a probationary status increases accountability, and places a special monitoring burden on regulators as the group home begins its operations and develops its procedures, standards, and habits.

Victims of Crime

On April 30, the Board of Control (BOC) published notice of its intent to adopt new sections 649 and 650.1 - 657.3, amend sections 650-656, 660, 660.1, 663, 664, 649.1, 649.2, 649.9, 649.10, 649.12, 649.13, 649.15, 649.16, 649.17, 649.18, 649.20, 649.21, 649.22, 650, 651, 652, 653, 654, 655, 656, 660, 660.1, 663, and 664, and repeal sections 649, 649.5, and 649.6, Title 2 of the CCR, regarding the Victims of Crime program, which assists eligible victims and derivative victims who incur compensable medical, mental health, or funeral/burial expenses, or income or support losses, as a direct result of a crime.

Among other things, the regulatory changes provide that a person may be found to have a relationship with a victim that is substantially similar to that of a parent if the person provided a significant portion of the necessities of life for the victim, including but not limited to financial support, food, clothing, shelter, medical expenses, educational expenses, and emotional support. A person may be found to have a relationship with a victim that is substantially similar to that of a sibling if the person lived in the same household as the victim and was under the care of the same parent or parents, primary caretaker, or legal guardian.

The amendments also provide that factors that shall be considered evidence of a child sexual or physical abuse qualifying crime include, but are not limited to (1) a sustained juvenile court dependency petition containing allegations of sexual or physical abuse, unless the court finds that the allegations of sexual or physical abuse did not occur; (2) medical or physical evidence consistent with child sexual or physical abuse; (3) a written or oral report from a law enforcement agency or a child protective services agency concluding that child sexual or physical abuse occurred; (4) a credible witness corroborated the child sexual or physical abuse; (5) a juvenile court order removed the child from the home because of sexual or physical abuse; or (6) criminal charges of child sexual or physical abuse were filed. Factors that may be considered evidence of a child sexual or physical abuse qualifying crime

include, but are not limited to (1) a mental health evaluation concluded that child sexual or physical abuse occurred; (2) the child victim's statement to a law enforcement or child protective services staff; (3) evidence of behavior consistent with child sexual or physical abuse; or (4) a final superior court order that finds that child sexual or physical abuse occurred.

The amendments further provide that the presumption of physical injury under Government Code sections 13960(b)(1) and (2) for violations of Penal Code sections 278 or 278.5 (child abduction cases) requires that the deprivation of custody continue for at least 30 consecutive days.

Also, the revisions state that a minor is presumed to have sustained physical injury as a result of a domestic violence qualifying crime if the child witnessed a domestic violence qualifying crime; a minor witnessed a domestic violence qualifying crime if the minor saw or heard an act constituting a domestic violence qualifying crime. Factors that may be considered as evidence that a minor witnessed an act constituting a domestic violence qualifying crime include, but are not limited to (1) the fact that the minor placed a 911 call; (2) a report from a counselor at a domestic violence agency concluded that the minor witnessed an act constituting a domestic violence qualifying crime; (3) a report from an eyewitness corroborated that the minor witnessed an act constituting a domestic violence qualifying crime; (4) a restraining order required the perpetrator to stay away from the minor and a declaration supporting the restraining order stated that the minor was the victim of, or was threatened with, physical injury; (5) the minor's reliable statements; or (6) other credible evidence.

BOC held a public hearing on these proposals on June 25, 1999; on December 17, 1999, OAL approved the Board's adoption of these changes.

Impact on Children: These rule changes continue BOC's gradual expansion of compensation eligibility for children who have been victimized by adults. Several years ago, BOC allowed the use of CPS social worker reports instead of otherwise required police reports to serve as an evidentiary basis for qualification. These rules clarify the eligibility of child abuse victims for treatment compensation with increased breadth and compassion. Eschewing formalism, the rules will allow substantial numbers of additional children who have been hurt by the criminal or abusive acts of adults to receive help from the fund.

Update on Previous Rulemaking Packages

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

Foster Care Reform

SB 933 (Thompson) (Chapter 311, Statutes 1998) requires DSS to make several changes to the Foster Care Program. On December 22, 1998, DSS adopted section 11-505, and amended sections 11-400, 11-401, 11-402,

11-403, 11-410, 11-415, 11-420 and 11-430 of the MPP, on an emergency basis, to implement the provisions of SB 933. The emergency regulations became effective on January 1, 1999. These regulations are intended to improve the provision of services to foster care children in group homes through the creation of a new system of provisional rates for group home providers. The regulations include several new restrictions on the placement of children in out-of-state group homes and provide DSS with increased monitoring authority. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 21.)

Update: DSS readopted the emergency regulations on June 15, 1999; on December 30, 1999, OAL approved the Department's permanent adoption of the regulations.

In a related action, on January 29, 1999, DSS published notice of its intent to further amend sections 11-400 and 11-402, and announced a public hearing for comment on March 17. This regulatory change relates to the computation of allowable shelter costs, to enable DSS to receive federal reimbursement for such costs. On March 1, 1999, DSS adopted the changes on an emergency basis, allowing it to receive the reimbursement immediately. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 21.)

Update: DSS readopted the emergency regulations on June 28, 1999. On December 10, 1999, DSS transmitted to OAL a certificate of compliance for the amendments; however, the text of the final regulations omits most of the language in the emergency regulations.

Out-of-State Group Home Requirements

SB 933 (Thompson) (Chapter 311, Statutes of 1998) requires out-of-state group homes that accept placements of California children to comply with the same reporting requirements applicable to in-state group homes. They must be certified by DSS, indicating compliance with the same standards as facilities operating within California, and provide the same personal rights and safeguards afforded to children placed in California group homes. On December 30, 1998, DSS adopted section 31-066, and amended sections 31-001, 31-002, 31-206.31, 31-230.11, 31-320, 31-435.2, 31-510, 45-101, 45-201.4, 45-202.51, 45-203.41, and 45-302.2 of the MPP, on an emergency basis, to implement and comply with SB 933. These emergency regulations, which were effective on January 1, 1999, enable children in out-of-county or out-of-state placements to receive services aimed at preventing further abuse and neglect, while ensuring that the child's placement is in his or her best interest. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 22.)

Update: On July 15, 1999, OAL approved DSS' permanent adoption of these regulatory changes.

JUVENILE JUSTICE

Update on Previous Rulemaking Packages

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

Juvenile Facilities

The Board of Corrections sets minimum standards for the operation and maintenance of juvenile halls for the confinement of minors (Welf. and Inst. Code sections 207.1(h) and 210). On October 2, 1998, the Board published notice of its intent to amend sections 1302 through 1561 (inclusive), Title 15 of the CCR, to effect a number of significant changes to these regulations. (For detailed background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 2, No. 1 (1999) at 24.) The Board accepted written comments until November 16, 1998, and held a public hearing in Sacramento on December 3, 1998.

Update: The Board did not submit the proposed changes to OAL within one year of its notice, as required by Government Code section 11346.4(b); accordingly, if the Board wishes to pursue this rulemaking action, it must republish its notice of intent to do so in the *California Regulatory Notice Register*.

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*:

Board of Control Victims of Crime Program

The Board of Control's (BOC) activities are largely devoted to the Victims of Crime (VOC) program (95.2% of the BOC's total budget and staff activities). The VOC program was the first victims' compensation program established in the United States. It reimburses eligible victims for certain expenses incurred as a direct result of a crime for which no other source of reimbursement is available. The VOC program compensates direct victims (persons who sustain an injury as a direct result of a crime) and derivative victims (persons who are injured on the basis of their relationship with the direct victim at the time of the crime, as defined in Government Code section 13960(2)). Crime victims who are children have particular need for medical care and psychological counseling for their injuries. Like other victims, these youngest victims may qualify for reimbursement of some costs. The BOC's enabling act is found at section 13900 *et seq.* of the Government Code; BOC regulations appear in Title 2 of the CCR. BOC's website address is www.boc.ca.gov.

Department of Developmental Services

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

State Board of Education and Department of Education

The California State Board of Education (State Board) adopts regulations for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state. The State Board is the governing and policy body of the California Department of Education (CDE). CDE assists educators and parents to develop children's potential in a learning environment. The goals of CDE are to set high content and performance standards for all students; build partnerships with parents, communities, service agencies and businesses; move critical decisions to the school and district level; and create a department that supports student success. CDE regulations cover public schools, some preschool programs, and some aspects of programs in private schools. CDE's enabling act is found at section 33300 *et seq.* of the Education Code; CDE regulations appear in Title 5 of the CCR. CDE's website address is www.cde.ca.gov; the Board's website address is www.cde.ca.gov/board.

Department of Health Services

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

Department of Mental Health

The Department of Mental Health (DMH) has jurisdiction over the laws relating to the care, custody, and treatment of

mentally disordered persons. DMH may disseminate education information relating to the prevention, diagnosis and treatment of mental disorder; conduct educational and related work to encourage the development of proper mental health facilities throughout the state; coordinate state activities involving other departments and outside agencies and organizations whose actions affect mentally ill persons. DMH provides services in the following four broad areas: system leadership for state and local county mental health departments; system oversight, evaluation and monitoring; administration of federal funds; operation of four state hospitals (Atascadero, Metropolitan, Napa and Patton) and an Acute Psychiatric Program at the California Medical Facility at Vacaville. DMH's enabling act is found at section 4000 *et seq.* of the Welfare and Institutions Code; DMH regulations appear in Title 9 of the CCR. DMH's website address is www.dmh.ca.gov.

Department of Social Services.

The California Department of Social Services (DSS) administers four major program areas: welfare, social services, community care licensing, and disability evaluation. DSS' goal is to strengthen and encourage individual responsibility and independence for families. Virtually every action taken by DSS has a consequence impacting California's children. DSS' enabling act is found at section 10550 *et seq.* of the Welfare and Institutions Code; DSS' regulations appear in Title 22 of the CCR. DSS' website address is www.dss.cahwnet.gov.

California Youth Authority

State law mandates the California Youth Authority (CYA) to provide a range of training and treatment services for youthful offenders committed by the courts; help local justice system agencies in their efforts to combat crime and delinquency; and encourage the development of state and local crime and delinquency prevention programs. CYA's offender population is housed in eleven institutions, four rural youth conservation camps, and two institution-based camps; its facilities provide academic education and treatment for drug and alcohol abuse. Personal responsibility and public service are major components of CYA's program strategy. CYA's enabling act is found at section 1710 *et seq.* of the Welfare and Institutions Code; CYA's regulations appear in Title 15 of the CCR. CYA's website address is www.cya.ca.gov.

FOR FURTHER INFORMATION

The *California Children's Budget*, published annually by the Children's Advocacy Institute and cited herein, is another source of information on the status of children in California. It analyzes the California state budget in eight areas relevant to children's needs: child poverty, nutrition, health, special needs, child care, education, abuse and neglect, and delinquency. The *California Children's Budget 1999-2000* is available at www.acusd.edu/childrensissues.

THE CALIFORNIA REGULATORY PROCESS

The Administrative Procedure Act (APA), Government Code section 11340 *et seq.*, prescribes the process that most state agencies must undertake in order to adopt regulations (also called "rules") which are binding and have the force of law. This process is commonly called "rulemaking," and the APA guarantees an opportunity for public knowledge of and input in an agency's rulemaking decisions.

For purposes of the APA, the term "regulation" is broadly defined as "every rule, regulation, order or standard of general application...adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure...." Government Code section 11342(g). Agency policies relating strictly to internal management are exempt from the APA rulemaking process.

The APA requires the rulemaking agency to publish a notice of its proposed regulatory change in the *California Regulatory Notice Register*, a weekly statewide publication, at least 45 days prior to the agency's hearing or decision to adopt the change (which may be the adoption of a new regulation or an amendment or repeal of an existing regulation). The notice must include a reference to the agency's legal authority for adopting the regulatory change, an "informative digest" containing a concise and clear summary of what the regulatory change would do, the deadline for submission of written comments on the agency's proposal, and the name and telephone number of an agency contact person who will provide the agency's initial statement of reasons for proposing the change, the exact text of the proposed change, and further information about the proposal and the procedures for its adoption. The notice may also include the date, time, and place of a public hearing to be held by the agency for receipt of oral testimony on the proposed regulatory change. Public hearings are generally optional; however, an interested member of the public can compel an agency to hold a public hearing on proposed regulatory changes by requesting a hearing in writing no later than 15 days prior to the close of the written comment period. Government Code section 11346.8(a).

Following the close of the written comment period, the agency must formally adopt the proposed regulatory changes and prepare the final "rulemaking file." Among other things, the rulemaking file — which is a public document — must contain a final statement of reasons, a summary of each comment made on the proposed regulatory changes, and a response to each comment.

The rulemaking file is submitted to the Office of Administrative Law (OAL), an independent state agency authorized to review agency regulations for compliance with the procedural requirements of the APA and for six specified criteria — authority, clarity, necessity, reference, and nonduplication. OAL must approve or disapprove the proposed regulatory changes within thirty working days of submission of the rulemaking file. If OAL approves the regulatory changes, it forwards them to the Secretary of State for filing and publication in the *California Code of Regulations*, the official state compilation of agency regulations. If OAL disapproves the regulatory changes, it returns them to the agency with a statement of reasons; the agency has 120 days within which to correct the deficiencies cited by OAL and resubmit the rulemaking file to OAL.

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

Interested persons may petition the agency to conduct rulemaking. Under Government Code section 11340.6 *et seq.*, any person may file a written petition requesting the adoption, amendment, or repeal of a regulation. Within 30 days, the agency must notify the petitioner in writing indicating whether (and why) it has denied the petition, or granting the petition and scheduling a public hearing on the matter.

References: Government Code section 11340 *et seq.*; Robert Fellmeth and Ralph Folsom, *California Administrative and Antitrust Law: Regulation of Business, Trades and Professions* (Butterworth Legal Publishers, 1991).



University of San Diego

SCHOOL OF LAW

Children's Advocacy Institute

University of San Diego

School of Law

5998 Alcalá Park

San Diego, CA 92110

(619) 260-4806

Sacramento Office:

926 J Street

Suite 709

Sacramento, CA 95814

(916) 444-3875

www.acusd.edu/childrensissues