

# Children's Regulatory Law Reporter

Children's Advocacy Institute ♦ Vol. 5, No. 1 (2004)

## HIGHLIGHTS

***Poverty:*** DSS Amends CalWORKs Regulations Regarding Educational Awards/Scholarships and Work Requirements for Minors Following High School Graduation

***Nutrition:*** DSS Implements Transitional Food Stamp Program for Households Terminating Participation in CalWORKs

***Special Needs:*** Board of Education Proposes Sanctions for Local Education Agencies that Fail to Comply with Special Education Mandates

***Child Care/Foster Care:*** DSS Proposes Regulations to Clarify Licensing Staff's Authority and Ability to Remove and Copy Facility Records During Inspections or Audits

***Education:*** Board of Education Proposes Regulations for Designation of Persistently Dangerous Schools



## KEY

This issue of the *Children's Regulatory Law Reporter* covers new regulatory packages published or filed from November 1, 2003, through June 30, 2004; actions on those packages through June 30, 2004; and updates on previously-reported regulatory packages through June 30, 2004.

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

The following abbreviations are used in the *Children's Regulatory Law Reporter* to indicate the following publications or agencies (described in detail on pages 33-34 ), publications, or documents:

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

## CHILDREN'S REGULATORY LAW REPORTER

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## TABLE OF CONTENTS

PREFACE .....	2
INTRODUCTION .....	3
CHILD POVERTY .....	4
NUTRITION .....	9
HEALTH / SAFETY .....	12
SPECIAL NEEDS .....	17
CHILD CARE / CHILD DEVELOPMENT .....	18
EDUCATION .....	21
CHILD PROTECTION .....	30
AGENCY DESCRIPTIONS .....	33
FOR FURTHER INFORMATION .....	34
RULEMAKING GLOSSARY .....	34
THE CALIFORNIA REGULATORY PROCESS ...	B/C

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

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

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

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## INTRODUCTION

Arnold Schwarzenegger was sworn in as California's 38th Governor on November 17, 2003, after winning the recall election ousting former Governor Gray Davis. The day Governor Schwarzenegger took office, he issued an executive order suspending all proposed state regulations for 180 days pending a thorough review. He also called for each agency in the state to conduct a 90-day review of all regulations adopted, amended, or repealed in the last five years "to determine if they are necessary, clear, consistent and are not unnecessarily burdensome or cause undue harm to California's economy." All findings of these reviews were to be submitted to the Governor's Legal Affairs Secretary. *See* Office of the Governor, Press Release dated November 17, 2003.

As described inside the back cover of this publication, the Administrative Procedure Act (APA), Government Code section 11340 *et seq.*, sets forth the process that most state agencies (including the agencies covered in the *Children's Regulatory Law Reporter*) must undertake to adopt regulations, which are binding and have the force of law. The rulemaking process includes a submission 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, as well as for six specific criteria: authority, clarity, consistency, necessity, reference, and nonduplication. Also, the APA requires an agency to make findings for each proposed regulatory change regarding any significant adverse economic impact on business; potential cost impact on private persons or businesses; small business impact; assessment of job creation or elimination; and effect on housing costs.

To many advocates, Governor Schwarzenegger's order suspending pending regulations for six months seemed redundant, gratuitously insulting to state officials, and unnecessarily pro-business, as such an order would give many companies a reprieve on proposed consumer and environmental rule changes—arbitrarily and apart from any hearing on the merits. The order impacted children by discouraging agencies from engaging in any rulemaking until the suspension was lifted. Due to the lack of usual rulemaking activity by the agencies covered in this publication, this version of the *Children's Regulatory Law Reporter* is comparatively short and covers the few regulatory packages implemented since November 2003.

# CHILD POVERTY

## New Rulemaking Packages Educational Awards/Scholarships and Eligible Teens' Exemption

**B**efore the passage of Senate Bill (SB) 1264 (Alpert) (Chapter 439, Statutes of 2002), when a CalWORKs dependent child received an award or scholarship based upon his or her academic or extracurricular achievement, the amount of the award/scholarship was considered unearned income for the family and reduced the CalWORKs cash grant received by the family on a dollar-for-dollar basis. In addition, prior to SB 1264, 16- and 17-year-old CalWORKs recipients who completed high school were required to meet adult welfare-to-work mandates, relegating many to minimum wage jobs in lieu of further educational achievement and long-term opportunity.

On December 29, 2003, the Department of Social Services (DSS)—on an emergency basis—amended sections 42-712, 42-719, and 44-111 of the Manual of Policies and Procedures (MPP) to implement SB 1264, making two changes in accordance with Welfare and Institutions Code sections 11157 and 11320.3 as follows: (1) the regulations exempt from consideration in the CalWORKs program the amount of an award or scholarship from a public or private entity to a dependent CalWORKs child based upon his or her academic or extracurricular achievement or participation in a scholastic, educational, or extracurricular competition; and (2) the regulations provide an exemption from CalWORKs welfare-to-work requirements for 16- and 17-year-old dependent children who, after graduating from high school or completing their GED, enroll or plan to enroll in a post-secondary education, vocational, or technical school training program. The amended regulations clarify that a child is deemed to be “planning to enroll” if the child, or the parent(s) of the child, submits a written statement expressing the child’s intent to enroll in a program for the following term. If verification of enrollment is not provided to, or obtained by, the county by the beginning of the following term, the exemption will not apply.

On November 28, 2003, DSS published notice of its intent to adopt these changes on a permanent basis, and on January 14, 2004 held a public hearing on the regulatory package. On June 2, 2004, OAL approved DSS’ permanent adoption of these amendments.

**IMPACT ON CHILDREN:** These legislative and regulatory reforms, allowing educational enhancement over opportunity limitations for qualified youth, will assist young adults who come from families reliant on welfare assistance. It should enhance the ability of many to achieve economic self-sufficiency. By not counting the value of awards and scholarships earned by dependent youth living

in families receiving CalWORKs against the family’s monthly grant, the benefit is two-fold. First, the disincentive to working toward the attainment of awards and scholarships is removed, and youth will be encouraged to achieve scholastically and in their extracurricular endeavors. Second, the family will not fear a decrease in its CalWORKs grant level, and will hopefully encourage its children to do well in school and sports and apply for awards and scholarships based upon their achievements.

These reforms also importantly allow 16- and 17-year-old high school graduates to waive the requirement that they immediately begin working during this critical time—when they can still be supported by their family, and can take advantage of post-secondary education without rent, utilities, and food costs that may otherwise impede further education. A 2001 study by the Manpower Demonstration Research Corporation found that welfare programs that offered a mix of work for some recipients, and education and training for others, were the most successful. Research suggests the value of allowing flexibility for the best course of action for recipients. For youth who want to continue their education, this policy change removes two arbitrary barriers—obstacles that parents commonly help their children surmount.

The private and public value of post-secondary education is profound. According to U.S. Department of Commerce data from 1998 (for the general population 25 years and over) the earning potential for college graduates is approximately twice that of high school graduates. Even an Associate degree or certificate can significantly improve the youth’s ability to earn enough to become self-sufficient and a productive member of society (see *“From Jobs to Careers—How California Community College Credentials Pay Off for Welfare Recipients”* by CLASP and the California Community Colleges, concluding that women receiving CalWORKs assistance who complete an Associate degree or certificate have higher employment rates and earn substantially more in the two years after college than they did before college). Education can break the cycle of poverty and reliance on welfare. California’s limited acknowledgment of the benefits of education is a positive step forward.

Child advocates will continue to stress the need for available and low-cost public higher education slots for these vulnerable youth; however, budget shortfalls over the last few fiscal years have prompted policymakers to actually reduce the capacity of UC and CSU schools; restrict financial aid opportunities; and raise student fees. Encouraging our children to move forward, become educated, and seek a career path where future employability is likely warrants high priority. The older generation continues to accumulate unprecedented wealth and yet push debt forward to future generations through Social Security, Medicare, and national (and state) budget deficits. Meeting

those deferred obligations requires future gainful employment for youth now in school. Recent reports by the Children's Defense Fund and other sources find that a \$4 trillion surplus in 2000 will become a \$6 trillion public debt for our children and grandchildren within the decade. Even more unsettling, Social Security and Medicare unfunded liabilities are projected to reach over \$30 trillion, or \$100,000 for every resident of the U.S. within the next twenty years. (See discussion in the Children's Advocacy Institute's *California Children's Budget 2004-05*, at Chapter 1, available at [www.caichildlaw.org](http://www.caichildlaw.org)).

### **Motor Vehicle Regulations: CalWORKs and Food Stamp Programs**

Prior to passage of Assembly Bill (AB) 231 (Steinberg) (Chapter 743, Statutes of 2003), California was one of nine states that applied the Food Stamp motor vehicle exclusion limit of \$4,650, an amount established in the late 70s. Thus, if a family owned a car valued at over \$4,650 (and no other exemptions applied), any portion of the value that exceeded this amount would be counted toward the family's resource level, which could not be greater than \$3,000 for a household with at least one member aged 60+ or disabled, and \$2,000 for all other households. Because the excluded value was set so low, it created an incentive to sell or abandon the family car in order to qualify for Food Stamps. This created obvious problems for a household's mobility, including getting to and from work and maintaining self-sufficiency.

AB 231 aligns the Food Stamp vehicle resource rule with an alternative program allowed under federal law (see Public Law 106-387, section 847(a) and proposed 7 CFR 273.8(f)(4) as published in the Federal Register, Vol. 68, No. 168, page 51933 on August 29, 2003). For example, in California, CalWORKs Stage 2 child care programs receive TANF funding but have no separate vehicle resource limit, so the value of a family's vehicle is not considered in making a determination of eligibility for CalWORKs Stage 2 child care services.

On December 31, 2003, DSS—on an emergency basis—amended sections 42-207, 42-215, 63-501, and 63-1101 of the MPP to implement the changes made by AB 231. Effective January 1, 2004, Food Stamp regulations are aligned with those of the CalWORKs child care program, and vehicles are exempt from being counted as resources when determining Food Stamp eligibility as allowed by federal law. Since existing law (before passage of AB 231) required counties to use the Food Stamp Program vehicle evaluation rules when determining eligibility for CalWORKs, these regulations eliminate this requirement and set out a separate regulatory section establishing treatment of motor vehicles when determining CalWORKs eligibility. As intended by AB 231, the vehicle resource rule will remain the same in the CalWORKs

program (an exemption will apply where needed to transport a disabled family member, used primarily for income-producing activities, has an equity value less than \$1,501, *et al.*, but no blanket exemption of the value of the car will apply). Thus, the vehicle resource exemption applies only to families who apply for and receive Food Stamps, not CalWORKs cash aid.

On January 30, 2004, DSS published notice of its intent to adopt these changes on a permanent basis, and on March 17 held a public hearing. On June 8, 2004, OAL approved DSS' permanent adoption of these changes.

**IMPACT ON CHILDREN:** The Legislature made several important findings in AB 231, including:

- ◆ Despite California's agricultural abundance, more than 2.2 million low-income adults in California cannot always afford enough food. About one out of every three adults experiences episodes of hunger, according to a recent UCLA survey of Californians' health status.
- ◆ Hungry Californians suffer from poor physical and emotional health, as well as a diminished capacity to learn and succeed in the workplace (this is especially true for school-aged children).
- ◆ The federal Food Stamp Program is an essential, cost-effective tool in preventing hunger among hard-working families, including families making the difficult transition from welfare to work. It provides over \$1.5 billion in federal food purchasing dollars to stimulate local economies throughout California.
- ◆ Only 49% of eligible people are participating in the Food Stamp Program, according to the U.S. Department of Agriculture. Red tape and bureaucracy limit participation among eligible Californians—particularly working families, who represent 70% of eligible households—from receiving federally-funded benefits. The UCLA survey found that 80% of adults who are income-eligible for Food Stamps and who are experiencing the actual pains of hunger are not receiving Food Stamps.
- ◆ California has not exercised certain federal options that would make the program more responsive to the needs of working families. These include transitional Food Stamps, reduction of unnecessary welfare office visits, and an increase in the value of motor vehicles that Food Stamp households can own.

As noted above, prior to the enactment of AB 231, California was one of nine states applying the Food Stamp motor vehicle exclusion limit of \$4,650, an amount essentially unchanged since 1977. As of February 2003, twenty states excluded the entire value of all vehicles in their Food

Stamp programs, and twelve other states excluded the value of at least one vehicle per household. Access to a car is necessary for employment and to maintain self-sufficiency, especially in many California cities where public transportation does not provide necessary mobility. Proponents of AB 231 argued that forcing a family to dispose of a car inhibits its future employment prospects, thus increasing the likelihood that the family will fall back onto public welfare assistance.

The adopted change benefits California's impoverished children. It does so without state cost because the brunt of the costs for additional Food Stamps will be paid for by the federal government. The Legislative Analyst estimated that in 2004–05, the state will retain more than \$200 million in federal funds and will gain \$1 million in state sales tax revenue upon implementation of the new vehicle resource and transitional Food Stamp rules (see Nutrition section below). The state will continue to bring in approximately \$2.3 million in sales tax annually in the following years. Local governments also directly benefit from increased sales tax revenues.

### **Job Retention Services for Former CalWORKs Recipients**

On March 5, 2004, DSS published notice of its intent to amend—on a permanent basis—section 42-717 of the MPP to provide that job retention services may be provided to former CalWORKs recipients both before and after they have exhausted their sixty-month time limit for CalWORKs cash aid, and counties may determine the duration, type, and reimbursement rate for services. Specifically, transitional services may be provided for a former recipient for a period of up to twelve months; this period must begin as soon as the former recipient is both employed and off aid, and this period must begin within a year of the time that the former recipient left aid. These amendments also clarify that participation in community service is not a prerequisite for receipt of job retention services, unless the county adopts such a requirement.

The proposed regulations officially implement the substance of DSS All County Letter No. 02-92, providing that counties have discretion to offer optional job retention services for the time periods and in the manner described above, in accordance with Welfare and Institutions Code sections 11320.15, 11323.2(b), and 11500. A county's eligibility criteria must be reflected in its County Plan, and its written policies must specify which types of services will be offered, for how long, and at what rate former recipients will be reimbursed. These amendments are necessary to ensure that counties understand the distinction between mandatory support services for current CalWORKs recipients and optional job retention services for former CalWORKs recipients (which can include case management, mental health services, substance abuse services, domestic abuse services, parenting classes, vocational training, and other support services such as transportation).

On April 21, 2004, DSS held a public hearing. At this writing, the regulatory action awaits review and approval by OAL.

**IMPACT ON CHILDREN:** The purpose of job retention services is to assist former CalWORKs recipients to retain employment or a better job. To the extent these services are provided by counties and made available to individuals in need, it could provide a significant boost to a family's self-sufficiency level, including a more stable home environment for any children involved. However, based upon the lack of a mandate in the proposed regulations, added to counties' current budget crises, it is unlikely that enough resources will exist to provide these supplemental services.

Governor Schwarzenegger's proposed budget for 2004–05 includes substantial cuts to the CalWORKs safety net available to California families as follows: (1) he does not provide a CalWORKs COLA (cost-of-living adjustment) even though a court has ordered the Administration to pay one based upon state law requiring cost-of-living increases for recipients if the Vehicle License Fee (VLF) is reduced (Governor Schwarzenegger rescinded the previous Administration's increase to the VLF on his first day in office, depleting the general fund of approximately \$4 billion); (2) he would suspend the statutory COLA for the 2004–05 budget year; (3) he proposes a 5% reduction in the basic grant, thus lowering the grant level to 1989 levels; (4) he proposes a 25% reduction to already reduced safety net grants for children where the parent has been sanctioned for failing to meet work participation requirements, and for children where the parent has exceeded the sixty-month limit; and (5) he proposes numerous and devastating cuts to CalWORKs Stage 3 child care funding and wants to increase the work requirements under CalWORKs. The end result of these changes is to cut the safety net (TANF plus Food Stamps) to 70% of the federal poverty line for the benchmark family of three—a record low for the state since the 1970s. These proposals would also cut total sustenance to below 50% of the poverty line for those suffering sanctions or reaching the sixty-month lifetime allowance.

There are bound to be many questions and complications that will arise in the coming years as families exceed their sixty-month time limits. This is just one of the implications of time-limited cash aid: what do we do with families that still cannot make ends meet because the money they bring home cannot pay for the increasing cost of living in California? A recent U.C. Berkeley report ("*The Hidden Public Costs of Low-Wage Jobs in California*") found that many of the families receiving public assistance, including CalWORKs, are receiving aid not because they do not work, but because the work available to them does not pay them enough to meet basic needs. The report concludes:

◆ Working families (those with at least one member who works at least 45 weeks per year) comprise over half (53%) of the families enrolled in at least one of the ten programs analyzed (including the Earned Income Tax Credit, CalWORKs, Section 8 Rental Voucher Program, child care assistance, Medi-Cal, Healthy Families, the Food Stamp Program, the National School Lunch Program, and the special supplemental nutrition program for Women, Infants and Children (WIC)).

◆ Of the \$21.2 billion of public assistance provided to low-income California families in 2002, 48%, or \$10.1 billion, went to working families.

◆ Simply raising wages for workers earning minimum wage and slightly above would both help working families and potentially save billions of dollars in program expenditures—a drop in public assistance payments from \$10.1 billion to \$7.4 billion would occur if the current group of public assistance recipients earned at least \$8 per hour.

A similar study titled “*Hidden Costs: The Public Cost of Low-Wage Jobs in San Diego*” conducted by the Center on Policy Initiatives, found that a family of four (two working parents and two school-age children) in San Diego has to earn more than \$50,000 each year to meet basic needs (as quantified in the study), which means that each parent has to earn at least \$12.27 per hour, nearly twice the state minimum wage and more than twice the federal minimum wage. Comparing a reasonable cost of living in California (\$50,000) versus the 2004 federal poverty level (\$18,850 for a family of four), shows the disparity between what the government labels “poverty” and what it actually takes Californians to pay bills, retain housing, and raise a family.

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

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

as when they began, but now without help from the government or a minimal safety net for their children. And although some families are earning wages above the poverty line, a substantial group of children have left safety net protection for the harm of extreme poverty. (For detailed discussion, see the Children’s Advocacy Institute’s *California Children’s Budget 2004–05* at Chapter 2, available at [www.caichildlaw.org](http://www.caichildlaw.org)). Additional job retention services provided during this time of need is a small step forward, and will have some positive incremental impact on the children of these families—if it were to be implemented by counties.

### **Updates on Previous Rulemaking Packages Learning Disabilities Regulations**

AB 1542 (Ducheny) (Chapter 270, Statutes of 1997) implemented welfare reform legislation enacted under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the PRA), and established the CalWORKs Welfare-to-Work program, the intent of which was to provide employment, education, and training services to assist families on aid to achieve self-sufficiency. On July 4, 2003, DSS published notice of its intent to adopt amendments to sections 42-700, 42-701, and 42-722 of the MPP to implement protocols regarding the screening and evaluation of CalWORKs welfare-to-work participants for learning disabilities and the provision of needed reasonable accommodations to assist participants in assigned welfare-to-work activities. (For background information on this rulemaking package, see *Children’s Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 4.)

**Update:** On January 22, 2004, DSS released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. Among other things, the revised language provides that counties must provide at least the following information to participants: that most people with learning disabilities are intelligent and many are gifted; individuals with learning disabilities may have difficulty reading, listening, understanding directions, writing, spelling, doing math, organizing things, getting along with others, expressing ideas out loud, paying attention, etc.; individuals with learning disabilities can be taught to use their strengths and find ways to make it easier to learn and be more successful at school and on the job; counties can help individuals get the appropriate welfare-to-work activity, including accommodations, once a learning disability is identified; the learning disabilities screening is a very simple and short test; the screening will help the individual decide if he/she wants a referral to a learning disability specialist for an evaluation to find out if a learning disability exists; the areas that will be tested at evaluation are aptitudes, information processing, achievement, and vocational interest; and individuals have the right to file for a fair hearing if they disagree with a county action.

The revised language also provides that counties may use discussions with, and observation of, the participant to determine the existence of a potential learning disability. Discussions with a limited-English proficient participant may include the participant's ability to follow instructions, both verbal and in writing; learning difficulty in his/her native language while growing up as compared to other children; and subject areas that were easy for the participant to learn and subject areas that were difficult to learn. Observation of the participant could include comparison of the participant's work habits and/or classroom ability to his/her peers.

The modified language also provides that if a county suspects that a participant has health, behavioral health, and learning disabilities problems, it should address the health-related issues first.

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

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

On May 5, 2003, the Department of Child Support Services (DCSS) adopted new sections 115500, 115510, and 115520, Title 22 of the California Code of Regulations (CCR), and repealed sections 12-223.2 through 12-223.22 of the MPP—on an emergency basis—regarding the review and adjustment of child support orders. Among other things, the emergency regulations require that each local child support agency provide written notice, at least once every three years, of the right to request a review to seek an upward or downward adjustment of a child support order, or an adjustment to include a provision for medical support; local child support agencies shall review cases to determine if a change in circumstances exists which could alter the amount of child support ordered by the court under the specified guidelines when certain conditions are met; and that any changes in circumstances which would result in a change in the child support order, either upward or downward, by at least 20% or \$50, whichever is less, shall be considered cause to file a motion for modification or order to show cause to adjust the child support order. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 4.)

**Update:** On November 3, 2003, DCSS readopted these provisions on an emergency basis. DCSS was required to transmit a certificate of compliance to OAL on this rulemaking package by May 3, 2004, or the emergency language would be repealed by operation of law on the next day. DCSS failed to transmit the certificate by the deadline.

On May 18, 2004, DCSS released a modified version of its regulatory proposal for an additional fifteen-day public

comment period; at this writing, the permanent changes have not yet been submitted to OAL for review and approval.

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

On November 25, 2002, DCSS adopted—on an emergency basis—sections 119015, 119019, 119045, 119069, 119076, and 119191, Title 22 of the CCR, to implement Family Code section 17550, which allows local child support agencies to compromise arrearages and interest owed for reimbursement for certain public assistance payments paid for children placed in foster care or with a relative caretaker or a guardian. Family Code section 17550 authorizes local child support agencies to settle overdue support owed in cases where separation or desertion of a parent results in aid being granted to a child and later the child is returned to the parent. Under these regulations, the obligor parent must have an income less than 250% of the current federal poverty level, and the local agency must determine that the settlement is necessary for the child's support. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 6.)

**Update:** DCSS was required by law to transmit a certificate of compliance to OAL on this rulemaking package by November 20, 2003, or the emergency language would be repealed by operation of law on the next day. DCSS failed to transmit the certificate by the deadline, and the regulations were repealed by operation of law, pursuant to Government Code section 11346.1(g).

However, on April 2, 2004—over five months after the emergency regulations had been repealed by operation of law—OAL approved DCSS' late submission of a certificate of compliance for the lapsed regulations. [*Editor's Note: It is unclear what statutory provision gives OAL the authority to accept a late submission of a certificate of compliance, especially in light of the mandatory language of Government Code section 11346.1(g) ("[i]n the event a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with [Government Code section 11346.1(e)], this failure shall constitute a repeal thereof and after notice to the adopting agency by the office, shall be deleted".)*]

### **CalWORKs 180-Day Family Reunification Extension**

AB 429 (Chapter 111, Statutes of 2001) allows parents of children who have been removed from the home and are receiving out-of-home care to continue to receive CalWORKs-funded services, such as substance abuse and mental health services, if the county determines such services are necessary for family reunification. On August 1, 2002, DSS—on an emergency basis—adopted sections 40-181.1, 42-710.66, 42-711.512, 42-711.558, 42-721.13, 42-

721.131,42-721.413, 80-301, and 82-812.68, and amended sections 42-711.551, 42-711.6, 42-711.8, and 44-314 of the MPP to implement AB 429. According to DSS, these regulatory changes ensure that services necessary for family reunification will be available to eligible parents. On August 30, 2002, DSS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 5 and Vol. 4, No. 2 (2003) at 7.)

**Update:** On November 26, 2003, DSS readopted these regulations on an emergency basis. On April 15, 2004, OAL approved DSS' permanent adoption of these changes.

### **Child Support: Immediate Enforcement Actions**

Federal and state law require DCSS to implement administrative procedures and requirements for immediate enforcement actions, which include income withholding orders, medical support notices, real property liens, and reporting to credit agencies. On October 21, 2002, DCSS adopted—on an emergency basis—new sections 110226, 110242, 110251, 110336, 110337, 110355, 110485, 110547, 110615, 116004, 116018, 116036, 116038, 116042, 116061, 116062, 116063, 116110, 116102, 116104, 116106, 116108, 116110, 116114, 116116, 116118, 116120, 116122, 116124, 116130, 116132, 116134, and 116140, and amended sections 110250, 110474, 110660, Title 22 of the CCR. DCSS also repealed section 117042, Title 22 of the CCR, and MPP sections 12-107.3, 12-224.3, 12-228.7, 12-228.8, and 12-601–12-606. Among other things, the new provisions define specific terms relating to immediate enforcement actions; specify the general requirements and timeframes necessary to prepare, serve, and terminate income withholding orders and medical support notices; specify the actions a local child support agency must take when a hearing regarding an income withholding order is requested and conducted; specify requirements for recording, creating, and releasing real property liens; specify circumstances under which to file a satisfaction of judgment and/or a substitution of payee; and specify requirements and timeframes for reporting child support obligations and arrearages to credit reporting agencies. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 9 and Vol. 4, No. 2 at 9.)

**Update:** On May 4, 2004, OAL approved DCSS' permanent adoption of these changes.

## **NUTRITION**

### **New Rulemaking Packages** **Transitional Food Stamps and** **Face-to-Face Interview Exemptions**

**A**B 1752 (Budget Committee) (Chapter 225, Statutes of 2003) requires the state to provide a transitional Food Stamp benefit program. In accordance with amended Welfare and Institutions Code section 18901.6, county welfare departments are required to provide five months of transitional Food Stamp benefits to households terminating their participation in the CalWORKs program without requiring them to reestablish Food Stamp eligibility. Within one month of this legislative change, former Governor Gray Davis signed AB 231 (Steinberg) (Chapter 743, Statutes of 2003), which requires the state to screen Food Stamp households for the need to conduct face-to-face interviews upon application and recertification in the program. As amended in Welfare and Institutions Code section 18901.10, county welfare departments must now grant applicable exemptions when appropriate, thus decreasing the use of the face-to-face interview. The Legislature mandated that DSS implement these changes to the Food Stamp Program by January 1, 2004.

On December 23, 2003, DSS submitted its first version of this emergency regulatory package to OAL, but then withdrew the package several days later.

Effective April 19, 2004, DSS amended—on an emergency basis—sections 63-300, 63-500, and 63-504 of the MPP to implement the statutory changes discussed above. On April 2, 2004, DSS published notice of its intent to adopt these changes on a permanent basis; the Department held a public hearing on the rulemaking package on May 19. At this writing, the changes await review and approval by OAL.

**IMPACT ON CHILDREN:** AB 231 and AB 1752 were victories for advocates seeking simplification of administrative procedures in the state's Food Stamp Program, as well as maximization of federal Food Stamp funds for California's hungry adults and children. However, child advocates are concerned that certain language in the proposed sections of the MPP is unclear, or is inconsistent with existing law, and could be construed arbitrarily by counties if not corrected, as follows:

◆ New section 18901.10 of the Welfare and Institutions Code (created by AB 231) essentially changed the presumption from mandating that all county welfare departments (CWDs) conduct face-to-face interviews with all applicants for Food Stamps both at initial certification and recertifications *unless there is a hardship* to **mandating that all CWDs exempt households from complying with**

**the face-to-face interview requirement when appropriate.** Although this change may seem subtle, it will cut down substantially on the time and resources required of CWDs if these regulations are implemented properly and fewer face-to-face interviews are performed by county workers. However, the proposed language in section 63-300.4 does not comport with the intent of the statute; in particular, the presumption to favor alternatives to face-to-face interviews is not apparent from the language. The Department's proposed section 63-300.4 reads in part as follows:

"All applicant households, including those submitting applications by mail, *shall have face-to-face interviews* in a food stamp office or other mutually acceptable location, including a household's residence, with a qualified eligibility worker prior to initial certification and all recertifications *except when waived* in accordance with Section 63-300.42 and .43, and .44" (emphasis added).

Child advocates contend that more appropriate language would mirror the language in section 18901.10. For example, "*when appropriate*, county welfare departments *shall exempt* a household from complying with face-to-face interview requirements for purposes of determining eligibility at initial application or recertification. County welfare departments shall screen each household's need for exemption status at application and recertification." (Emphasis added). DSS should then describe what are "appropriate" circumstances for exempting a household, which are essentially the hardship reasons stated in existing sections. The Department should also provide guidance on how CWDs should "screen" households for exemptions. The final Assembly analysis for AB 231 provides some guidance: "the screening envisioned is less formal and demanding than the 'determination' or 'assessment' required in earlier versions of the bill, permitting a cursory consideration of the need for an exemption" (see analysis at [http://leginfo.ca.gov/pub/bill/asm/ab\\_0201\\_0250/ab\\_231\\_cfa\\_20030911\\_011939\\_asm\\_floor.html](http://leginfo.ca.gov/pub/bill/asm/ab_0201_0250/ab_231_cfa_20030911_011939_asm_floor.html), pages 4-5).

◆ Further, the language in subsections (b) and (c) of 18901.10 has not been incorporated into the proposed regulations. These are important provisions that allow individuals receiving Food Stamps to request a face-to-face interview in order to meet program requirements (subsection (b)), and also clarify that CWDs may still require applicants or recipients of Food Stamps to make a personal appearance at a CWD office if the person "no longer qualifies for an exemption or for other good cause" (subsection (c)). It is imperative that DSS provide guidance as to how this language should be interpreted; for example, regulations should set forth what constitutes "good cause" and what procedures should be put in place to ensure that a county does not overuse subsection (c).

◆ Proposed section 63-504.131(b) states that if a household loses its benefits under CalWORKs or the Food Stamp program due to a sanction, the five months of transitional Food Stamp benefits will not be provided. There are two problems with this limitation. One, if the household or individual is no longer receiving CalWORKs benefits (the purpose of the language in AB 231 was to provide transitional Food Stamps after cash aid is terminated), it is unclear how the individual could be sanctioned under the CalWORKs program. Second, it is unclear what statutory language exists allowing CWDs to deny transitional Food Stamp assistance to a household sanctioned under either the Food Stamp or CalWORKs programs.

◆ The language contained in subsections 63-504.132(b), (c), and (d) implies that the CWDs must send out two separate notices to recipients of transitional benefits: one notifying the household of the change in its certification period, and another notifying the household of the expiration of the end of the transitional benefit period. Advocates would prefer that in the first notice, the county notify recipients of transitional benefits of their certification period, the proposed date of expiration, and how to get additional Food Stamp benefits after that period. This would better prepare recipients for the time period after their transitional benefits expire.

For the period of October 1, 2003 through September 30, 2004, the maximum Food Stamp allotment for a family of four is \$471 per month, which works out to be less than \$16 per day to provide three meals for four people.

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

## **Motor Vehicle Regulations: CalWORKs and Food Stamp Programs**

(See Poverty section.)

## **Updates on Previous Rulemaking Packages ABAWD, Food Stamp Voluntary Quit, and FSET Emergency Regulations**

On August 8, 2003, DSS amended—on an emergency basis—sections 63-300, 63-407, 63-408, 63-410, 63-411, 63-503, and 63-505 of the MPP to bring California's Food Stamp Program regulations concerning penalties for voluntarily quitting a job and reducing work hours below certain

thresholds into compliance with Federal Food Stamp Employment and Training (FSET) regulations, the federal able-bodied adult without dependents (ABAWD) regulations, and the Food Stamp Reauthorization Act of 2002. ABAWD regulations provide that individuals between 18 and 50 years of age, who do not receive CalWORKs benefits, but are economically deprived and meet the work requirements of the program, may be eligible for food stamps. The FSET is the employment and training program for food stamp recipients in California that do not otherwise receive state assistance, e.g., CalWORKs. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 10.)

**Update:** On January 16, 2004, OAL adopted DSS' permanent adoption of these changes.

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

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

On August 1, 2003, DSS published notice of its intent to permanently adopt amendments to sections 20-400, 20-401, 20-402, 20-403, 20-404, 20-405, 20-406, and 20-409 of MPP to implement recent changes to this federal law and California's implementation of the Welfare Intercept System (WIS) Enhancement Project, which allows counties to establish, increase, decrease, or delete accounts as appropriate throughout the year, instead of on an annual basis. Existing regulations required counties to submit delinquent accounts by May 1 of each year for intercept the following tax season. After these changes, WIS will be updated weekly with information provided by counties, the Franchise Tax Board, and the IRS. DSS states that moving to a continuous system will allow counties to keep account information more current and accurate. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 11.)

**Update:** At this writing, the changes still await review and approval by OAL.

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

On August 29, 2003, DSS published notice of its intent to permanently adopt amendments to section 63-502 of the MPP to align state regulations with federal regulations regarding budgeting of the Standard Utility Allowance (SUA). The federal government released notice in February 2002, which provided that states do not have the option to prorate the SUA when household members share utility expenses (heating or cooling) with excluded individuals, e.g., ineligible non-citizens. These regulations follow a DSS All County Letter issued in July 2002, stating that effective October 1, 2002, the procedures for budgeting of the SUA would be updated to allow a household with an excluded member to claim the full SUA. One other technical amendment, changing the word "alien" to "non-citizen" throughout section 63-502, was also made by this regulation. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 12.)

**Update:** On February 26, 2004, OAL approved DSS' adoption of these regulations, which became effective on March 27, 2004.

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

Effective November 1, 2003, DSS amended—on an emergency basis—sections 63-503, 63-504, and 63-505 of the MPP to implement recent federal regulations by the U.S. Department of Agriculture as follows: (1) the current regulation that households report a change of more than \$25 in monthly gross income is increased to more than \$50 in unearned income and to more than \$100 in earned income; and (2) a technical amendment addressing procedures for the handling of certain recurring income in a retrospective budgeting system. Final federal rules were issued on April 29, 2003, requiring all states to implement these changes by November 1, 2003. On October 31, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 12.)

**Update:** On March 1, 2004, DSS readopted these amendments on an emergency basis. On May 27, 2004, DSS transmitted a certificate of compliance to OAL; at this writing, OAL is reviewing the rulemaking file.

# **HEALTH / SAFETY**

## **New Rulemaking Packages**

### **Drug Medi-Cal Rates for Fiscal Year 2002–03**

**O**n April 22, 2004, DHS amended—on an emergency basis—section 51516.1, Title 22 of the CCR, to update Medi-Cal reimbursement rates for substance abuse services for fiscal year 2002–03. Welfare and Institutions Code sections 14021.5, 14021.6, and 14105, and Health and Safety Code section 11785.42 require the Department of Alcohol and Drug Programs (ADP), in consultation with DHS, to establish rates for Drug Medi-Cal services, including perinatal residential treatment services for pregnant women and women in the postpartum period, Naltrexone (drug and alcohol addiction) treatment, and day care habilitative (rehabilitative/ambulatory intensive outpatient) services; establish a dosing fee for use of two specific narcotic replacement drugs (Methadone and Levoalphacetylmethadol (LAAM)); and to establish a uniform statewide monthly reimbursement rate for narcotic treatment programs.

Pursuant to section 51516.1, Title 22 of the CCR, reimbursement for the above-identified services are based on the lowest of the following three options: (1) the provider's usual and customary charge to the public for similar services; (2) the provider's allowable cost of rendering services; or (3) the statewide maximum allowances (SMAs) for the fiscal year, which ADP establishes in accordance with Welfare and Institutions Code section 14021.6. The SMAs are set by determining aggregated, median rates for each treatment/service from data reported by county-operated providers, county contract providers, and ADP's direct contract providers, which is presented in the form of year-end cost reports. The fiscal year 2002–03 SMAs (amended in these proposed regulations) are based on cost report data from fiscal year 2000–01, which is the most recent data available and was available to DHS in November 2001.

DHS is adopting these regulations, rather than ADP, because DHS is the single state agency authorized by federal law to administer the Medicaid program in California (Medi-Cal). DHS/ADP have been paying these increased rates for services provided on or after July 1, 2002. Based upon decreased payment levels for services provided under this regulatory package, there is a combined state-federal (50/50) fiscal savings (from 2002–03) of over \$3.2 million.

More specific examples of the methodology used to determine the amended reimbursement rates are contained in DHS' rulemaking file in documents titled "Drug Medi-Cal Rate Setting Methodology, Fiscal Year 2002–2003" and "Narcotic Treatment Program Methodology—Uniform Statewide Monthly Reimbursement Rates and Methodology, FY 2002–03."

On May 7, 2004, DHS published notice of its intent to adopt the changes on a permanent basis. Pursuant to its Notice of Extension of Written Comment Period and Rescheduled Public Hearing, DHS will hold a public hearing on July 14, 2004 (rescheduled from June 23, 2004).

**IMPACT ON CHILDREN:** Unlike rates paid to providers under Medi-Cal, the rates paid for drugs, including substance abuse treatment, which are based upon aggregated median costs, are set to keep pace with the rising cost of health care services and products, in particular the cost of drugs and other prescription medications. Although DHS is approximately two years behind in its rulemaking (the effective date of these "emergency" regulations is July 1, 2002, and the rates are effective through June 30, 2003), at least there is a system in place to reevaluate the costs of substance abuse services on an annual basis. This type of analysis is mandated by statute—but remains unenforced—and should be conducted by DHS for every provider who treats Medi-Cal patients to ensure that access to health care meets federal requirements.

Federal Medicaid law mandates that each state must "assure that payments [to providers]... are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. section 1396a(a)(30)(A). This section is often referred to as the "equal access" standard. In essence, it means that patients covered by Medicaid are entitled to the same quality of care and access to care as are individuals covered by other insurance, including private health care insurance and Medicare. California is responsible for complying with this federal mandate by adequately setting provider rates for Medi-Cal services.

Many recent studies have found Medi-Cal provider rates to be low in California—particularly for services to children. These rates have not been adjusted consistent with medical cost or consumer price inflation for more than a decade, and many practitioners complain that Medi-Cal patients in general and Medi-Cal-covered children in particular, impose out-of-pocket costs. Accordingly, an increasing number of practitioners refuse to handle Medi-Cal patients. The American Academy of Pediatrics published its Medicaid Reimbursement Survey in 2001, finding California's reimbursement rates for physicians and other specialists who treat children to be significantly less than compensation paid for the same medical procedures for the elderly under Medicare. In many cases, California compensation is substantially less than national average fee-for-service rates.

Of special concern are rates paid to pediatric specialists—those physicians needed to treat a child's significant illness or injury after diagnosis. These critical medical

providers include allergy/immunology, critical care, emergency care, perinatal pediatrics, urology and dialysis, hospital care, office visits, psychiatry, and even child preventive services (EPSDT). Most rates applicable to these practitioners are now less than 50% of the amount paid for the identical treatment for an elderly Medicare patient. For example, a doctor treating an elderly patient under Medicare would receive \$203.15 for an initial inpatient consultation of high complexity. The same doctor treating a child under Medi-Cal would receive \$82.25 for the same service. This disparity is common between pediatric specialty Medi-Cal rates and their Medicare counterparts.

The Medi-Cal Policy Institute released its Medi-Cal compensation study in 2003, and made the following findings regarding access to care:

- ◆ In 2001, 56% of primary care physicians, 55% of medical specialists, and 52% of surgical specialists in urban counties said they had Medi-Cal patients in their practice;
- ◆ Fewer physicians were willing to accept new Medi-Cal patients into their practices. Only 55% of primary care physicians, 48% of medical specialists, and 43% of surgical specialists who were accepting new patients said that they were open to new Medi-Cal patients;
- ◆ Despite efforts in the late 1990s to increase physician participation in the Medi-Cal program, including expansion of managed care and an increase in physician reimbursement rates, there was no measurable increase in physicians' participation in the program between 1996 and 2001;
- ◆ Overall, the ratio of primary care physicians available to Medi-Cal patients in 2001 (46 per 100,000) was well below the standards set by the federal Health Resources Services Administration, which recommends 60 to 80 primary care physicians per 100,000 people.

Notwithstanding this and other evidence, rather than increasing rates to be more equivalent with Medicare or other lawfully-mandated levels (requiring the approximate doubling of rates for pediatric specialists), the 2003–04 budget cut Medi-Cal provider rates by 5%, a small but disastrous improvement from the 15% reduction proposed by former Governor Davis.

In response to these cuts, the California Medical Association, the American Academy of Pediatrics, and several other provider and beneficiary organizations joined forces to sue the state. In a published opinion dated December 23, 2003 (*Clayworth v. Bonta*, 295 F. Supp. 2d 1110 (E.D. Cal. 2003)), the federal District Court issued a preliminary injunction barring defendant Sandra Shewry (who replaced Diana Bonta as DHS Director during the

course of the litigation) from implementing the 5% rate reduction to fee-for-service Medi-Cal rates. The court held that the plaintiff Medi-Cal recipients have a private right of action under the Civil Rights Act to enforce the provisions of 42 U.S.C. section 1396a(a)(30)(A), the equal access provision. While the court held that providers do not have a private right of action to enforce section 1396a(a)(30)(A), it held that the plaintiff providers and provider associations have third-party standing to bring such claims on behalf of Medi-Cal recipients. Further, the court held that plaintiffs had established both the likelihood of irreparable injury if the rate reduction were to go into effect and the likelihood of success on the merits of their claims. All of these issues have been appealed by the defendant Director to the Ninth Circuit Court of Appeals.

State law requires that Medi-Cal fee-for-service rates be adopted pursuant to a regulatory process and requires that DHS annually review Medi-Cal rates for physician and dental services, taking into account annual Consumer Price Index cost increases, reimbursement levels under Medicare and other third party payors, prevailing customary charges, and other factors. (*See* Welfare and Institutions Code sections 14075, 14079, 14105; 42 C.F.R. section 447.45; 42 U.S.C. section 1396a(a)(32).) Plaintiffs alleged that prior to enacting the 2003–04 budget bill, including the addition of section 14105.19 of the Welfare and Institutions Code (reducing Medi-Cal program service rates by 5%, with a few exceptions), no studies or other analyses were conducted by the Legislature or DHS to determine whether the Medi-Cal rates resulting from the 5% reduction would be consistent with efficiency, economy, and quality of care, or with the costs of providing the services affected, or what impact the rate reduction would have on beneficiaries' access to health care services as compared to the general public. In fact, section 14105.19(a) explicitly states that the 5% reduction in rates was due to "the significant state budget deficit projected for the 2003–04 fiscal year." Even the Legislative Analysts' report on the proposed 15% rate reduction initially introduced found that California's reimbursement rates, when adjusted for cost-of-living, were among the ten lowest in the country, that the proposed rate reduction would negatively affect beneficiaries' access to providers, and that DHS has "no rational basis for its rate system." Since federal courts have consistently rejected exclusively budget-driven efforts to ignore federal equal access and quality requirements in setting Medicaid payment rates, the plaintiffs argued in the case discussed above that California's sole justification for the 5% reduction in rates (due to budgetary constraints) does not fulfill the relevant factors set out in federal and state law.

In Governor Schwarzenegger's 2004–05 budget released in January 2004, he proposed an additional 10% provider rate reduction, even though the 5% rate reduction from the prior year had been successfully challenged in court. In Schwarzenegger's May Revision, however, he

withdrew the proposed Medi-Cal provider rate reductions, stating that as a result of alternative proposals “the Administration has the ability to avoid implementing other reductions that would have more directly affected the state’s most vulnerable residents.” Thus, Governor Schwarzenegger has acknowledged the detrimental impact that reduced Medi-Cal provider rates have on Medi-Cal recipients; unfortunately, his proposed budget still fails to provide rates that would ensure appropriate health care for the state’s most vulnerable residents.

Child advocates argue there is great disparity between medical services for the elderly, usually covered by Medicare, and health care for poor and disabled children, usually covered by Medi-Cal. The following facts highlight the foolishness of a national agenda which prioritizes care of the elderly over care for the young: (1) children incur less than one-fifth the per capita medical costs of the elderly; (2) senior citizens receive basic medical coverage, while almost 20% of the state’s children are uncovered and must rely on emergency room *post hoc* treatment; (3) the state has available funds to cover almost all of the state’s children at a one-third state match, but sent over \$1.1 billion back to Washington and failed to cover most of those who were intended for coverage; and (4) the child poverty rate remains at well over twice that of seniors (who are covered by Social Security).

Proposed new public investment on the national level remains focused on additional prescription drug benefits for seniors under Medicare, with pharmaceuticals being the fastest rising sector of health care costs; many of the most expensive prescription drugs have been found to have no additional health benefits compared to lower-priced drugs already on the market.

For a more detailed discussion of the problems facing the Medi-Cal system and provider rates, see the Children’s Advocacy Institute’s *California Children’s Budget 2004–05* (San Diego, CA; June 2004) at 4-39 through 4-45, and the previous issue of the Children’s Advocacy Institute’s *Children’s Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 16–17, both available at [www.caichildlaw.org](http://www.caichildlaw.org).

### Notices of General Public Interest

The Department of Health Services issued the following notices of general public interest:

- ◆ to adopt 2004 Healthcare Common Procedure Coding Structure (HCPCS) billing codes for Medi-Cal and eliminate interim codes for durable medical equipment and related accessories (published June 25, 2004);
- ◆ to adopt 2004 Current Procedural Terminology—4th edition (CPT-4) and Healthcare Common Procedure Coding Structure (HCPCS) billing codes for Medi-Cal (published May 28, 2004);

- ◆ to eliminate Medi-Cal interim billing codes for acupuncture services and adopt 2004 Current Procedural Terminology—4th edition (CPT-4) codes (published May 14, 2004);
- ◆ intent to submit a state plan amendment regarding the long-term care reimbursement methodology (published January 2, 2004);
- ◆ intent to request a state plan amendment to modify the methodology for supplemental reimbursement of publicly-owned hospital outpatient departments (published December 26, 2003);
- ◆ intent to introduce a new reimbursement methodology for wheelchairs, wheelchair accessories, and replacement parts, with no maximum allowable rate (published December 19, 2003);
- ◆ intent to submit a state plan amendment regarding the methodology for determining Medi-Cal long-term care reimbursement rates for the 2004–05 fiscal year (published November 28, 2003);
- ◆ to implement the statutorily required 5% payment reduction for Medi-Cal and other state health programs (November 28, 2003).

The above notices invited public comment and made available the regulatory language being changed and/or adopted by the notice. However, the notices did not fulfill the requirements of the Administrative Procedure Act regarding formal rulemaking, will not be approved by the Office of Administrative Law, and do not require DHS to respond to any comments received.

**IMPACT ON CHILDREN:** Most of the changes made in these notices will affect reimbursement rates through the Medi-Cal program. Plaintiffs in the *Clayworth v. Bonta* lawsuit, referenced above, alleged in their complaint for injunctive and declaratory relief that DHS violated state law because it failed to adopt the Medi-Cal fee-for-service rates pursuant to the regulatory process. (See Welfare and Institutions Code sections 14075, 14079, and 14105.) Specifically, section 14079 requires that DHS annually review and revise reimbursement rates to ensure reasonable access by Medi-Cal beneficiaries to physician and dental services, consider Consumer Price Index increases, consider reimbursement levels under Medicare and other third-party payors, and consider prevailing customary charges and other factors required by statute.

The plaintiffs also alleged that DHS violated federal regulations that require public notice of the reduction of rates and an opportunity for public comment. (See 42 C.F.R. section 447.205.) DHS issued a notice of general public interest regarding the 5% reduction in rates in

November 2003, after the *Clayworth v. Bonta* complaint was filed.

The plaintiffs further alleged that DHS' 5% reduction is invalid because, according to federal law, any state plan amendments must be submitted to the Secretary of the U.S. Department of Health and Human Services for approval; thus, a state cannot implement its state plan, or any amendments to the plan, before approval from the Secretary is granted. Procedurally, DHS cannot implement rate reductions without going through the proper and formal rulemaking procedures in the state. Specifically, California's approved state plan requires DHS, when setting rates, to (1) develop an evidentiary base or rate study resulting in the determination of a proposed rate; (2) present the proposed rate at a public hearing to gather public input; (3) determine the final rate based on the evidentiary base including the pertinent public input; and (4) establish the payment rate through the adoption of regulations specifying such rates.

The purpose of these code sections is to protect beneficiaries of Medi-Cal services (who are disproportionately children) by disallowing arbitrary decisionmaking by the agency and creating an avenue for public input and comment. Unfortunately, for many years budgetary considerations have dictated the rates paid to providers, a distinct disadvantage for child beneficiaries who cannot gain access in some instances to necessary health care. It could be argued that several or all of the above-referenced notices of general public interest should have been implemented through the formal rulemaking process. However, the question remains whether DHS' use of this general notice procedure fulfills the federal and state requirements listed above. Until a court or OAL rules on this issue, it appears that DHS will continue to utilize this process when changing reimbursement rates within the Medi-Cal program.

### **Updates on Previous Rulemaking Packages Established Place of Business**

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

approval to providers who fail to meet the new standards set forth in this regulation.

On February 3, 2003, DHS amended, on an emergency basis, sections 51000.4, 51000.30, 51000.45, 51000.50, 51000.55, 51200, 51200.01, and 51451, Title 22 of the CCR, in order to reflect changes made in AB 1107 and AB 1098. On February 21, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 18.)

**Update:** On August 5, 2004, and again on February 2, 2004, DHS readopted these amendments on an emergency basis. Following the February 2004 re-adoption, DHS was required to transmit a certificate of compliance to OAL by June 2, 2004, or the emergency language would be repealed by operation of law on the following day. DHS failed to transmit the certificate to OAL by June 2, and the emergency changes were repealed. However, on June 8, 2004, DHS readopted these changes—yet again on an emergency basis; DHS must transmit a certificate of compliance to OAL by October 6, 2004, or the emergency changes will be repealed by operation of law on the following day.

Welfare & Institutions Code section 14043.75 provides that any regulations adopted, readopted, repealed, or amended pursuant to that section to prevent or curtail fraud or abuse shall be deemed emergency regulations; shall be deemed necessary for the immediate preservation of the public peace, health and safety, or general welfare; and shall be exempt from review by OAL. It is unclear, however, if the Legislature intended that DHS' "emergency" changes made pursuant to section 14043.75 would stay in effect for over eighteen months without DHS compliance with the formal rulemaking provisions of the APA.

### **Upper Billing Limit**

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

On March 1, 2003, DHS adopted new section 51008.1 and amended sections 51104, 51515, 51520, and 51521, Title 22 of the CCR, on an emergency basis, in order to immediately curb the practice of providers inappropriately charging the Medi-Cal program for supplies and devices that the provider acquired at low or no cost. As a result of these changes, the net purchase price plus up to a 100% mark-up establishes the upper billing limit for providers of these products. Providers who pay nothing to acquire specified products will receive no reimbursement through Medi-Cal, while providers who acquire products through normal market channels will receive the same reimbursement under Medi-Cal, as their net purchase price equals or exceeds the estimated acquisition cost or the weighted average of the negotiated contract price. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 19.)

**Update:** On February 24, 2004, DHS readopted these provisions on an emergency basis. On March 12, 2004, DHS transmitted a certificate of compliance to OAL, which approved the permanent adoption of these provisions on April 26, 2004.

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

Federal law requires state Medicaid plans to include procedures intended to safeguard the system from unnecessary use of care and services. On July 17, 2003, DHS amended—on an emergency basis—sections 51315 and 51515, Title 22 of the CCR, to impose a prior authorization requirement on prosthetic and orthotic appliances and to impose a restriction on which providers may prescribe specified appliances to Medi-Cal beneficiaries. By tracking the billing practices of providers, DHS determined that billing thresholds under Medi-Cal have been implemented in such a way to allow numerous appliances to be provided and paid for under Medi-Cal when they were not necessary. These regulations are necessary to ensure adequate utilization review while ensuring appropriate access to prosthetic and orthotic appliances and to prevent over-billing for unnecessary appliances. On August 8, 2003, DHS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 23.)

**Update:** On January 14, 2004, DHS readopted these changes on an emergency basis. DHS must transmit a certificate of compliance to OAL by July 12, 2004, or the emergency changes will be repealed by operation of law on the following day.

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

Federal law requires state Medicaid plans to include

procedures intended to safeguard the system from unnecessary utilization of care and services. Prior authorization of services may be imposed by DHS. However, Welfare and Institutions Code section 14133.9 establishes requirements that must be met by the Department if prior authorization is used. For example, for major categories of treatment, like acute inpatient intensive rehabilitation, DHS must publicize and continually develop a list of objective criteria to indicate when authorization will be granted. The Department is currently expanding and updating its Manual of Criteria for Medi-Cal Authorization, which is incorporated by reference into Title 22 of the CCR, due to the outcome of a lawsuit, *Fresno Community Hospital and Medical Center v. State of California, et al.*, Fresno County Superior Court Case No. 555694-9 (1996).

On August 22, 2003, DHS published notice of its intent to permanently adopt changes to section 51003, Title 22 of the CCR, to change the date of the proposed revision of the Manual of Criteria to May 28, 2003, and to expand and adopt criteria for inclusion in the Manual for acute inpatient intensive rehabilitation. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 23.)

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

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

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

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

Parents will then have to apply for continued coverage for their child (twelve months of eligibility) under either Medi-Cal or Healthy Families by mailing in a single application.

On July 31, 2003, MRMIB adopted—on an emergency basis—sections 2699.6612 and 2699.6827, and amended sections 2699.6500, 2699.6600, 2699.6607, 2699.6611, 2699.6705, 2699.6715, 2699.6717, 2699.6725, 2699.6813, 2699.6815, and 2699.6819 of Title 10 of the CCR, in order to reflect changes made in AB 442 and other recent federal requirements. On August 22, 2003, MRMIB published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 23.)

**Update:** On November 17, 2003, MRMIB transmitted a certificate of compliance to OAL, which approved the permanent adoption of these changes on December 30, 2003.

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

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

On August 4, 2003, MRMIB adopted and amended—on an emergency basis—various sections of Chapter 5.5, Title 10 of the CCR, to implement recent legislation, AB 1401 (Chapter 794, Statutes of 2002), which established a four-year pilot project allowing for only 36 months of eligibility for individuals enrolled in MRMIP and a guarantee to MRMIP graduates that they will be covered in the individual insurance market. On September 12, 2003, MRMIB published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 25.)

**Update:** On January 23, 2004, MRMIB transmitted a certificate of compliance to OAL, which approved these regulatory changes on March 1, 2004.

## **SPECIAL NEEDS**

### **New Rulemaking Packages**

#### **(Rulemaking Petition Decision)**

#### **Petition to Repeal 22 CCR 35333(c)(1)(C)**

**O**n April 16, 2004, DSS, pursuant to Government Code section 11340.7, published notice of its response to the December 19, 2003 petition for rulemaking filed by the Association of Regional Center Agencies (ARCA) requesting the repeal of section 35333(c)(1)(C), Title 22 of the CCR, which states as follows:

“If the child is a client of a California Regional Center (CRC) for the Developmentally Disabled, the maximum rate shall be the foster family home rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services. CRC clients who leave California shall be able to continue to receive AAP [Adoption Assistance Program] benefits based on the most recent level of need assessed by the CRC.”

In its petition, ARCA claimed that the regulation exceeded the Department's statutory authority because it delegated duties imposed by statute on DSS and county agencies to Regional Centers, and DSS has no authority over Regional Centers. The primary dispute appears to be what public or private entity is required to set the rates that are to be paid by DSS for developmentally disabled foster children or children adopted from the foster care system who need 24-hour care and supervision, so called “dual agency” children.

Regional Centers are non-profit corporations, each of which is under contract with the Department of Developmental Services (DDS) to be local points of contact and to provide case management services to infants at risk of developmental delays and individuals over age three who have one or more developmental disabilities, as defined by the Lanterman Act (see Welfare and Institutions Code sections 4620 and 4512). The Lanterman Act further provides that “Regional Center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services” (see Welfare and Institutions Code section 4648). Thus, Regional Centers are to fund services only if no public agency is legally responsible for funding the particular service. Regional Centers are also permitted to contract separately with state-licensed community care facilities to provide residential services to “clients” (including children as defined above).

In response, DSS states that it construes the regulation as only instructing counties, for the purposes of a child's Adoption Assistance Program (AAP) benefits, to use the

# CHILD CARE / CHILD DEVELOPMENT

## New Rulemaking Packages

### **Records Reproduction and Removal in Licensed CCL Facilities Regulations**

facility rates set by DDS if the child utilizes Regional Center services. Thus, according to DSS, the regulation was not intended to impose a duty on Regional Centers or procedures for Regional Centers to follow. DSS implemented this regulation in the context of other sections of state law (specifically Welfare and Institutions Code sections 4684 and 11464), which require that the cost of providing 24-hour, out-of-home, non-medical care and supervision for developmentally disabled children be funded by federal foster care entitlement funds (AFDC-FC is funded under Title IV-E of the Social Security Act) for children who use Regional Center services and are dependents of the state's child welfare system. Under these code sections, DDS is then required to set the rates paid to state-licensed community care facilities by DSS.

Ultimately, DSS denied the petition based upon the fact that the Department is discussing the problems raised in the petition with DDS. DSS and DDS are attempting to resolve conflicts between the different programs involved, including Regional Centers, foster care (under AFDC-FC funding), and AAP.

Specifically, DSS General Counsel Larry Bolton denied the petition because the regulation is being considered as part of an overall reform package that will focus on how to set rates for "dual agency" children. According to Bolton, interested parties will be able to provide input, and such regulations will be developed by June 30, 2004. At this writing, no proposed regulations (as indicated by DSS) had been published in the *Notice Register*.

**IMPACT ON CHILDREN:** According to the petitioner, the repeal of this regulation is necessary because county agencies responsible for foster children have been asking Regional Centers to determine the rates to be paid to both foster care providers and adoptive parents of foster children under the AAP. Apparently, DDS should be setting the referenced rates, but has not done so, leaving the burden to fall on the Regional Centers.

The argument over which entity sets the rates to be paid by the government for the care and supervision of developmentally disabled foster children or adopted children has no direct impact on the child, so long as the services are provided. The petitioner in this rulemaking decision represents the non-profit Regional Centers, and not the children affected by the regulation. Therefore, no discussion of the best interests of the children who receive services has ensued. This is a particularly vulnerable population of children and includes those who have developmental disabilities of varying degrees—although once a child requires 24-hour, out-of-home care, that suggests the child could not be placed in a foster family home due to the severity of the child's disabilities. With no parent or other guardian to advocate for the child, the abilities and attention of Regional Center staff may be the only real parenting these foster children receive.

A recent federal court decision (*Golden Day Schools, Inc. v. Pirillo*, 118 F. Supp. 2d 1037 (C.D. Cal. 2000)) held that DSS or county-designated licensing agency staff may not remove records from a licensed facility for copying unless expressly authorized by regulation or consented to by the facility. The court found that while it was clear from the regulations that licensing staff were permitted to enter and inspect a facility without prior notice, and to, in some situations, reproduce facility records, it was not clear from the regulations whether licensing staff had the authority to seize and remove records from the facility in order to copy them. The plaintiff day care facilities who challenged DSS in court alleged unreasonable seizure of facility files based upon the removal and return of files a few hours later without the facilities' consent.

Primarily due to the lack of clarity in existing regulations, as pointed out by the court, DSS is offering these amended regulations to clarify licensing staff's authority and ability to remove and copy facility records when inspecting or otherwise auditing facilities. The proposed regulations apply to all licensed adult and elderly community care facilities, children's residential community care facilities (e.g., group homes and foster family agencies caring for foster children), and child day care facilities.

On April 30, 2004, DSS published notice of its intent to amend—on a permanent basis—sections 80044, 80045, 80066, 80070, 84063, 87344, 87345, 87566, 87570, 87571, 87844, 87866, 87870, 88069.7, 88070, 89119, 89182, 89244, 89245, 89370, 89566, 101200, 101201, 101217, 101221, 102391, and 102392, Title 22 of the CCR, to give DSS Community Care Licensing (CCL) staff the express authority to copy client or facility documents, or to remove them if necessary for copying, thus, emphasizing the licensing program's authority to audit and inspect facilities, and to copy facility records on demand during normal business hours. The proposed regulations also contain safeguards that prohibit the licensing staff from removing emergency or health-related information (which is separately defined for each type of facility), unless other copies of those documents are available, and set out standards for the safe removal and timely return of records to facilities. Specifically, the regulations require the licensing staff to create a list of records to be removed, sign and date the list upon removal, leave a copy of the list with the facility administrator, and return the records undamaged and in good order within three business days.

DSS held a public hearing on the proposed regulations on June 16, 2004 in Sacramento. At this writing, the permanent changes await review and approval by OAL.

**IMPACT ON CHILDREN:** According to DSS, these changes will protect the health and safety of children in licensed child care and foster care facilities by ensuring that designated licensing staff have reasonable access to information in order to better evaluate facilities and investigate complaints. Certainly, in cases where children's health and well-being may be at risk, advocates support broad authority for state licensing staff to investigate and take appropriate action to protect children in those facilities. However, the underlying problem is that there are not enough site visits due to years of decreased funding and staffing at the CCL division. This may easily outweigh any positive impact that these regulations could have for children.

CCL licenses the residential facilities that many of the 100,000 children in foster care reside in, and the 55,000 licensed child care facilities that serve over one million children. CCL's once a year visits were a minimum standard established to ensure the safety and security of foster youth and children in day care, and to oversee enforcement of the rights of foster youth in out-of-home, residential placements. However, annual visits were hardly sufficient to further these objectives.

In January 2000, the General Accounting Office (GAO) released a national review of state child care safety and health regulation using 1999 data (focusing on day care facilities, not foster care facilities). California's performance was near the bottom of the nation—carrying the 4th smallest inspection staff per licensed facility in the nation, with 249 facilities per inspector. National standards advise 75 facilities per inspector, meaning California would have to more than triple its staff to comply. Finally, California's frequency of visits per year for compliance was less than once every two years for family day care, and once a year for day care centers—less frequent than any other state.

Thus, before the recent years' funding and staffing declines for CCL, California already ranked as one of the poorest performers in terms of ensuring the health and safety of children in state-regulated care facilities. During the 2003–04 budget year, child advocates lost the battle to maintain the annual CCL visits to licensed facilities. In an attempt to cut spending, lawmakers decreased the mandates for CCL site visits to a level that is lower than that required for dog kennel inspections under statutory mandate (annually). A 2003–04 budget trailer bill (AB 1752 (Budget Committee) (Chapter 225, Statutes of 2003)) amended the Health and Safety Code so that annual unannounced visits of a facility only need occur if the facility is on probation, when terms of the agreement require it, when an accusation is pending against a facility, when required by federal law, or in order to verify that a person ordered

out of the facility so complied. The Code provides that DSS or the licensing agency (which can be counties or other providers so designated by DSS) must conduct random annual unannounced visits to no less than 10% of facilities not otherwise evaluated for the above-stated reasons, and under no circumstances will DSS visit a facility less often than once every five years.

California's lawmakers routinely fail to provide appropriate oversight resources to ensure quality of care in foster care and child care facilities. However, foster youth are at an even greater disadvantage, since the state is solely charged with their safety and well-being—they have no parents to turn to for help when they are mistreated. Recent media reports of youth who are harmed in the very placements entrusted with their care reinforces the need for funding of CCL visits to, and inspections of, facilities where such youth are placed. Some of the tragedies that have come to light include accounts of sexual abuse, inadequate medical treatment, physical abuse, inadequate commitment to the educational needs of the youth, and the use of youth as free labor, as well as violations of rights mandated in the foster care bill of rights and California statutes. Many of these problems could have been identified or avoided with careful attention and oversight by CCL. Eliminating yearly inspections by this oversight body will only increase the probability that more youth will be harmed while in foster care placements, and that problems will go undetected, unreported, and unresolved. Future incidents of abuse and neglect inflicted upon foster children could escalate and result in the state incurring even greater costs in the future.

There are similar problems in the child care arena. For instance, in June 2003, the *Los Angeles Times* reported that about 30,000 workers who care for children, seniors, and people with disabilities at state-licensed facilities had been arrested for various offenses since January, causing a backlog of arrest reports to be investigated. (Unfortunately, this information was not new—a California State Auditor report in 2000 was highly critical of DSS' monitoring of criminal histories for individuals working at child care facilities and red-flagged the issue.) The 2003 report, and the result of allowing children to be under the care and supervision of alleged criminals in those facilities, led to recent regulatory changes allowing DSS more authority to quickly remove arrested individuals during a preliminary investigation into the criminal allegations. However, due to the reported backlog of cases to investigate, it is unclear how DSS will manage to timely investigate all of these cases.

The inspections of child care facilities—where children spend four to eight hours a day—occur less frequently than the inspections of dog kennels. Advocates further complain that, while eschewing new taxes, Governor Schwarzenegger has proposed substantial new license

renewal fees for child care and foster care licensees, perhaps the state's lowest paid economic sectors, with the goal of ending all general fund contribution for regulation and safety assurances.

While affording DSS authority to remove facility records for copying may assist the licensing staff in their investigations, this regulatory change, without increased funding and staffing, will have little positive impact on the health and safety of children while in these facilities. (For a detailed discussion of regulatory failure and oversight underfunding, see the Children's Advocacy Institute's *California Children's Budget 2004–05* at Chapters 6 and 8, available at [www.cachildlaw.org](http://www.cachildlaw.org).)

### **Updates on Previous Rulemaking Packages** **Child Care Intercounty Transfers**

On September 26, 2003, DSS published notice of its intent to amend sections 47-110 and 47-310 of the MPP, to address child care intercounty transfers under CalWORKs. Among other things, the changes specify the responsibility of the first county to inform the client to apply for child care in the new county; require the second county to establish a child care case during the cash aid transfer period when the client applies for and meets child care eligibility requirements; provide standards for which county has payment responsibility when a client moves to a new county; and specify reasonable time periods for both counties to ensure that current and former CalWORKs clients receive Stage One child care services without delay when transferring from one county to another. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 28.)

**Update:** On May 13, 2004, OAL approved these amendments, which became effective on June 12, 2004.

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

Approximately 420,000 individuals statewide have received caregiver background checks and are associated with licensed child care facilities. Each month, DSS receives subsequent arrest information for approximately twenty such individuals, involving a crime for which, if convicted, the individual would not be eligible by law to receive an exemption to work in a child care facility. On July 24, 2003, DSS amended—on an emergency basis—sections 101170 and 102370, Title 22 of the CCR, to set forth the procedure DSS may follow to require a licensee to cease operation or remove an individual from the facility for up to thirty days pending DSS' investigation into the facts underlying the arrest. For example, if the arrested individual is a licensee, DSS may notify the licensee, by telephone or in writing, to immediately cease operation for up to thirty days. If the individual is not a licensee, DSS may notify the licensee and the individual associated with the facility,

by telephone or in writing, that the individual may not be present in the facility for up to thirty days. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 28.)

**Update:** On November 12, 2003, DSS readopted these amendments on an emergency basis. On November 21, 2003, DSS transmitted a certificate of compliance to OAL, which approved the permanent adoption of these changes on December 30, 2003.

### **Criminal Record Exemption Regulations**

On July 16, 2003—on an emergency basis—DSS adopted new section 102416.1 and amended sections 80001, 80019, 80019.1, 80019.2, 80054, 80061, 80065, 80066, 87101, 87219, 87219.1, 87454, 87565, 87566, 87801, 87819, 87819.1, 87861, 87865, 87866, 101152, 101170, 101170.1, 101170.2, 101195, 101212, 101216, 101217, 102352, 102370, 102370.1, 102370.2, 102395, 102416, 102417, and 102419, Title 22 of the CCR, regarding the requirements and procedures for criminal background checks, including fingerprinting, and criminal background check exemptions for persons who work or are present in licensed facilities that provide care to children and dependent adults. On August 29, 2003, DSS published notice of its intent to adopt these provisions on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 29.)

**Update:** On November 12, 2003, and again on March 11, 2004, DSS readopted these changes on an emergency basis. DSS must transmit a certificate of compliance to OAL on July 9, 2004, or the emergency language will be repealed by operation of law on the following day.

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

The 2003–04 Budget Act directed the California Department of Education to promulgate emergency regulations governing the use of the Regional Market Rate (RMR) to provide consistency statewide, as well as clarify the appropriate rate of reimbursement for child care services. On September 4, 2003, the Superintendent of Public Instruction adopted—on an emergency basis—new sections 18074, 18074.1, 18074.2, 18074.3, 18075, 18075.1, 18075.2, 17076, 18076.1, and 18076.2, amended sections 18413 and 18428, and repealed section 18021, Title 5 of the CCR. As required by the Budget Act, the emergency regulations change the definitions of certain rate categories and provide conditions and limitations on the use of certain rates and adjustment factors. On September 26, 2003, the Superintendent published notice of his intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 30.)

# **EDUCATION**

## **New Rulemaking Packages Countywide Charter Schools**

**A**B 1994 (Reyes) (Chapter 1058, Statutes of 2002) amended the Charter School Act of 1992 to create new responsibilities for county boards of education to review and approve charter schools that propose to operate multiple sites within the county. On January 23, 2004, the Board of Education published notice of its intent to adopt section 11967.8, Title 5 of the CCR, to clarify the process for providing funding to countywide charter schools and how financial audits will be conducted for those schools. Similar regulations exist for statewide charter schools. The proposed regulations clarify that a “sponsoring local education agency” is the school district where a pupil attending the charter school resides, which will ensure that local tax funds are transferred appropriately. The proposed regulations will also allow for necessary arrangements to be made for countywide charter school participation in the state’s teacher and employee retirement programs.

The Board held a public hearing on March 8, 2004. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Since 1991, over 400 charter schools have opened in California. The notion that charter schools can raise academic performance through a variety of innovative techniques lies behind the charter school influx. However, charter school success varies widely, with conflicting data emerging. Some studies indicate that charter schools exceed traditional public school quality due to high test scores and unconventional teaching techniques. Other studies indicate that charter schools rely on inexperienced teachers and have lower overall test scores. Educators clearly need to refine outcome measures to clarify what techniques work with respect to student profiles to limit charter school dis-education for students, and to generalize success. The proposed regulations do not address the performance ambiguity, but attempt to ensure that charter schools operating on a countywide basis receive the funding needed to function and serve their student population—a prerequisite to success regardless of the educational approach undertaken.

## **Golden State Seal Merit Diploma**

On January 23, 2004, the Board of Education published notice of its intent to adopt section 876, Title 5 of the CCR, to specify standards and scores required for students to qualify for the Golden State Seal Merit Diploma, due to the phase out of the Golden State Examination. The proposed regulations define the level of mastery of subjects required in order to receive the diploma, and designate specific classes which students must complete to receive the diploma.

***Update:*** On December 10, 2003, the Superintendent released a modified version of the proposed regulatory changes for an additional fifteen-day public comment period. On December 29, 2003, the Superintendent readopted these changes on an emergency basis; on April 26, 2004, he transmitted a certificate of compliance to OAL, which approved the permanent changes on June 8, 2004.

## **Retroactive Child Care Payment Limits**

On July 1, 2003, DSS adopted—on an emergency basis—new sections 47-120 and 47-430 and amendments to sections 40-107.16, 40-131.3, 40-181.1, 42-711.522, 42-711.6, and 47-301 of the MPP, regarding child care payment limits. AB 444 (Committee on Budget) (Chapter 1022, Statutes of 2002) limited retroactive child care payments in the CalWORKs Stage One child care program to thirty days. This regulatory action requires that CalWORKs applicants and recipients be provided with a written notice that informs them of the availability of subsidized child care both at the time of application and when an original or amended welfare-to-work plan is signed. When this notice is provided, child care payment would be limited to services provided no more than thirty days prior to the applicant’s/ recipient’s request for child care. On July 4, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. For background information on this rulemaking package, *see Children’s Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 30.)

***Update:*** On December 29, 2003, DSS transmitted a certificate of compliance to OAL, which approved the permanent adoption of these changes on February 2, 2004.

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

On March 15, 2002, CDE published notice of its intent to amend sections 18023, 18272, 18273, 18274, 18275, and 18279, and adopt new sections 18280 and 18281, Title 5 of the CCR, regarding the child development accountability system, which is aimed at achieving certain child and family desired results. Through this regulatory action, CDE seeks to combine contract compliance monitoring and program quality into one review process using standardized procedures, measures, and instruments. Following an April 29, 2002 public hearing, CDE modified its proposal and released it for an additional fifteen-day public comment period. On July 10, 2002, CDE submitted the package to OAL for review and approval; however, the Department withdrew the package from OAL on August 20, 2002. (For background information on this rulemaking package, *see Children’s Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 23, and Vol. 4, No. 2 (2003) at 31.)

***Update:*** OAL approved these regulatory changes on September 23, 2003.

The proposed regulations implement legislation that eliminated the Golden State Examination Program as a basis for qualification for the Golden State Seal Merit Diploma.

The Board held a public hearing on March 9, 2004. On April 22, 2004, the regulations were approved by OAL.

**IMPACT ON CHILDREN:** One of the greatest challenges in education is motivating students to succeed. Another challenge is adequately recognizing those students who excel in school. The Golden State Seal Merit Diploma acts as a method of achieving both of these goals. Students are more likely to succeed when they have clear goals. The regulations clearly state the requirements needed to qualify for the Golden State Seal Merit Diploma. Although the needs of low-performing students are critical, all students may benefit from attention and motivation, including those at the high end of performance.

### Vision Screening Regulations

California Education Code sections 49452, 49455, and 49456 provide for periodic pupil vision screening, basic components of the screening, and parental notification of possible vision defects.

On January 23, 2004, the Board of Education published notice of its intent to amend sections 590 through 596, Title 5 of the CCR, in order to make the regulations consistent with existing statutes and more accurately reflect the procedures performed in the schools. Since the last amendments to the regulations in 1977, numerous technological advances and changes in the vision screening field have occurred. The proposed regulations modernize the vision screening regulations, and remove current technological limitations. The proposed regulations also indicate when re-evaluation of a pupil should occur, and how parents and guardians should be notified when their child does not pass both the initial screening and a follow-up evaluation.

The Board held a public hearing on March 9, 2004. At this writing, the regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** The medical industry has made important advances in vision screening and correction over the past twenty-seven years. However, regulations covering vision screening have been neglected, and remain tied to terminology and techniques of the 1970s. The updated regulations will allow school districts to better serve students' visual needs, and will also give parents more complete information regarding student visual impairments, facilitating vision correction and proper special needs diagnosis.

### Withholding Funds—Special Education Mandates

Federal law (20 U.S.C. section 1413) generally requires

a free appropriate public education be made available to all children with disabilities, including children with disabilities who have been suspended or expelled from school. Further, 20 U.S.C. section 1413 requires state education agencies to monitor local education agencies (LEAs) to assure compliance with special education laws. LEAs found out of compliance with special education laws may have funding withheld in accordance with federal regulations (34 C.F.R. 300.197) and state law (Education Code section 56845).

On January 23, 2004, the Board of Education's Special Education Division published notice of its intent to adopt sections 3088.1 and 3088.2, Title 5 of the CCR, to impose sanctions for failure to comply with special education mandates authorized by Education Code section 33031. Based upon public comments received, the Board withdrew the original proposed regulations.

On May 21, 2004, the Board published a new notice of its intent to adopt sections 3088.1 and 3088.2, Title 5 of the CCR, to establish procedures consistent with federal and state law that enable the California Department of Education to withhold funding from LEAs that do not comply with the law. The proposed regulations will allow non-compliant LEAs to continue receiving funding if progress is being made toward compliance with special education mandates.

The proposed sections specify timelines and notice hearing requirements mandated by state and federal law prior to withholding funding. Proposed section 3088.1 requires that prior to the withholding of funds, LEAs receive notice of three items: (1) the non-compliance that is the basis for withholding funds; (2) the efforts that the Board has taken to verify that corrective actions have been taken; and (3) required actions that must be taken by a specified date to avoid loss of funds. The proposed sections further clarify the procedures for requesting and holding a hearing prior to withholding funds. If a LEA makes progress toward compliance with special education laws, proposed section 3088.2 allows for an individualized assessment of that progress. This assessment allows a LEA to continue receiving or resume funding as continued progress is made toward compliance.

The Board will held a public hearing on July 6, 2004 in Sacramento to discuss the proposed regulations. At this writing, the regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Students identified with a disability must, pursuant to federal law, receive a "free appropriate public education." If a child does not receive this education, either the child is put at a further disadvantage, or expensive litigation ensues to compel statutory compliance. Cooperation of local, state, and federal edu-

cational agencies is intrinsically more cost-effective and timely than litigation to secure the same ends. In 2002, four California school districts were notified that funds would be withheld if compliance with federal and state special education mandates was not fulfilled. As a result, all four districts were brought into compliance and the funds were not withheld—meaning that more children received the modifications needed to assist in their education. The fact that the proposed sections do not require immediate, full compliance, but rather allow LEAs to make progress under the supervision of the Board without losing funding, reflects a concern for the children which the funding benefits and allows for short- and long-term benefits to be conferred on impacted children.

Another critical component to the success of special education laws is adequate funding at the federal level. According to the National Education Association, special education is under-funded nationwide by \$11.4 billion in the current budget proposal. As reported by the National Priorities Project, California alone would need an additional \$1.2 billion just to meet federal mandates. Under-funding at the federal level poses significant challenges for state and local education agencies (who are working through severe budget deficits for the third year in a row in California) as they try to meet federal mandates that are meant to improve education for children with both physical and learning disabilities.

### **Enhancing Education Through Technology (EETT)**

As part of the No Child Left Behind (NCLB) Act of 2001 (Public Law 107-110), the Enhancing Education Through Technology (EETT) competitive grant program was created to improve academic achievement through technology. On August 26, 2003, the Board of Education adopted emergency regulations to disseminate the first round of grant funding.

Eligibility to receive EETT grant funding is limited to school districts serving students in grades 4–8 that are among the districts serving the highest number or percentage of children from families with an income below the federal poverty line, and meet either of the following criteria: (a) the district operates one or more schools identified under Section 116 of the No Child Left Behind Act, or (b) the district has a substantial need for assistance in acquiring and using technology. Districts serving other populations (e.g., K–8 or K–12) may apply for the grant, but funds will only be awarded for students in grades 4–8. A minimum of 25% of the grant must be used to provide professional development. The remaining funds are to be utilized to implement and support the comprehensive program described in the application submitted by the school district in a manner consistent with the federal Education Department Guidelines Administrative Regulations.

On January 30, 2004, the Board published notice of its intent to amend—on a permanent basis—sections 11973, 11974, 11975, 11977, 11978, and 11979, Title 5 of the CCR, to clarify instructions and align calendar dates for the application for EETT competitive grant funding. Specifically, the proposed regulations clarify the program's accountability requirements and application process, revise dates for awarding and distributing funding, and remove reference to the School Renovation Technology Grant, which has ended and is no longer funded.

On March 23, 2004, the Board held a public hearing regarding the proposed regulations. At this writing, the regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Through the Enhancing Education Through Technology grant program, over \$40 million will be distributed to local education agencies and eligible local education partnerships. In order to receive funding through the EETT, the applicant must draft a plan indicating how funds will be used as follows:

- ◆ Strategies for using technology to improve academic achievement and teacher effectiveness;
- ◆ Goals aligned with the state content standards for using advanced technology to improve student academic achievement;
- ◆ Steps the applicant will take to ensure that all students and teachers have increased access to technology;
- ◆ Steps the applicant will take to help ensure that teachers are prepared to integrate technology effectively into instruction;
- ◆ A description of the type and costs of technology to be acquired with Ed Tech funds, including provisions for interoperability to components;
- ◆ A description of how the applicant will integrate technology into curricula and a time line for this integration;
- ◆ A description of how the applicant will use technology effectively to promote parental involvement and increase communication with parents;
- ◆ A description of how the applicant intends to collaborate with adult literacy service providers;
- ◆ A description of the process and accountability measures that the applicant will use to evaluate the extent to which activities funded under the program effectively integrate technology into instruction, increase the ability of teachers to teach, and enable students to reach challenging state academic standards; and

- ◆ A description of the supporting resources, such as services, software, other electronically delivered learning materials and print resources, which will be acquired to ensure successful and effective uses of technology.

Due to the competitive nature of the grant, applicants are encouraged to create innovative and realistic means of bringing technology to children. Effective integration of technology in the classroom helps motivate children and prepares them for the future.

### **General Educational Development Test (GED)**

The General Education Development (GED) Test determines whether or not an applicant possesses the academic skills and knowledge of a high school graduate. Upon passage, the test taker receives a California High School Equivalency Certificate. In 1974, California adopted the first GED test regulations, including test fees. Test fees are the sole source of funding for overall program costs. The fees were last adjusted in 1996.

On March 26, 2004, the Board of Education published notice of its intent to amend section 11530, Title 5 of the CCR, to raise the GED application fee from \$12 to \$20. The purpose of the proposed regulation is to cover the 76.7% cost increase since the 1995–96 school year. Costs have risen over the past eight years as a result of inflation, an increased number of examinees, an increased number of follow-up services requested by examinees, and an improved scoring system and database.

The Board held a public hearing on May 10, 2004. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** The GED test allows students an alternative method of receiving the equivalent of a high school diploma in order to better their lives. GED test takers apply to take the test for an assorted number of reasons: to set an example for younger family members to stay in school; to qualify for a promotion or further their career; or to apply to college. Approximately 5% of first-year college students received their equivalency certificate after passing the GED test. The adjusted fee will help ensure that the program continues to exist, giving students an alternative to completing high school.

### **Instructional Materials Follow-up Adoptions**

California Education Code section 60200(b)(1) requires the adoption of new instructional materials not less than two times every six years in the areas of language arts, mathematics, science, and social studies, and not less than two times every eight years in all other subjects. The first instructional materials adoption following the Board of Education's approval of new evaluation criteria is termed a

“primary adoption.” A “follow-up adoption” is any additional adoption conducted during the six- or eight-year time period and is conducted using the same evaluation criteria as the primary adoption. Pursuant to recently enacted section 60227 of the Education Code, manufacturers and publishers of instructional materials may be assessed a fee of up to \$5,000 per grade level submitted for review in order to participate in follow-up adoptions to help offset the costs.

In order to establish a process for follow-up adoptions in grades K–8, the Board of Education published notice of its intent to amend sections 9515 and 9517, and adopt section 9517.1, Title 5 of the CCR, on March 26, 2004. The proposed regulations distinguish and define primary adoption and follow-up adoption of instructional materials, and maintain consistency with current terminology in the statutory language. The proposed regulations also clarify the follow-up adoption process, specifically outlining for publishers how to participate in the follow-up adoption process and indicating how small publishers may have the fee assessment reduced in order to participate in the process.

The Board held a public hearing on May 10, 2004. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Content standards have greatly impacted California's public schools. Outdated, non-conforming instructional materials are a frustration for students, parents, and schools. As schools seek to conform to the content standards, many of the curriculum options begin to look alike. This is another frustration facing schools during the adoption process. Many of the options available from publishers are similarly structured and contain similar activities and approaches to teaching the curriculum. It is rare for teachers and administrators to have a broad range of options for teaching techniques and curriculum structure to meet the needs of their school and students. In the end, it is the students who are harmed by inefficient adoption procedures. Regulations which will help streamline and effectuate the adoption process will assist schools in better meeting student needs and reaching the state's content standards goals.

### **Charter School Facilities Program**

In 2002, the Charter School Facilities Program was created in order to provide construction funding for charter schools. A charter school or district with a charter school may apply for funding under the program, providing that the applicant matches 50% of the project cost with local funding. In conjunction with the Charter School Facilities Program, the School Finance Authority was organized pursuant to sections 17170 through 17199.45 of the Education Code to determine financial security of the applicant. The Education Code directs the School Finance Authority to: (a) mandate uniform terms and conditions for determining the payment of match-

ing funds; (b) visit charter schools; (c) determine methods of allocating security interests in a charter school project; and (d) indicate general funding procedures.

Emergency regulations were adopted in June 2003 to allow for the first round of applications to take place. A second round of the application process began in April 2004. On April 16, 2004, the California School Finance Authority published notice of its intent to permanently amend sections 10152 through 10162 and adopt sections 10163 and 10164, Title 4 of the CCR. The proposed regulations address changes made to the Charter School Facilities Program in the 2003–04 legislative session and rectify problems which arose in the first round of applications.

Specifically, the proposed regulations clarify definitions and procedures to ensure that the purpose of the statute is fulfilled. The proposed regulations clarify how the School Finance Authority determines whether or not an applicant is financially sound. An applicant's financial security is determined through a process that includes the submission of two applications, the disclosure of financial documents, site visits, disclosure of sources of income and how that income is used. The proposed regulations permit the School Finance Authority to monitor the applicant's financial security after the preliminary apportionment, and require that the School Finance Authority reach a decision about the financial state of the applicant prior to the final apportionment. The proposed regulations also clarify which contributing entities are entitled to a security interest in the project. Finally, the proposed regulations indicate that applicants who desire advance apportionment must indicate financial soundness in order to receive funding.

The written public comment period ended June 4, 2004, with no public hearing. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** The Charter School Facilities Program provides \$400 million to be set aside from two separate bonds for the purposes of financing charter school construction projects. With the creation of charter schools, parents have more educational options to consider when determining the best method of educating their children. Charter schools also give school districts greater opportunity to offer a variety of academic options in their communities. The proposed regulations ensure that school districts are financially sound in order to protect the funds from waste and misuse. Ultimately, children will benefit from the construction and operation of additional schools in their communities, particularly those charter schools that offer students a unique, quality education.

### **California English Language Development Test (CELDT)**

Under existing regulations, English language proficien-

cy is assessed through the California English Language Development Test, which is generally administered to any student whose primary language is other than English. On May 21, 2004, the Board of Education published its notice of intent to amend sections 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516, 11516.5, and 11517, Title 5 of the CCR, to clarify what is required of school districts to properly administer the CELDT required under Education Code sections 313 and 60810 *et seq.*, in order to be in compliance with federal Title III No Child Left Behind Act accountability standards.

The following important terms are clarified and defined: accommodation, alternate assessment, annual assessment window, date of first enrollment, excessive materials, grade level, home language survey, initial assessment, modification, primary language, proctor qualifications, records of results, scribe, test examiner, and variation. In greater specificity, the proposed regulations also outline administration of the test; reporting to parents; necessary documentation by districts and transfer of pupil records; what data must be analyzed regarding pupil proficiency in English; the duties of CELDT district coordinators; the duties of test site coordinators; test security issues; and what accommodations, modifications and test variations can be used for students with disabilities to fulfill their IEPs (Individual Education Plans, as required under the 1997 federal Individuals with Disabilities Education Act).

The Board of Education held a public hearing on July 6, 2004 in Sacramento to discuss the proposed amendments. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** The CELDT has consequences for both students and schools since identification of a student's English language proficiency level may affect the instructional program offered to the student. Identification of English-learners also affects school district funding. According to CDE, these regulations are designed to assure the test is administered in a consistent, reliable, valid, and fair manner statewide.

The proposed regulations further state that whenever a pupil transfers from one school district to another, the pupil's CELDT records and other academic information, must be transferred by the sending district within twenty calendar days upon a request from the receiving district where the pupil is newly enrolled. The twenty-calendar day timeframe is problematic for two reasons:

(1) There is no federal requirement that a twenty-day period be afforded to districts for transfer of records, thus, it is unclear how CDE determined that twenty days would be appropriate or beneficial to the child. It is also unclear from the proposed regulations whether the receiving district will require receipt of the CELDT test results prior to

assigning the pupil to an appropriate classroom or for other necessary services. If a pupil is transferred and cannot be assigned to an appropriate classroom, grade level, etc., until receipt of the test results, then waiting twenty days will be detrimental to the child's educational attainment. Depending on the date from which the district begins counting the twenty-day period, this time lag could hold up the receiving district's assessment of the pupil's abilities for over three weeks.

(2) Of primary concern to child advocates is protecting the new time limits regarding transfer of educational records for foster children under AB 490 (Steinberg) (Chapter 862, Statutes of 2003), which amended Education Code section 48853.5(d)(4)(C) to require the transfer of all academic and other records from one school to the next within two business days. Before AB 490, there were no mandated time limits for transfer of a foster child's academic records, which often held up the child's enrollment in the new school for days or weeks, causing the student to fall behind academically. This legislative change was necessary to ameliorate the effects of frequent home/school changes on this at-risk child population.

### **Defining Persistently Dangerous Public Schools**

The federal No Child Left Behind Act of 2001 included a provision (the "Unsafe School Choice Option") which requires that each state receiving funds under the Act establish and implement a statewide policy that allows students attending public schools labeled "persistently dangerous" to attend a safe public elementary or secondary school within the local educational agency (LEA), including a public charter school. States must also implement a method of identifying such persistently dangerous schools under federal law. In April 2002, CDE convened a committee of 20 LEAs from around the state to develop California's definition for persistently dangerous schools. The Board of Education adopted the standard in May 2002.

These proposed regulations will further revise the definition for persistently dangerous schools, as adopted by the Board in March 2004. On May 21, 2004, the Board published notice of its intent to adopt sections 11992, 11993, and 11994, Title 5 of the CCR, to clarify and provide guidance on the implementation of the statewide policy definition for designating persistently dangerous schools, which is as follows:

"A California public elementary or secondary school is 'persistently dangerous' if, in each of three consecutive fiscal years, one of the following criteria has been met:

(1) For a school of fewer than 300 enrolled students, the number of incidents of firearm violations committed by non-students on school grounds during school hours or during a school-sponsored activity, plus the number of

student expulsions for any of the violations delineated in subsection (b), is greater than three;

(2) For a larger school, the number of incidents of firearm violations committed by non-students on school grounds during school hours or during a school-sponsored activity, plus the number of student expulsions for any of the violations delineated in subsection (b) is greater than one per 100 enrolled students or a fraction thereof."

Subsection (b) of proposed section 11992 states that "violations" can include assault or battery upon a school employee; brandishing a knife; causing serious physical injury to another person (except in self-defense); hate violence; possessing, selling, or furnishing a firearm; possession of an explosive; robbery or extortion; selling a controlled substance; and sexual assault or sexual battery.

Proposed section 11993 provides definitions applicable to the above standard for persistently dangerous schools, and proposed section 11994 establishes data reporting requirements for LEAs to report to CDE the number of incidents of non-student firearm violations and student expulsions. Implementation of the revised policy provisions began July 1, 2004.

The Board held a public hearing on July 6, 2004 in Sacramento to discuss the proposed amendments. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Child advocates remain concerned about the use of what are in some cases extreme disciplinary measures (expulsion and suspension) for fairly typical youthful and adolescent behavior. Combating violence in public schools has been the purpose behind strict, and oftentimes inappropriate, implementation of the expulsion/suspension laws by school districts in the state. Although the public may believe that schools are dangerous, the statistics show the opposite—schools are a relatively safe place for children to be. Violent crimes in schools are down over 50% in the last ten years.

Labeling a school as persistently dangerous may just perpetuate any existing public fear that schools are unsafe. However, in the end, educators, advocates, parents, and students should all be working toward the same goal—for California's children to be able to safely attend and become educated in public schools. Thus, to the extent that there are schools in this state that need to be identified and improved, CDE could assist this process by ensuring that these regulations are implemented in an appropriate, consistent, and clear manner.

Several concerns were raised by advocates regarding CDE's proposed rulemaking package as follows:

(1) Federal Public Law 107-110, Title IX, Part E, Subpart 2, Section 9532 reads in part as follows:

“Each state receiving funds under this Act shall establish and implement a statewide policy requiring that a student...who becomes a victim of a violent criminal offense, as determined by State law, while in or on the grounds of a public elementary school or secondary school that the student attends, be allowed to attend a safe public elementary school or secondary school within the local educational agency, including a public charter school.”

The proposed regulations do not address this part of the federal law. CDE should provide guidance to LEAs and districts regarding how to implement these transfers, since they are required irregardless of the danger level at any given school.

(2) It is impossible to gauge the number of schools that will fall under this criteria for persistently dangerous schools because CDE’s DataQuest program on its website does not track expulsions by school, but only by district. Under the previous criteria, not one of the 8,000 schools in California was labeled persistently dangerous—a fact that many commentators and advocates find odd given the abundance of metal detectors and video surveillance cameras in many of our state’s schools. This problem is not unique to California, *e.g.*, most state administrators have narrowly defined what qualifies as persistently dangerous so that no schools in their state are labeled as such. In fact, only 52 of the nation’s 92,000 public schools were labeled persistently dangerous—a number which later dropped after several states readjusted their data. Considering that government data showed nearly 700,000 violent crimes in America’s schools in 2000, the small number of persistently dangerous schools renders the federally-required assessment meaningless.

(3) Part of the problem with the proposed definition is that an expulsion arising from violent or criminal conduct is required before that incident will be considered sufficiently critical. Advocates believe the incident itself should count toward the total. In fact, the “*Unsafe School Choice Option: Non-Regulatory Guidance*” manual published by the U.S. Department of Education in May 2004 clarifies that states should be using “objective” criteria to identify persistently dangerous schools, and lists as examples records that detail the number of referrals to law enforcement agencies for bringing a firearm to school, results from student surveys about issues such as physical fights on school grounds, or data on gang presence on school grounds. (See section B-4, pages 7–8.) The U.S. Department of Education urges states to define these schools based on the number of incidents over a one school year period, instead of the two or three consecutive year time periods implemented by many states, including

California. (See section B-5, page 8.) The Department also encourages states to define schools based upon the number of offenses, and not the number of disciplinary occurrences arising from such offenses. (See section B-6, page 8.)

(4) Under section 11992(a) of the proposed regulations, only “incidents of firearm violations committed by non-students on school grounds during school hours or during a school-sponsored activity” count toward the persistently dangerous label. The logical conclusion from this language is that if a non-student commits any other type of violation (*e.g.*, assault or battery, causing serious physical injury to another, hate violence, possession of an explosive, robbery, extortion, selling controlled substances, sexual assault or battery), then the incident does not count toward defining the danger level at a school.

(5) Similarly, section 11992(c) of the proposed regulations states “[i]n instances where a student has committed a violation in subsection (b), but cannot otherwise be expelled, that violation must be reported as a non-student firearm violation.” This requirement does not make sense. Why would the Department require reporting of data that is inherently inaccurate?

(6) Regarding data collection, the federal law requires states to identify persistently dangerous schools in sufficient time to allow an affected LEA to offer the required transfer option to students at least fourteen days before the start of each school year. Considering the time it takes to identify the schools, notify parents and students, and allow time for requests to transfer, new section 11994 should include deadlines for submittal of data by the LEA to CDE to ensure the fourteen-day period cited above. (For guidance on implementation of appropriate time lines, see the “*Unsafe School Choice Option: Non-Regulatory Guidance*” manual, sections D-1, D-2, pages 11–12.)

(7) Finally, if a school is labeled persistently dangerous, CDE does not require in the proposed regulations that the school improve its safety level. There are no regulations addressing what will happen to schools that are so labeled, what will be required to make a labeled school safer, and how the state will ensure accountability. A more thorough discussion of corrective action plans for schools that are labeled persistently dangerous is set out in the U.S. Department of Education “*Unsafe School Choice Option: Non-Regulatory Guidance*” manual, sections D-3 through D-6, pages 12–13.

### **No Child Left Behind Teacher Requirements—Highly Qualified Teachers**

The federal No Child Left Behind Act (NCLB) requires that all teachers of core academic subjects meet the federal definition of “highly qualified teacher” no later than the end of the 2005–06 school year. Schools that receive Title I funds are currently required to hire only teachers that

meet the federal definition of “highly qualified teacher.” Core academic subjects include English, reading, language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography. While federal law defines the requirements for “highly qualified teacher,” some details regarding how the definition is applied in each state must also be determined.

The proposed regulations amend the existing language related to the No Child Left Behind Teacher Requirements (covered in the last edition of the *Children’s Regulatory Law Reporter*, Vol. 4, No. 2, pages 33–34, and in the Update section below), and implement new guidance issued by the U.S. Department of Education and published on January 16, 2004. Federal guidelines identify the “rigorous state test” that federal law requires each new to the profession elementary school teacher pass, and outlines the “high objective uniform state standard of evaluation” that can be used to qualify not new to the professional teachers as highly qualified.

On May 21, 2004, the Board of Education published notice of its intent to amend sections 6100, 6115, and 6125, and adopt sections 6116 and 6126, Title 5 of the CCR, to conform the state regulations to the federal definitions and guidelines in order to assist local school districts in complying with federal law and allowing California schools to continue receiving federal Title I funding. The proposed regulations clarify the definition of elementary, middle, and high schools; clarify requirements for teachers from out-of-state; and define an “international teacher,” requiring such a teacher to hold a degree equivalent to an American bachelor’s degree, a teaching credential that meets the California Commission on Teacher Credentialing requirements, and demonstrate competency in the grade and subject to be taught. Finally, the proposed regulations require that teachers with supplementary authorizations hold a teaching credential and demonstrate competency in the grade and subject to be taught.

The Board held a public hearing on the proposed changes on July 6, 2004 in Sacramento. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Statistics from the 2003–04 school year show that approximately 10.7% of the California teaching population did not have a preliminary, clear, professional clear or life credential; credentials which currently qualify as “highly qualified” credentials and require at least one year of credentialing course work. Approximately 7.3% of all California teachers did not meet the NCLB teacher qualification standards.

The original NCLB teacher requirements stated that those individuals holding an emergency permit, a supplemental authorization, a waiver, or teaching as a pre-intern did not meet NCLB teacher requirements. In order to hold

a supplemental authorization, a teacher must hold a California credential and complete additional course work. Holding this credential should make the teacher highly qualified. Although the proposed regulations recognize this, the language does not address the concerns of many child advocates: that children being taught by individuals without a credential are not receiving instruction by “highly qualified” individuals. The proposed regulations continue to recognize interns, who have not yet received a teaching credential, as “highly qualified” teachers. These interns are disproportionately serving children of color, children in low-income families, and children in low-performing schools, which may continue to leave those children who are most in need of qualified teachers behind.

Another critical component to the success of the No Child Left Behind Act is adequate funding at the federal level. According to the National Priorities Project, the current Administration proposal will under-fund the NCLB Act by \$9.4 billion nationally. In California, federal grants for Title I (to improve the teaching and learning of at-risk students) is under-funded by \$1 billion, and federal grants to improve teacher quality, including recruitment and retention of highly-qualified teachers, is under-funded by \$28.5 million. Under-funding at the federal level poses significant challenges for state and local education agencies (who are working through severe budget deficits for the third year in a row in California) as they try to meet federal mandates that are meant to improve educational outcomes for the nation’s children.

### **Math and Reading Professional Development Program**

California Education Code sections 99236 and 99233 provide teachers, instructional aids, and paraprofessionals the opportunity to participate in professional development activities in the subject areas of mathematics, science, and language arts. With the intent of clarifying the Education Code and increasing the program’s availability, the Board of Education published notice of its intent to amend sections 11981 and 11985, Title 5 of the CCR, on June 21, 2004.

The proposed regulations conform the CCR to the Education Code by limiting funding, beginning in the 2004–05 fiscal year, to providing one instructional materials program per subject area (reading/language arts and mathematics) to each eligible teacher, paraprofessional, or instructional aide. The proposed regulations further assure that developmental activity funding is equally distributed and maximizes the number of recipients applying for and ultimately using the funding.

The Board held a public hearing on the proposed changes on July 6, 2004. At this writing, the proposed regulations await review and approval by OAL.

**IMPACT ON CHILDREN:** Teachers holding a multiple-subject credential are authorized to teach a self-contained classroom typical of a K–5 school. Multiple subject credentialed teachers may also teach middle school or junior high school, subject to some restrictions, such as the requirement that they teach more than one subject to basically the same students. This allows for teachers to specialize in two or three subjects and students to maintain a schedule similar to a high school setting.

Providing funding for multiple-subject credentialed teachers to gain advanced subject matter training in professional development classes gives teachers the opportunity to excel in their field. Generally speaking, qualified teachers are better for California's students. The proposed regulations give the opportunity of professional development program instruction to more teachers and school workers in the state. Under the proposed regulations, teachers will not lose the opportunity to attend a program because the funding has been appropriated to a small number of teachers who have applied for funding early. Instead, the proposed regulations may assist teachers in low-income districts who would not otherwise attend professional development programs due to a lack of district funding. However, one risk of limiting the funding appropriations is that, despite the increased opportunity, more teachers will not be made aware of the available funding and not request the funding. This would cause money intended to benefit children to go unused.

### **Updates on Previous Rulemaking Packages California High School Exit Examination**

On July 25, 2003, the Board published notice of its intent to amend sections 1200, 1203, 1204, 1204.5, 1205, 1206, 1207, 1207.5, 1208, 1209, 1210, 1211, 1211.5, 1215, 1215.5, 1216, 1217, 1218, 1218.5, 1219, 1219.5, 1220, and 1225, Title 5 of the CCR, regarding the administration of the California high school exit examination (CAHSEE), which each pupil completing grade twelve or each adult school student must successfully pass as a condition of graduation. The purpose of the proposed revisions is to guide districts and schools in the administration of the high school exit examination, including but not limited to definitions, data requirements, test security, and apportionment. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 23, and Vol. 4, No. 2 (2003) at 31.)

**Update:** On May 19, 2004, OAL approved these regulatory changes.

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

On September 26, 2003, the Board published notice of its intent to amend sections 850, 852, 853, and 859, and adopt new section 853.5, Title 5 of the CCR, to expand and clarify regulations related to ensuring the security and

integrity of test and assessment questions and materials used in the state's Standardized Testing and Reporting (STAR) Program. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 32.)

**Update:** On February 3, 2004, OAL approved these regulatory changes.

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

The federal No Child Left Behind Act (NCLB) requires that all teachers of core academic subjects meet the federal definition of "highly qualified teacher" no later than the end of the 2005–06 school year. Schools that receive Title I funds are currently required to hire only teachers that meet the federal definition of "highly qualified teacher." On July 25, 2003, the Board published notice of its intent to adopt sections 6100, 6101, 6102, 6103, 6104, 6110, 6111, 6112, 6115, 6120, and 6125, Title 5 of the CCR, which set forth the state's definition of "highly qualified teachers." The proposed regulations also define several key phrases to assist school districts in complying with the federal law. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 33.)

**Update:** On February 27, 2004, OAL approved these regulatory changes.

### **Administration of Medication to Pupils at School**

Education Code section 49423.6, enacted as part of AB 1549 (Poochigian) (Chapter 281, Statutes of 2000), provided that, on or before June 15, 2001, CDE shall develop and recommend to the Board of Education, and the Board shall adopt, regulations regarding the administration of medication in public schools. These regulations were to be developed in consultation with parents, representatives of the medical and nursing professions, and other individuals jointly designated by the Superintendent of Public Instruction, the Advisory Commission on Special Education, and the Department of Health Services. Any regulations adopted pursuant to section 49423.6 must be limited to addressing a situation where a pupil's parent or legal guardian has initiated a request to have a local educational agency dispense medicine to a pupil, based on the written consent of the pupil's parent or legal guardian, for a specified medicine with a specified dosage, for a specified period of time, as prescribed by a physician or other authorized medical personnel. On December 6, 2002, the Board published notice of its intent to adopt new sections 600 through 611, Title 5 of the CCR, regarding the administration of medication to pupils at school. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 34.)

**Update:** On November 20, 2003, OAL approved these regulatory changes.

### **Alternative Schools Accountability Model**

The Public Schools Accountability Act of 1999 requires that all schools be held accountable through the state's accountability system. The Alternative Schools Accountability Model (ASAM) provides a measure of accountability for alternative schools with insufficient data to be held accountable under California's primary accountability system. To be fully functional, the ASAM requires its schools to be able to measure student performance using pre-post assessment instruments. On July 21, 2003, the Board adopted—on an emergency basis—new sections 1068, 1069, 1070, 1071, 1072, 1073, and 1074, Title 5 of the CCR, to establish the requirements for administering, scoring, and reporting locally adopted pre-post assessments for use as indicators of achievement by schools registered in the ASAM. On July 25, 2003, the Board published notice of its intent to adopt these provisions on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 36.)

**Update:** On September 25, 2003, the Board transmitted a certificate of compliance to OAL, which approved these regulatory changes on November 6, 2003.

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

On January 31, 2003, the Board of Education published notice of its intent to amend section 11960, Title 5 of the CCR, to clarify the requirements for individuals to be eligible for claiming as K–12 average daily attendance when the individuals are over the age of 19. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 38.)

**Update:** On February 10, 2004, OAL approved these regulatory amendments, which took effect on March 11, 2004.

### **Classroom- and Nonclassroom-Based Instruction in Charter Schools**

On March 15, 2002, the Board of Education adopted—on an emergency basis—new Article 1.5, consisting of sections 11963, 11963.1, 11963.2, 11963.3, and 11963.4, Title 5 of the CCR, to implement the classroom- and non-classroom-based instruction provisions of SB 740 (Chapter 892, Statutes of 2001), as set forth in Education Code sections 47612.5 and 47634.2. On March 22, 2002, the Board published notice of its intent to adopt Article 1.5 on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 27 and Vol. 4, No. 2 (2003) at 40.)

**Update:** On October 28, 2003, OAL approved these regulatory changes.

## **CHILD PROTECTION**

### **New Rulemaking Packages** **Records Reproduction and Removal in Licensed CCL Facilities Regulations**

(See Child Care section.)

### **Updates on Previous Rulemaking Packages** **Independent Living Program (ILP)/ Transitional Independent Living Plan (TILP)/Transitional Housing Placement Program (THPP) & Transitional Housing Program-Plus (THP-Plus)**

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

**Update:** On April 29, 2004, DSS readopted these changes on an emergency basis. At this writing, the permanent changes await review and approval by OAL.

### **Transitional Housing Placement Programs**

On September 26, 2003, DSS published notice of its intent to adopt new sections 86000–86087.1, and amend section 86088, Title 22 of the CCR, to implement the provisions of AB 427 (Hertzberg) (Chapter 125, Statutes of 2001). That measure expanded the age of youth served in licensed transitional housing placement programs (THPPs) to persons who are at least 16 years of age and not more than 18 years of age, except as specified, and creates a separate, license-exempt, county-optional, certified THPPPlus program for youth 19–21 years of age. On October 27, 2003, DSS adopted these provisions on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 42.)

**Update:** On April 26, 2004, DSS readopted these provisions on an emergency basis. On May 24, 2004, DSS released a modified version of this rulemaking package for an additional fifteen-day public comment period. In accordance with changes suggested by child advocates, the re-noticed regulations provide that a THPP plan of operation shall contain separate rules and program design for youth who are in the foster care system and for youth who are no longer in the foster care system, but who are participating in the THPP. The revised language also provides that a plan of operation shall include procedures for payment or monitoring of utilities, telephone, and rent, including the consequences for those participants who are unwilling or unable to meet their financial obligations or whose behavior is disruptive to the program and infringes on the rights of other participants in the program. The revised language also modifies the necessary qualifications for the position of THPP administrator.

At this writing, the permanent adoption awaits review and approval by OAL.

### **Foster Youth Personal Rights**

On August 1, 2003, DSS published notice of its intent to amend sections 80072, 83072, 84072, 84172, and 84272, Title 22 of the CCR, to set forth the foster youth personal rights enumerated in AB 899 (Liu) (Chapter 683, Statutes of 2001). (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 44.)

**Update:** On June 4, 2004, DSS released a modified version of this rulemaking proposal for an additional fifteen-day public comment period. Many of DSS' revisions were consistent with comments submitted by child advocates, including the Children's Advocacy Institute. For example, the revised language provides that each facility shall provide each school age child, who is placed in foster care, and his/her authorized representative, with an age and developmentally appropriate orientation that includes an explanation of the rights of the child and addresses the child's questions and concerns; each child has a right to have visitors, provided the rights of others are not infringed upon, including brothers and sisters, unless prohibited by court order, and other relatives, unless prohibited by court order or by the child's authorized representative; each child has the right to possess and control his/her own cash resources, maintain an emancipation bank account, and manage personal income consistent with his/her age and developmental level, unless otherwise agreed to in the child's needs and services plan and by the child's authorized representative; and that under no circumstances are postural supports or protective devices to be used for disciplinary purposes.

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

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

On July 1, 2003, DSS adopted—on an emergency basis—amendments to sections 11-405 and 11-406 of the MPP, to reduce the frequency of mandatory submissions of financial audit reports for group homes and foster family agencies that annually receive less than \$300,000 in combined federal funds from once every year, to at least once every three years. On August 1, 2003, DSS published notice of its intent to adopt these changes on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 45.)

**Update:** On December 15, OAL approved DSS' permanent adoption of these amendments.

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

AB 1449 (Keeley) (Chapter 463, Statutes of 2003) required the Department of Child Support Services (DCSS), in consultation with DSS, to establish and promulgate, by October 1, 2002, specified regulations by which the local child support agency may compromise an obligor's liability for public assistance debt in cases where the parent separated from or deserted a child who consequently became the recipient of aid under the AFDC-FC or CalWORKs programs, if specified conditions are met, and DCSS determines that compromise is necessary for the child's support. On August 1, 2003, DSS published notice of its intent to amend sections 31-206 and 31-503 of the MPP, to implement its portion of AB 1449. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 45.)

**Update:** On May 20, 2004, DSS released a modified version of its rulemaking proposal for an additional fifteen-day public comment period. Among other things, the revised language provides that for a child receiving AFDC-Foster Care in accordance with Welfare and Institutions Code section 11400, the social worker shall determine whether it is in the child's best interest to make a referral to the local child support agency; if the child's case plan is family reunification, the social worker shall consider specified factors, including the relevant social, cultural, and physical factors of the home from which the child was removed that would affect the probable success of the child's return to that home. In addition to the factors specified in the regulation, additional factors may be considered, such as the parent's employment status, housing status, access to day care, availability of community-based services, and connection with CalWORKs or other public assistance programs. The social worker shall document in the child's case plan the determination of whether it is in the best interest of the child to refer the child's case to the

local child support agency and the basis for this determination.

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

### **Criminal Record Exemption Regulations**

On July 16, 2003—on an emergency basis—DSS adopted new section 102416.1 and amended sections 80001, 80019, 80019.1, 80019.2, 80054, 80061, 80065, 80066, 87101, 87219, 87219.1, 87454, 87565, 87566, 87801, 87819, 87819.1, 87861, 87865, 87866, 101152, 101170, 101170.1, 101170.2, 101195, 101212, 101216, 101217, 102352, 102370, 102370.1, 102370.2, 102395, 102416, 102417, and 102419, Title 22 of the CCR, regarding the requirements and procedures for criminal background checks, including fingerprinting, and criminal background check exemptions for persons who work or are present in licensed facilities that provide care to children and dependent adults. On August 29, 2003, DSS published notice of its intent to adopt these provisions on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 46.)

**Update:** On November 12, 2003, and again on March 11, 2004, DSS readopted these amendments on an emergency basis. At this writing, the permanent changes await review and approval by OAL.

### **Minor Parent Regulations**

Existing law requires DSS to adopt regulations regarding mother and infant programs serving children younger than six years of age who reside in a group home with a minor parent who is the primary caregiver of the child. On April 4, 2003, DSS published notice of its intent to amend sections 84001, 84065.2, 84065.5, 84065.7, 84200, 84201, 84222, 84265, 84265.1, 84268.1, 84268.3, 84272, 84272.1, 84274, 84275, 84276, 84277, 84278, 84278.1, 84279, 84287, and 84287.2, Title 22 of the CCR, regarding such minor parent and infant programs. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 47.)

**Update:** On November 18, 2003, OAL approved these revisions, which became effective on December 18, 2003.

### **Victims of Crimes: Emergency Awards**

On February 3, 2003, the Victim Compensation and Government Claims Board adopted—on an emergency basis—section 649.11, Title 2 of the CCR, to set forth the procedure for obtaining an emergency award. On February 28, 2003, the Board published notice of its intent to adopt section 649.11 on a permanent basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 47.)

**Update:** On July 14, 2003, OAL approved the Board's permanent adoption of section 649.11.

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

On February 3, 2003, the Victim Compensation Board adopted—on an emergency basis—new sections 649.23–649.25, Title 2 of the CCR, to implement service limitations for outpatient mental health services. On February 28, 2003, the Board published notice of its intent to adopt these provisions on a permanent basis; on June 4, 2003, the Board readopted the changes on an emergency basis. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 48.)

**Update:** On October 10, 2003, the Board readopted these regulations on an emergency basis. On February 6, 2004, the Board transmitted a certificate of compliance to OAL, which approved the Board's adoption of these provisions on March 23, 2004.

### **Anti-Discrimination Regulations**

On May 30, 2003, DSS published notice of its intent to adopt new section 89002 and amend sections 80017, 87118, 87817, 88030, 89317, 101168, and 102368, Title 22 of the CCR, which set forth anti-discrimination policies for DSS applicants. (For background information on this rulemaking package, see *Children's Regulatory Law Reporter*, Vol. 4, No. 2 (2003) at 48.)

**Update:** On December 10, 2003, OAL approved these revisions, which became effective on January 9, 2004.

### **Supportive Transitional Emancipation Program (STEP) Regulations**

On September 27, 2002, DSS published notice of its intent to adopt sections 90-200, 90-205, 90-210, 90-215, and 90-220 of the MPP, in order to implement the Supportive Transitional Emancipation Program (STEP). Among other things, the proposed regulations provide definitions, STEP eligibility requirements, STEP county responsibilities, and STEP rates. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 31 and Vol. 4, No. 2 (2003) at 49.)

**Update:** On May 28, 2003, OAL approved these regulatory changes, which became effective on June 27, 2003.

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

On June 25, 2002, OAL approved DSS' emergency adoption of changes to sections 31-001, 31-002, 31-075,

31-401, 31-405, 31-410, 31-420, 31-440, and 31-445 of the MPP, to implement provisions of AB 1695, urgency legislation providing statutory clarification of California's process for licensing/approval of foster family homes. On August 9, 2002, DSS published notice of its intent to adopt these changes on a permanent basis. On October 21, 2002, DSS readopted these changes on an emergency basis. On February 28, 2003, DSS readopted these changes for the third time as emergency regulations. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 32, and Vol. 4, No. 2 at 49.)

**Update:** On July 22, 2003, OAL approved DSS' permanent adoption of these provisions.

In a related rulemaking proposal, on June 28, 2002, DSS published notice of its intent to amend sections 45-101, 45-201, 45-202, 45-203, 45-302, 45-304, and 80-310 of the MPP, in order to implement certain child welfare provisions of AB 1695. (For background information on these changes, see *Children's Regulatory Law Reporter*, Vol. 4, No. 1 (2003) at 32, and Vol. 4, No. 2 (2003) at 49.)

**Update:** On January 18, 2003, OAL approved DSS' amendments.

## **AGENCY DESCRIPTIONS**

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

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

**California Department of Developmental Services.** The Department of Developmental Services (DDS) has jurisdiction over laws relating to the care, custody, and treatment of developmentally disabled persons. DDS is responsible for ensuring that persons with developmental disabilities receive the services and support they need to lead more independent, productive and normal lives, and to

make choices and decisions about their own lives. DDS executes its responsibilities through 21 community-based, nonprofit corporations known as regional centers, and through five state-operated developmental centers. DDS' enabling act is found at section 4400 *et seq.* of the Welfare and Institutions Code; DDS regulations appear in Title 17 of the CCR. DDS' website address is [www.dds.ca.gov](http://www.dds.ca.gov).

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

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

**California Department of Mental Health.** The Department of Mental Health (DMH) has jurisdiction over the laws relating to the care, custody, and treatment of mentally disordered persons. DMH disseminates education information relating to the prevention, diagnosis, and treatment of mental disorder; conducts educational and related work to encourage the development of proper mental health facilities throughout the state; and coordinates state activities involving other departments and outside agencies and organizations whose actions affect mentally ill persons.

DMH provides services in the following areas: (1) system leadership for state and local county mental health departments; (2) system oversight, evaluation and monitoring; (3) administration of federal funds; and (4) operation of four state hospitals (Atascadero, Metropolitan, Napa and Patton) and an Acute Psychiatric Program at the California Medical Facility at Vacaville. DMH's enabling act is found at section 4000 *et seq.* of the Welfare and Institutions Code; DMH regulations appear in Title 9 of the CCR. DMH's website address is [www.dmh.ca.gov](http://www.dmh.ca.gov).

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

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

**California Youth Authority.** State law mandates the California Youth Authority (CYA) to (1) provide a range of training and treatment services for youthful offenders committed by the courts, (2) help local justice system agencies in their efforts to combat crime and delinquency, and (3) encourage the development of state and local crime and delinquency prevention programs. CYA's offender population is housed in eleven institutions, four rural youth conservation camps, and two institution-based camps. CYA's facilities provide academic education and treatment for drug and alcohol abuse. Personal responsibility and public service are major components of CYA's program strategy. CYA's enabling act is found at section 1710 *et seq.* of the Welfare and Institutions Code; CYA's regulations appear in

Title 15 of the CCR. CYA's website address is [www.cya.ca.gov](http://www.cya.ca.gov).

**Youthful Offender Parole Board.** This Board enhances public safety, creates offender accountability, and reduces criminal recidivism by ensuring appropriate lengths of confinement and by prescribing treatment-effective programs for individuals seeking parole from the California Youth Authority. Welfare and Institutions Code section 1719 authorizes the Board to revoke or suspend parole; set a parole consideration date; recommend treatment programs; determine the date of next appearance; authorize release on parole and set conditions thereof; discharge persons from the jurisdiction of the Youth Authority; return persons to the court of commitment for redispotion by the court; return nonresident persons to the jurisdiction of the state of legal residence; and adjust length of incarceration based on institution violations (add time) or for good behavior (reduce time). The Board's enabling act is found at section 1716 *et seq.* of the Welfare and Institutions Code; the Board's regulations appear in Title 15 of the CCR. The Board's website address is [www.yopb.ca.gov](http://www.yopb.ca.gov).

## **FOR FURTHER INFORMATION**

The California Children's Budget, published annually by the Children's Advocacy Institute and cited herein, is another source of information on the status of children in California. It analyzes the California state budget in eight areas relevant to children's needs: child poverty, nutrition, health, special needs, child care, education, abuse and neglect, and delinquency. The *California Children's Budgets* for 2004–05 and 2002–03 are currently available at [www.caichildlaw.org](http://www.caichildlaw.org).

## **RULEMAKING GLOSSARY**

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

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

and responses are published in the California Regulatory Notice Register.

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

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

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

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

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

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

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

**Judicial Declaration:** A decision or opinion rendered

by a court declaring the legal status of an agency regulation. Any interested person may request this declaration of a superior court.

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

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

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

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

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

**Public Hearing:** A state agency may or may not schedule a public hearing on the regulatory action under consideration during the comment period. If none is scheduled, any interested person may request one and the agency must

comply if the request is received no later than fifteen days before the end of the comment period.

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

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

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

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

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

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

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

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

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

# THE CALIFORNIA REGULATORY PROCESS

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

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

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

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

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

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

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

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



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