



## National Center for Youth Law

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Via E-Mail and Mail

**Director**

John F. O'Toole

**Deputy Director**

Patrick Gardner

**Senior Attorneys**

Pat Arthur

Admitted only in NY & WA

William L. Grimm

Admitted only in MD

Rebecca Gudeman

Leecia Welch

**Attorneys**

Christiana Macfarlane

Bryn Martyna

**Of Counsel**

Allison Crapo

Edward Opton

Jora Trang

**Equal Justice Works Fellow**

Fiza Quraishi

**Liman Fellow**

Zahra Hayat

**Skadden Fellow**

Jesse Hahnel

**Director of Communications**

Tracy Schroth

**Assistant to the Director**

Frankie Guzmán

**Administrative Staff**

Ethel L. Oden-Brown

Dainellee D. Stoll

Office of Regulations Development  
California Department of Social Services  
744 P Street, MS 8-4-192  
Sacramento, California 95814

Re: Proposed Regulations – SB 39, Child Fatality Reporting and Disclosure Requirements (ORD No. 1008-07)

Dear Sirs:

The National Center for Youth Law, the Children's Advocacy Institute, and the California Newspaper Publishers Association, welcome this opportunity to comment on the California Department of Social Services (CDSS) January 2009 draft regulations, "SB 39, Child Fatality Reporting and Disclosure Requirements" (ORD No. 1008-07).

We propose a number of modifications, the most important of which revise sections 31-502.441 and .442. As currently drafted, those sections would be inconsistent with the underlying statute and therefore prohibited by the Administrative Procedures Act. (Govt. Code section 11349.1(a)(4).)

Proposed Regulations, Sections 31-502.441 and 31-502.442

These subsections require substantial revision because, as currently worded, they fail to provide the guidance required by the statute and they include unnecessary and inappropriate citations to external laws and regulations. Unfortunately, both of these subsections were omitted from the version circulated to interested parties for comment in 2008, so it has not been possible to address their problems until now.

In cases of child abuse or neglect leading to a child's death, SB 39 requires the release of 12 types of documents and/or information maintained by the local child protective services agency. The records and information to be released are specified in the law. The 12 items are:

- Age of child
- Gender of child
- Whether the child was residing with parent(s)/guardian or in foster care

- Whether an investigation is being conducted or has been conducted by law enforcement, child welfare agency, both or neither
- Previous referrals while living with parent(s)/guardian, if any
- Emergency response referral information form
- Emergency response notice of referral disposition form
- Cross reports from child welfare agency to law enforcement
- Risk and safety assessments by child welfare agency
- Health care records, excluding mental health records, if reflective of a pattern of abuse/neglect
- Police reports concerning the perpetrator of abuse/neglect
- If death occurred in foster care, initial and renewal licensing records for the foster parents at the time of the child's death, reports of licensing violations, notices of action concerning licensing violations, and records of the foster parents' training.

For details, see Welfare & Institutions Code, sec. 10850.4(a)-(c).

Prior to release of the records, however, the statute requires the redaction of personally identifying information: "names, addresses, telephone numbers, ethnicity, religion, or any other identifying information of any person or institution, other than the county or the State Department of Social Services . . ." (Section 10850.4(e)(1)(A).) In addition, requests by the district attorney to redact information because its release would jeopardize a criminal investigation or proceeding are to be honored (section 10850.4(e)(1)(B)). Finally, SB 39 also requires redaction of "[a]ny information that is privileged, confidential, or not subject to disclosure pursuant to any other state or federal law" (section 10850.4(e)(1)(C)).

Recognizing that the above items of information might include information protected by other federal or state statutes, the legislature directed CDSS to promulgate regulations listing such external laws and regulations as are relevant and setting standards governing any further redactions.<sup>1</sup>

The legislature's intent in requiring the CDSS regulations to list external statutes and regulations designating information that is "privileged, confidential, or not subject to disclosure pursuant to any other state or federal law" is, of course, to help county administrators/custodians of records to ensure that within the 12 items or documents to be released there is no information subject to redaction because it is protected by other statutes not overridden by SB 39.

Administrators/custodians of records will cross-check the 12 items or documents against the restrictions in the listed external statutes to facilitate appropriate redactions, if any, beyond the scope of the redactions specifically prescribed in SB 39, i.e., information other than "the names addresses,

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<sup>1</sup> "Prior to releasing any document pursuant to subdivision (c), the custodian of records shall redact the following information: . . .

(e)(1)(C). Any information that is privileged, confidential, or not subject to disclosure pursuant to any other state or federal law.

(e)(2)(A) The State Department of Social Services shall promulgate a regulation *listing* the laws described in subparagraph (C)[reproduced immediately above] of paragraph [10850.4(e)](1) and *setting forth standards* governing redaction." (Welfare & Institutions Code Sec. 10850.4 (emphasis supplied).)

telephone numbers, ethnicity, religion, or any other identifying information of any person or institution . . . .” (Welf. & Inst. Code, Sec. 10850.4(e)(1)(A).)

The list of laws and regulations in the draft of subsections .441 & .442 is overly inclusive and misleading. The mere mention of privacy, confidentiality or privilege in a statute or regulation does not make it relevant to the redaction of the records called for by SB 39. As they stand now, the draft regulations take a scattergun approach that conflicts with both the text and the intent of the statute. For example, Revenue and Taxation Code section 19542, cited at .441(h), refers to the disclosure of information from state tax filings. Such state tax filing information is not part of the records to be released under SB 39. Indeed, they are unlikely to be found in any child welfare records. The list of statutes in the regulations should be much more precise. In Attachment A to this letter we propose an alternative, pared down list of the statutes that may need to be considered. Attachment A also includes language to provide the guidance to county administrators that SB 39 requires.

Listing statutes that do not require redaction of any information would be contrary to SB 39’s text and destructive of its intent. To list statutes that would require redaction of the same information that is explicitly required to be redacted by SB 39 also would be contrary to the legislative intent: it would send county administrators on time-wasting, budget-consuming, wild goose chases, wading through irrelevant statutory materials to find only that the same names, addresses, etc., that the administrators have already redacted pursuant to Section 10850.4(e)(1)(A) also would be appropriate for redaction by application of other laws. The time-wasting and budget-depleting consequences of listing laws that should not be listed are particularly troublesome when they occur in the absence of the guidance that SB 39 requires.

The revised list in Attachment A is shorter than the list in the CDSS draft because we have deleted citations to statutes and regulations that meet one or more of the following criteria:

- a. The statute or regulation deals with judicial (i.e., court) records or proceedings, not the administrative records that are found in child welfare agency files. For example, Penal Code section 1054.2, cited at proposed regulation .441(g), deals with disclosures by attorneys in criminal trials. It is irrelevant to SB 39.
- b. The statute or regulation requires redaction of the same information—names, addresses and/or other personally identifying information—that will be redacted pursuant to Welfare & Institutions Code subdivision 10850.4(e)(1)(A), i.e., “. . . names, addresses, telephone numbers, ethnicity, religion, or any other identifying information . . . .” For example, Penal Code section 293.4, cited at proposed regulation .441(g), allows a sexual crime victim to request deletion of her or his name from trial records. Names must be deleted from responses to SB 39 requests, so a citation to Penal Code section 293.4 would be redundant.
- c. The statute or regulation does not exist. For example, we have been unable to find a section 255.7 in the California Health & Safety Code, so it should not be cited at proposed regulation .441(f).
- d. The statute or regulation does not prohibit county officials from releasing information. For example, Evidence Code section 1560, cited at proposed regulation .441(c), defines the term “business” and specifies procedures related to subpoenas duces tecum; it has nothing to do with redactions or the limits on disclosure of information. As another example, Family Code section 17505 mandates limits on acquisition of criminal information coming *into* the California Child Support Automation System, but it does not regulate dissemination of

information *from* that system, nor does Family Code section 17505 have any relationship to the files of county agencies.

- e. The statute or regulation deals with documents or types of information that are not among the documents or types of information that SB 39 specifies as subject to release. The documents and types of information that are subject to release are only those listed earlier in this letter. (See Welfare & Institutions Code sec. 10850.4(a)-(c).) For example, income tax data is not among the types of information that SB 39 permits to be released, so the citation to the federal Internal Revenue Code, 26 USC, at proposed regulation .442(d), is unnecessary.

SB 39 also requires CDSS to develop standards for application of the state and federal statutes that may apply to the records whose release it requires. The legislature's intent is that CDSS not only provide a list of statutes, but also guidance, i.e., standards, for application of external statutes. The proposed regulations provide no guidance or standards for dealing with the numerous statutes and regulations listed in proposed sections .441(a)-(j) and .442(a)-(g). For that reason, the current draft would produce just the opposite of the statute's mandate. Without the guidance that SB 39 mandates, county administrators would have to do their own parsing of numerous statutes and regulations, leading to precisely the lack of uniformity in disclosure that the legislature, in SB 39, has determined to remedy. The absence of the legislatively mandated standards, along with the excessive and unwarranted number of citations to irrelevant statutes, would impose an unnecessary burden and cost on administrators charged with the release of records.

It is important to provide the sort of guidance that we propose in Attachment A. The legislature has been explicit concerning the need to provide guidance. It explained the problem in the text of the statute:

"The current procedures for accessing information about a child's death from abuse or neglect are **costly**, at times resulting in **lengthy delays** in the release of that information, fail to provide adequate **guidance** for what information should and should not be disclosed, and permit **significant variation** from one jurisdiction to another in the nature and extent of the information released." (SB 39 (2007), Sec. 1(d) (emphasis supplied).)

#### Additional Recommendations for the Proposed Regulations

1. Proposed section 31-502 includes potentially troublesome variations of terminology concerning causation:

"the direct cause" (proposed regulation .221)

"a direct cause" (proposed regulation .222)

"a direct result" (proposed regulation .223)

"a result of" (proposed regulation .23)


The last of these, "a result of," or "a cause of," is preferable, as it avoids perennial problems in defining causation. If A is "*the* direct cause" of X, can B also be *a* cause of X? If A is *a* direct cause of X, can B also be *a* direct cause of X? The CDSS can avoid seeming to enter into such debates by consistent use of the most straightforward term: "a result of" or "a cause of." This unembellished approach is also required for consistency with the legislature's

choice of terms in SB 39: “the fatality was caused by abuse or neglect,” “abuse or neglect leads to a child’s death,” and “child fatality . . . that was the result of child abuse or neglect.” (Welfare & Institutions Code subdivisions 10850.4(a), 10850.4(b), 10850.4(j).)

2. Section .341(e) (p. 8) should read “person(s)” rather than “person.”
3. At section .431 (p. 9) and sections .432 and .433 (p. 10) the word “that” should be inserted after “except” for clarity.

The National Center for Youth Law, the Children’s Advocacy Institute and the California Newspaper Publishers Association appreciate your consideration of these recommendations and hope that you will find them helpful.

Yours very truly,



Edward M. Opton  
Of Counsel  
National Center for Youth Law



Bill Grimm  
Senior Attorney  
National Center for Youth Law

/s/

Ed Howard  
Senior Counsel  
Children’s Advocacy Institute

/s/

Jim Ewert  
Legal Counsel  
California Newspaper Publishers Association

Enc.

CC: L. Bolton, w/enc.  
S. Diedrich, w/enc.  
J. O’Toole, w/enc.

Attachment A to letter to CDSS Office of Regulations Development

Proposed revision of SB 39 regulations, sections .441-.442, with guidance

The following listing of laws and regulations and the guidance concerning them applies only to requests pursuant to Welfare & Institutions Code section 10850.4.

.441

(d)<sup>12</sup> Family Code sections 3041.5, 3111, and 7643

Family Code section 3041.5 provides for alcohol and drug testing in judicial proceedings concerning custody, visitation, and guardianship. The results of such tests are confidential and should be redacted.

Family Code section 3111 provides for confidential child custody evaluation reports in cases of contested child custody and contested visitation rights. For example, one family member may object to visits from another family member. Documents from such cases are in the files of the Superior Court, not the Juvenile Court. If such evaluation reports are found in the county's files, they should be redacted.

Family Code section 7643 provides for confidentiality of court proceedings to establish the identity of a child's father. Records of such proceedings, including paternity test results, should be redacted.

(g) Penal Code section 13300

Penal Code section 13300 allows several government agencies, including child welfare agencies, to obtain "local summary criminal history information," more commonly known as "rap sheets." Rap sheet information concerning the perpetrator(s) of neglect or abuse that has come from a local criminal justice agency should be redacted. Rap sheet information concerning the criminal history of persons other than the perpetrator(s) of neglect or abuse should be redacted. Information about the criminal history of the perpetrator(s) of neglect or abuse that has come from sources other than a "rap sheet," such as police reports, the individual concerned, family members, child welfare department personnel, etc., should not be redacted.

(i) Welfare & Institutions Code section 11478.1

Welfare & Institutions Code section 11478.1 requires public agencies to maintain the confidentiality of information gathered for purposes of child and spousal support enforcement. (See 42 U.S.C., ch. 7, Part D, section 651.) Documents generated or acquired for purposes of child or spousal support enforcement, as well as information derived from such documents, should be redacted. Information that could have been acquired for purposes of child or spousal support enforcement, but which actually was acquired through

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<sup>12</sup> For convenience in cross-referencing these recommended revisions to CDSS's proposed regulations, we have retained CDSS's numbering system, e.g., .441(a), .441(b), etc. In the final regulations, the sections should be renumbered.

other channels (for example: mother tells Child Protective Services caseworker how much father earns) should not be redacted.