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June 25, 2004

BY E-MAIL: ord@dss.ca.gov

Ms. Maureen M. Miyamura, Acting Chief
Office of Regulations Development
California Department of Social Services
744 P Street, MS 7-192
Sacramento, CA 95814

RE: ORD #0902-23: CCL – Criminal Record Exemption Regulations
Notification of 15-Day Public Availability of Changes to Regulations and Supporting Documents and Information

Dear Ms. Miyamura,

Attached are comments from the California Alliance of Child and Family Services on the above referenced regulations. Thank you for the opportunity to comment on these important proposed regulations. Please enter our statement into the record for the public hearing.

If the California Department of Social Services modifies the proposed regulations or files them with the Office of Administrative Law, please notify us of that fact and provide us with a copy of the modified or proposed final regulations.

If you have any questions about our comments, you may contact by telephone at (916) 449-2273, Extension 20, or by e-mail at djohnson@cacfs.org.

Thank you for full consideration of our comments.

Sincerely,

Douglas K. Johnson
Associate Executive Director

Enclosure

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Comments on the CCL – Criminal Record Exemption Regulations

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ORD #0902-23

The California Alliance of Child and Family Services (CACFS) strongly supports the goal of these regulations and underlying authority in State law: to ensure that the individuals working with clients in community care facilities do not have a criminal history indicating they may pose a threat to the safety and/or well-being of a facility's clients.

CACFS is a statewide association of private nonprofit agencies providing a variety of services to at-risk children and their families. These services include the operation of community treatment facilities, group homes, foster family agencies (FFAs), and adoption agencies. Our comments are primarily directed at the components of regulations affecting CCL-licensed children's residential facilities, but may have applicability to other types of facilities and activities, as well.

Clarification of the phrase "prior to employment, residence or initial presence in a licensed facility"

In the original emergency regulations, Section 80019 (e) required that all individuals subject to a criminal record review must obtain a DOJ clearance or a CDSS exemption "prior to employment, residence or initial presence in a licensed facility." We found this phrase to be ambiguous and open to multiple and conflicting interpretations. Therefore, we recommended that the regulations should be amended to clarify its meaning and intent.

Based on our contacts with CCL staff, it was our understanding that this phrase was intended to preclude individuals who have not yet received a DOJ clearance or CDSS exemption from assuming any responsibility for the care and supervision of client children residing at a facility licensed by CCL or in a FFA-certified home, and from having unsupervised, regular, or frequent contact with the client children. We were told by CCL staff that the four types of activity described below would be examples of actions which would not be precluded by this phrase in the emergency regulations.

1. The new regulations did not prevent providers from hiring individuals, and providing them with orientation and training, prior to obtaining a DOJ clearance or CDSS

exemption, as long as the prospective employees are not allowed to have unsupervised contact with the client children.

2. The new regulations did not prevent providers from holding interviews and pre-employment orientation sessions with individuals applying for employment, or families interested in becoming FFA-certified foster parents, in licensed facilities, as long as the prospective employees or foster parents are not allowed to have unsupervised contact with the client children.

3. New employees, for whom a DOJ clearance or CDSS exemption has not yet been obtained, may be physically present in the same licensed facility as client children, but unlike the prior CCL requirement, they may not assume any responsibility for the care and supervision of client children residing at a licensed facility and they may not have unsupervised, regular, or frequent contact with the children.

4. Some licensees conduct pre-employment "observations" in order to give applicants some appreciation of what the job entails and to give the prospective employer an opportunity to see how the applicants respond to the children. Under the new regulations, licensees may continue to have job applicants, as part of the interview process, visit their licensed facilities to observe the client children and their interaction with current staff. However, these "observations" must be limited to a relatively short period of time, the job applicant may not be paid by the licensee for his time, may not be left alone with the children, and may not provide care, supervision, or services for the children.

In our comments on the original emergency regulations, we recommended that they should be amended to clarify the phrase "prior to employment, residence or initial presence in a licensed facility" so that licensees, CCL field staff, and others will be able to interpret it consistently and in a way that gives licensees flexibility in their recruitment, hiring, training, and other personnel activities, as long as the health and safety of clients is protected in a reasonable manner.

In Section 80019 (e) in the revised regulations, dated June 10, 2004, the phrase "prior to employment, residence or initial presence in a licensed facility" has been deleted and replaced with "prior to working, residing or volunteering in a licensed facility."

The formal CDSS response to our original comments included in the Final Statement of Reasons (on page 240 of the copy provided to us by the CDSS Office of Regulations Development) states:

> "The term "initial presence" is taken directly from statute. The Department realizes that this creates an interpretation problem. The intent of the statute and the regulation is not to prevent an uncleared person from walking in the door of a facility to fill out personnel documents, attend an orientation or other situations addressed in the comments. The intent of the statute and regulations is to address volunteers subject to a background check as "… employment, residence …" would not apply to volunteers.
>
> The Department will amend the regulations for clarification."

The California Alliance thanks CDSS for responding positively and directly to our concerns by both making the change in the regulatory language and clarifying its intent in the Final Statement of Reasons.

Section 80065 Personnel Requirements and clarification of the phrase "prior to employment or initial presence in the facility"

The phrase "prior to employment or initial presence in the facility" is used in Section 80065 (i). This is very similar to the ambiguous wording used in the original emergency regulations in Section 80019 (e). Section 80065 (i) should be amended to use wording consistent with that used in Section 80019 (e) in the revised regulations, dated June 10, 2004; i.e. "prior to working or residing in the facility."

Transfer of CDSS Criminal Record Exemptions

Section 80019 (e) permits an individual, who has a criminal record clearance associated with another CCL-licensed facility, to begin working with the client children at a different facility as soon as a request to transfer the existing clearance has been made. The individual does not have to wait until the transfer has been approved by CCL. However, for an individual with a criminal record exemption, Section 80019 (e) prohibits him/her from working with the client children until the transfer of the existing exemption has been approved by CDSS.

In our comments on the original emergency regulations, we recommended that they should be amended to permit an individual with a criminal record exemption to begin working with the client children as soon as a request to transfer the existing clearance has been made. The CDSS criminal record exemption process, including the processing of requests to transfer existing criminal record exemptions, often takes weeks (and sometimes months) to complete. The length of time varies enormously and cannot be predicted in advance. This places a huge burden on employers, as well as prospective employees. It is unreasonable to automatically require an individual who has already been granted a criminal record exemption in the past to wait for a lengthy and unspecified period of time before starting work at a different facility.

We are disappointed that our recommended amendment was not adopted in the revised regulations, dated June 10, 2004. We strongly urge that CDSS reconsider this issue. The requirement for prior approval by CDSS of a transfer of a criminal record exemption creates serious operational problems for CCL-licensed facilities, and thereby has an indirect but negative impact on the children whom they serve. It creates an unnecessary and unjustified burden on the individual applicants and employees affected. It also is a waste of precious CCL staff time, which is now in very short supply following staff reductions and increasing workload.

Let us consider just one actual case to illustrate this point. One of the executive directors of a member agency of the California Alliance has a criminal conviction as the result of nonviolent actions in an anti-war protest while he was a student in the early 1970s, over 30 years ago. This individual has been granted a criminal record exemption by CDSS and has been allowed to transfer that exemption on a number of occasions. Correctly, CDSS has determined that this old nonviolent offense is not a reason to believe that this individual presents a threat to the health

and safety of the clients; nor is it a factor which should be used as a basis for preventing this individual from working in his current capacity. However, every time this individual changes jobs, or his agency opens a new facility, he is required to obtain prior approval by CDSS of the transfer of his criminal record exemption.

If CDSS were able to review and respond promptly to requests for the transfer of criminal record exemptions, this would not be such a critical issue. But that is not the case. The fact of the matter is that it often takes several weeks, if not months, for an individual to obtain approval (or denial) of such a request.

If CDSS is unwilling to accept the original recommendation of the California Alliance [to amend the regulations to permit any individual with a criminal record exemption to begin working with the client children as soon as a request to transfer the existing clearance has been made], CDSS should consider adopting the following alternative as an amendment to these regulations. A category of "transferable criminal record exemptions" should be created by CDSS for individuals whose offenses [because of their age, nature, and circumstances] are determined by CDSS <u>not</u> to be an appropriate basis for denying <u>future</u> transfers of their criminal record exemption to work, or to resume a position with different or greater responsibilities, in any type of CCL-licensed facility. Such an alternative would permit this limited group of individuals to begin working in a different facility, or in a new capacity, as soon as they request a transfer of their criminal record exemption, without having to wait for prior approval by CDSS. It would also streamline the work of CDSS and eliminate unnecessary re-reviews of criminal records for individuals who CDSS has already determined do not pose any health or safety threat to clients in any type CCL-licensed facility, regardless of their specific job responsibilities. Finally, it would continue to permit CCL to require the prior approval of all transfers of criminal record exemptions for other individuals whose criminal history is more problematic and for whom CCL wants to retain the authority to review future transfers of their criminal record exemptions.

In order to ensure consistency throughout the regulations, the provisions of Section 80065 (i) should also be modified accordingly.

<u>Informative Digest/Policy Statement Overview for the Regulations</u>

In our comments on the original emergency regulations, we pointed out that these new regulations are having an enormous impact on the recruitment and training activities of CCL-licensed facilities and driving up their costs in these areas. We recommended that the Cost Estimate, Statement of Significant Adverse Economic Impact on Business, Statement of Potential Cost Impact on Private Persons or Business, and Small Business Impact Statement should be amended to include a comprehensive analysis of this impact.

The formal CDSS response to our original comments included in the Final Statement of Reasons (on page 222 of the copy provided to us by the CDSS Office of Regulations Development) states, in part:

> "The Administrative Procedures Act does not require CDSS to perform a comprehensive analysis of the financial impact of regulations on businesses."

Leaving aside the issue of whether the APA requires a "comprehensive" analysis of the financial impact or some less in-depth analysis, we find no evidence in the Cost Estimate, Statement of Significant Adverse Economic Impact on Business, in the Statement of Potential Cost Impact on Private Persons or Business, or in the Small Business Impact Statement that any serious analysis of the financial impact was conducted in the development of this regulation package.

The formal CDSS response to our original comments included in the Final Statement of Reasons goes on the stated that:

> "In determining the financial impact of these regulations, in particular the clearance or exemption prior to initial presence, CDSS determined that the impact was minimal because it did not expand who was subject to background check only when an individual could e in the facility. Further, these regulations could in fact save providers the expense of training an individual who would later be disqualified from receiving an exemption."

Our review of the Final Statement of Reasons shows that several other individuals and organizations made comments about how these regulations create additional difficulties for various types of CCL-licensed facilities to maintain adequate staff. The formal CDSS response to those comments included the following statement:

> "All facilities are required to have qualified, background cleared substitutes in the event of an emergency such as staff illness or a staff person quitting without notice. Staffing ratios should not be compromised while a background check is conducted on a new hiree."

CDCC acknowledges in the Final Statement of Reasons that 10% of individuals for whom background checks are conducted are found to have criminal histories. However, individuals with a "criminal history" include~~includes~~ individuals who have been arrested, but never convicted of any crime. It is our understanding that a large majority of individuals with a criminal history are eventually granted a CDSS clearance (in arrest-only cases) or an exemption (in cases where there was a conviction). However, the weeks and months of waiting for such clearances and exemptions for 10% of all new employees has significantly driven up the costs of recruitment, training, and other activities of CCL-licensed facilities. It also means that they have to maintain a larger pool of employees because the new regulations, in 10% of the cases, will cause a delay in hiring replacement staff. This also drives up the costs of CCL-licensed facilities.

The changes made in the revised regulations, dated June 10, 2004, do not reduce the impact or the new costs being imposed upon the private nonprofit agencies operating CCL-licensed facilities such as foster family agencies, group homes, and community treatment facilities. These agencies care for children placed through the public child welfare services, juvenile justice, and mental health systems. They receive the vast majority of their funding from the AFDC-Foster Care Program, which is also administered by CDSS. The AFDC-Foster Care payment levels are established by CDSS. The agencies are not permitted charge the families of the children for costs of care and services that exceed the funding provided by the AFDC-Foster Care program. The AFDC-Foster Care payment levels were frozen by the State for fiscal years 2002-03 and 2003-04 and the Schwarzenegger Administration has proposed to freeze them again for 2004-05.

This means that these private nonprofit agencies have had to absorb rising operational costs for their facilities with the same level of funding they were receiving for fiscal year 2001-02. The purchasing power of their AFDC-Foster Care payments has declined by nearly 15% over the past three years.

Before these regulations are finalized, a real analysis of their cost impact should be conducted and included in the Cost Estimate, Statement of Significant Adverse Economic Impact on Business, Statement of Potential Cost Impact on Private Persons or Business, and Small Business Impact Statement.