

FINAL STATEMENT OF REASONS

a) Specific Purpose of the Regulations and Factual Basis for Determination that Regulations Are Necessary

Section 80017(a)

Specific Purpose:

This section is amended to clarify anti-discrimination policies for applicants seeking licensure of community care facilities governed by Title 22, Division 6, Chapter 1, General Licensing Requirements.

Factual Basis:

This amendment is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

Section 87118(a)

Specific Purpose:

This section is adopted to clarify anti-discrimination policies for applicants seeking licensure to operate a Residential Care Facility for the Elderly.

Factual Basis:

This adoption is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

Sections 87118(b) and (c) (Renumbered from Sections 87118(a) and (b))

Specific Purpose/Factual Basis:

These sections are renumbered for clarity to accommodate the adoption of a new Section 87118(a).

Section 87817(a)

Specific Purpose:

This section is amended to clarify anti-discrimination policies for applicants seeking licensure to operate a Residential Care Facility for the Chronically III.

Factual Basis:

This amendment is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

Section 88030(a)

Specific Purpose:

This section is adopted to clarify anti-discrimination policies for Foster Family Agencies (FFA) when considering certification or denial of potential foster applicants, or decertification of a certified foster family home(s).

Factual Basis:

This section is necessary to specify that foster family agencies must comply with California Unruh Civil Rights Act (Section 51 of the Civil Code) when processing applications for certification, or decertification of a certified family home(s).

Sections 88030(b) through (f) (Renumbered from Sections 883030(a) through (e))

Specific Purpose/Factual Basis:

These sections are renumbered for clarity to accommodate the adoption of a new Section 88030(a).

Section 89002 and Title

Specific Purpose/Factual Basis:

A new section number and title are adopted to meet the "clarity" standard of the Administrative Procedure Act, Government Code Section 11349(c).

Section 89002(a)

Specific Purpose:

This section is adopted to clarify anti-discrimination policies for applicants seeking licensure of an adoption agency.

Factual Basis:

This adoption is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

Section 89002(b)

Specific Purpose:

This section is adopted to clarify anti-discrimination policies for adoption agencies when evaluating applicants seeking to adopt a child.

Factual Basis:

This adoption is necessary to specify that adoption agencies must comply with California Unruh Civil Rights Act (Section 51 of the Civil Code) when processing applications of individuals seeking to adopt a child.

Final Modification:

Following the public hearing, this section is removed based on not meeting the "clarity" standard of the Administrative Procedure Act, Government Code Section 11349(c). Upon reevaluation of this section, this standard appears to apply to placement decisions rather than its original intent of solely applying non-discrimination standards to the application process. By removing this section, interested individuals applying for licensure of an adoption agency are still protected from discrimination under Section 89002(a) of these regulations.

Section 89317(a)

Specific Purpose:

This section is amended to clarify anti-discrimination policies for applicants seeking a foster family home license.

Factual Basis:

This amendment is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

Section 101168(a)

Specific Purpose:

This section is amended to clarify anti-discrimination policies for applicants seeking a child care center license.

Factual Basis:

This amendment is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

Section 102368(c)

Specific Purpose:

This section is amended to clarify anti-discrimination policies for applicants seeking a family child care home license.

Factual Basis:

This amendment is necessary to meet the "necessity" and "consistency" standard of the Administrative Procedures Act, Government Code Sections 11349(a) and (d), respectively. This regulation is necessary for consistency with existing anti-discrimination law which includes Section 51 of the Civil Code (Unruh Civil Rights Act) and existing regulations for community care facilities.

b) Identification of Documents Upon Which Department Is Relying

- Unruh Civil Rights Act (Section 51 of the Civil Code)

c) Local Mandate Statement

These regulations do not impose a mandate on local agencies or school districts. There are no state-mandated local costs in these regulations which require state reimbursement under Section 17500 et seq. of the Government Code.

d) Statement of Alternatives Considered

CDSS has determined that no reasonable alternative considered would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed action.

e) Significant Adverse Economic Impact On Business

CDSS has determined that the proposed action will not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

f) Testimony and Response

These regulations were considered as Item #2 at the public hearing held on July 16, 2003 in Sacramento, California. Written testimony was received from the following during the 45-day comment period from May 30, 2003 to 5:00 p.m. July 16, 2003:

- Judy Kriege, Technical Assistant, BANANAS Child Care Resource and Referral Agency
- Eric C. Sohlgren, Attorney at Law, representing Olive Crest Treatment Centers, Inc.

The comments received and the Department's responses to those comments follow.

General Comment:

Judy Kriege wrote: "We are writing to give our support to the proposed changes in regulations of the California Department of Social Services addressing Community Care Facilities and Anti-Discrimination Regulations. We appreciate any efforts to prevent discrimination against those who feel called to provide care to others. However, as we understand it, there are no regulations that specifically address discrimination against those who apply for or are using care in these facilities. BANANAS, as a child care resource and referral agency, has had complaints of discrimination and have been surprised to find that there is no guidance from the department on this issue."

Response:

Thank you for your comment and your endorsement of the proposed regulations. Although unrelated to the proposed regulations, it is important to note that CDSS regulations do provide personal rights protections for clients in care. Although the personal rights accorded to children in care do not specifically include anti-discrimination language, there are protections in place to effectively prevent humiliation or abuse of any kind. Moreover,

the Department Ombudsman's office has recently released a poster (that children's residential facilities are required to post in a clearly visible area) that clearly explains the personal rights accorded to children in care. The Ombudsman also provides a toll free number for children to call if they feel their rights are violated. In addition, Assembly Bill 458 of the 2002-2003 Legislative Session, if passed, may amend the personal rights regulations for children in care to specifically address anti-discrimination protections. No change to the proposed regulations based on this comment.

Sections 88030(a) and 89002 et seq.

Comment:

Eric C. Sohlgren wrote: "This firm represents Olive Crest Treatment Centers, Inc. ('Olive Crest'), and we are providing this statement to comment on the Proposed Changes in Regulations of the California Department of Social Services ('CDSS') regarding Community Care Facilities. While perhaps well-intentioned, these proposed regulations should not be adopted for many reasons. We will focus on the fact that the proposed regulations are not grounded in any statutory authority, specifically the Unruh Act, and thus constitute impermissible regulatory 'legislation' that will not withstand judicial scrutiny.

"A. Olive Crest's Long History of Serving the Needs of California's Children

"Olive Crest is a private, nonprofit provider of foster family and adoption services, which for over thirty years has been a leader in the prevention and treatment of child abuse. Over the years, Olive Crest has provided shelter, foster care, adoption, professional treatment, counseling, and educational services to over 30,000 abused, abandoned, neglected and at-risk youth. Olive Crest operates more than twenty neighborhood homes, foster family and adoption agencies, and children's centers for high risk youth. Olive Crest provides services in Los Angeles, Orange, San Diego and Riverside Counties.

"B. The Unruh Act Does Not Support the Proposed Regulations

"1. The Proposed Regulations

"The CDSS proposes to amend existing regulations and promulgate new regulations to require foster family and adoption agencies not to consider 'marital status' or 'actual or perceived sexual orientation,' in the application process and in how these agencies evaluate foster and adoptive parents. The only statute the CDSS cites for these proposed regulatory changes is the Unruh Act, California Civil Code section 51. However, the Unruh Act does not support the proposed regulations because (1) foster family and adoption agencies are exempt from the Unruh Act; (2) marital status and 'actual or perceived' sexual orientation are not protected under the Unruh Act; and (3) requiring foster family and adoption agencies to ignore potentially relevant characteristics in making child placement decisions through regulatory fiat would go far beyond the scope of the Unruh Act's limited prohibitions of only invidious, arbitrary or unreasonable discrimination.

"2. Foster Family and Adoption Agencies Are Exempt from the Unruh Act

"Foster family and adoption agencies are exempt from the Unruh Act because they do not constitute 'business establishments' covered by the Act.

"a. Foster family and adoption agencies are not profit-making businesses

"First, foster family and adoptions agencies do not operate as profit-making businesses in California. Therefore, they are exempt *per se* from the Unruh Act. *Rotary Club of Duarte v. Board of Dirs. of Rotary Int'l*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986); *Harris v. Mothers Against Drunk Driving*, 40 Cal. App. 4th 16, 46 Cal. Rptr. 2d 833 (1995).

"b. Foster family and adoption agencies exist to provide social, not economic benefits

"Second, foster family and adoption agencies are nonprofit organizations with predominantly expressive social purposes unrelated to the promotion of economic interests, and that offer their families programs not equivalent to a traditional place of public accommodation or amusement. Therefore, they are exempt from the Unruh Act. *Randall v. Orange County Council, Boy Scouts of Am.*, 17 Cal. 4th 736, 72 Cal. Rptr. 2d 453 (1998).

"Foster family and adoption agencies exist to promote social welfare by caring for foster children and placing them in good homes. Such agencies are unlike public parks, retail stores, restaurants or amusement parks. They exist not to entertain or to create wealth, but to better society. They are thus more akin to organizations like the Boy Scouts of America than to any traditional public place of accommodation.

"Similar results come from applying another judicially established test for determining whether or not an organization has sufficient businesslike attributes to qualify as a 'business establishment' under the Unruh Act. In *Harris*, 40 Cal. App. 4th 16, 46 Cal. Rptr. 2d 833, the court enumerated a list of factors to consider in determining whether an organization is a 'business establishment';

"Those factors include: 1. what, if any, business benefits one may derive from membership; 2. the number and nature of paid staff; 3. whether the organization has physical facilities, and if so, whether those facilities are incidental to the purposes and programs of the organization; 4. what are the purposes and activities of the organization; 5. the extent to which the organization is open to the public; 6. whether there are any fees or dues for participation or membership, and if so, what percentage of those involved in the organization pay them; and 7. the nature of the organization's structure.'

"*Id.* at 20, 46 Cal. Rptr. 2d at 835.

"This test requires that foster family and adoption agencies fall outside the scope of the Unruh Act. Business benefits are not generally derived from 'membership' or affiliation with the agencies. Agencies are not where persons go to make business deals. Employees of nonprofit agencies make only modest salaries. Staffing is efficient, if not lean. Physical facilities exist not to accommodate, entertain or solicit the general public, but to temporarily

house foster children and to facilitate child placement. Thus, their physical facilities are only incidental to the agencies' general purpose of providing children with good homes. Any fees charged for the application process are used to cover costs, not make a profit, and many agencies waive or reduce fees for low income applicants. Though agencies are structured differently, they tend to be organized less hierarchically than business organizations. Therefore, foster family and adoption agencies lack the characteristics of a 'business establishment' as defined by the Unruh Act.

"c. Foster family and adoption agencies exist to promote family relationships

"Third, the role of foster family and adoption agencies implicates rights of intimate association, in that these agencies protect and advocate the interests of children to facilitate family relationships with their future parents. The law recognizes and protects these 'highly personal relationships [with] a substantial measure of sanctuary from unjustified interference by the State.' *Rotary Club of Duarte*, 178 Cal. App. 3d at 1062, 224 Cal. Rptr. at 229. The Unruh Act does not govern relations which are 'truly private,' meaning relationships that are 'continuous, personal and social, and which take place more or less outside public view.' *Id.* at 1058, 224 Cal. Rptr. at 226. Among such highly personal relationships entitled to constitutional shelter 'are those that attend the creation and sustenance of a family-marriage, childbirth, the raising and educating of children and living with relatives.' *Id.* at 1062, 224 Cal. Rptr. at 229. (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984)).

"As the court in the *Rotary Club of Duarte* case reiterated:

"Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

"*Id.* at 1063, 224 Cal. Rptr. at 299.

"Just as the law generally cannot mandate that a person select his or her spouse in accordance with prevailing political or social norms, it ought not to prevent a child or the agency acting on his or her behalf from considering relevant factors in helping to select his or her parents. Especially where a child is too young or immature to make such a decision, the agency responsible for placing the child in a good home effectively stands in the child's shoes to facilitate what will be one of the most personal, intimate and monumental decisions of that child's life. In doing so, agencies need leeway to consider all factors potentially relevant to the child's happiness, even if the law would otherwise generally prohibit a 'business establishment' from taking such factors into account.

"3. Considering Marital Status or 'Actual or Perceived' Sexual Orientation In Foster Family and Adoption Placements Is Not Prohibited by the Unruh Act

"The proposed regulations go beyond the Unruh Act and constitute impermissible rule-making for two additional reasons.

"a. The proposed regulations conflict with court decisions about protected categories under the Unruh Act

"First, the Unruh Act makes no mention of marital status or 'actual or perceived' sexual orientation. Indeed, courts have consistently held that 'discrimination' on the basis of marital status does not violate either the California Constitution or the Unruh Act. *Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985) (upholding denial of dental benefit coverage to unmarried partners of homosexual state employees as permissible discrimination based on marital status); *Beaty v. Truck Ins. Exch.*, 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593 (1992) (Unruh Act does not extend to discrimination based on marital status); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299 (1997) (Unruh Act does not prohibit discrimination based on marital status).

"b. CDSS cannot expand the Unruh Act to add marital status or 'actual or perceived' sexual orientation as protected categories

"Second, the CDSS cannot, through regulation, expand the Unruh Act, which constitutes a legislative, not a regulatory function. Even if the CDSS had such legislative authority (which it does not), the California Supreme Court has made it clear that further expansions of prohibited categories should be carefully weighed to ensure a result consistent with legislative intent. See *Harris v. Capital Growth*, 52 Cal. 3d 1142, 278 Cal. Rptr. 614 (1991). To determine whether the Unruh Act covered an unenumerated category (wealth), the Court examined (1) the language and history of the Unruh Act; (2) any legitimate business interests justifying limitations on consumer access; and (3) the consequences of expanding class recognition. *Id.* Later courts have adopted this same analysis. *King v. Hofer*, 42 Cal. App. 4th 678, 49 Cal. Rptr. 2d 719 (1996); *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 120 Cal. Rptr. 2d 550 (2002); *Scripps Clinic v. Superior Ct.*, 108 Cal. App. 4th 917, 134 Cal. Rptr. 2d 101 (2003).

"At least two California cases decided after *Harris* have held that the Unruh Act does not apply to marital status-based discrimination. *Beaty*, 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593; *Cloutier*, 964 F. Supp. 299. Furthermore, any contemporary application of the test would produce the same result.

"First, the language and history of the Unruh Act evince no intent to include marital status among its protected categories. Second, foster family and adoption agencies have a legitimate interest in preferring married couples over unmarried couples for placements to ensure that foster children are placed in the most stable family environment possible, and consistent with longstanding, historical norms that children should, if possible, have mothers and fathers. Third, expanding the scope of the Unruh Act to ban foster family and adoption agencies from considering marital status in placement decisions would violate the

longstanding public policy that 'de facto couples are not generally entitled to the benefits afforded to married couples,' *Beaty*, 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593 (1992), and thus undermine state efforts to promote marriage and its attendant family stability. *See* Cal. Fam. Code 308.5.

"Therefore, contrary to CDSS's contentions, the proposed regulations are *not* in accord with existing California law. CDSS cannot add marital status to the Unruh Act through regulation, and to the extent that a court may have held that 'sexual orientation' is protected by the Unruh Act, the CDSS cannot expand the scope of the category by adding the language, 'actual or perceived.'

"4. The Proposed Regulations Would Require Foster Family and Adoption Agencies to Ignore Potentially Relevant Factors in Making Child Placement Decisions, Which the Unruh Act Specifically Allows

"It is axiomatic that the Unruh Act prohibits only 'arbitrary, invidious or unreasonable discrimination.' *See, e.g., Sunrise Country Club Ass'n v. Proud*, 190 Cal. App. 3d 377, 235 Cal. Rptr. 404 (1987); *Sargoy v. Resolution Trust Corp.*, 8 Cal. App. 4th 1039, 10 Cal. Rptr. 2d 889 (1992). It does *not* prohibit differentiation based on actual characteristic differences. *Sunrise Country Club*, 190 Cal. App.3d 377, 235 Cal. Rptr. 404 (upholding designation of adult and family regions within a condominium development because different groups had different characteristics and needs). It does *not* prohibit 'socially beneficial' discrimination. *Sargoy*, 8 Cal. App. 4th 1039, 10 Cal. Rptr. 2d 889 (recognizing a strong public policy in providing age discounts for senior citizens). Nor does it trump compelling societal interests and health and safety concerns. *Marina Pointe, Ltd. v. Wolfson*, 30 Cal. 3d 721, 180 Cal. Rptr 496 (1982). (acknowledging compelling social interest in providing housing facilities for senior citizens and safety concerns for children).

"Thus, the Unruh Act allows for reasonable status-based distinctions in certain contexts like foster family placements and adoption, where otherwise 'suspect' categories may be relevant to determining the best interests of the child. This has been recognized by the State of California through its passage of California Family Code section 7950(b), which expressly permits foster care agencies to 'consider the cultural, ethnic or racial background of the child and the capacity of the prospective foster parents to meet the needs of the child of [a given] background as one of a number of factors used to determine the best interest of a child.' Given the fact that California law allows agencies to consider race and ethnicity in placing children with prospective parents, despite the fact that such categories are protected under law in other contexts, it follows that marital status, an unprotected category, and sexual orientation, can also be properly and lawfully considered when placing children with prospective foster and adoptive parents.

"Equally important is the fact that child placement requires a case-by-case evaluation of numerous tangible and intangible factors that does not lend itself to general regulatory mandates of the consideration or non-consideration of any given potentially relevant factor or factors. Foster family and adoption agencies must be free to exercise their professional judgments to assess how the personal characteristics and attributes which prospective parents have will influence and affect a given child. Such agencies ought to be able to

consider how a prospective parent's marital status or sexual orientation will affect the upbringing and life of the child. Specifically, the agencies ought to be able to consider how a prospective parent's race, sex, national origin, sexual orientation, disability or medical condition might affect the child.¹

"This may very well result in a decision to place a child in a home because the agency has considered, as part of its evaluation, the parent's sexual orientation, marital status or other characteristic. Thus, such factors need not be disqualifying. However, requiring agencies and their social workers to turn a blind eye to factors potentially relevant to the best interests of children simply to enforce a far more general perception of political or social trends, as determined by CDSS, not the California Legislature, would be unwise and unfair to children.

"C. Conclusion

"The Unruh Act does not support the CDSS's proposed regulations because (1) foster family and adoption agencies are exempt from the Unruh Act; (2) marital status and 'actual or perceived' sexual orientation are not protected under the Unruh Act; and (3) requiring foster family and adoption agencies to ignore potentially relevant characteristics in making child placement decisions through regulatory fiat would go far beyond the scope of the Unruh Act.

¹ Likewise, prohibiting agencies from considering actual or perceived sexual orientation creates ambiguities which practically are almost impossible to manage. Whose perception? What has to be perceived? How perceived?

Response:

The California Department of Social Services (Department) would like to thank Olive Crest for their commitment to providing care for children in California, and for providing comments on the proposed regulations. However, the Department disagrees with the assertion that the proposed regulations are not grounded in statutory authority, and "thus constitute impermissible" regulations.

The Department has broad regulatory authority to develop regulations impacting State licensed community care facilities. For example, Section 1530 of the Health and Safety Code states in part; the "Department shall develop, amend, or repeal... such reasonable rules, regulations, and standards as may be necessary or proper to carry out the purposes and intent of this chapter..."

The Department believes that by promulgating clear anti-discrimination standards that prohibit discrimination of applicants seeking licensure or certification, or unjust decertification of a certified family home, the Department is clearly carrying out the intent of the Community Care Facilities Act and being consistent with the provisions of the Unruh Civil Rights Act. Moreover, the Department is simply holding foster family agencies to the

same standards that CDSS holds itself. In addition, foster family agencies perform a licensing function by certifying family homes, and should be subject to the same anti-discrimination standards.

The Department also disagrees with the assertion that foster family agencies are exempt from the Unruh Civil Rights Act because they are not a "business establishment." Foster family agencies receive government funding and perform a governmental function as described above. Therefore, foster family agencies do not fall within the definition of a "private institution." Also, the "right of intimate association" does not apply to the application or decertification process of foster family agencies or the application process of adoption agencies because these regulations do not affect placement decisions.

The Department has the statutory authority by way of its broad regulatory authority to increase the protections afforded by the Unruh Civil Rights Act. Therefore, if it were determined that "marital status" or any other basis was not covered under the Unruh Civil Rights Act; the Department nevertheless has the authority to prohibit discrimination on that basis.

The Department disagrees that "the proposed regulations would require foster family and adoption agencies to ignore potentially relevant factors in making placement decisions, which Unruh Act specifically allows," because the proposed regulations do not affect placement decisions. The proposed regulations provide anti-discrimination protections through the application process and prohibit unjust decertification of a certified home.

However, the Department is removing subdivision (b) of Section 89002. Upon closer examination, this section may be misinterpreted as affecting placement decisions which would go beyond the scope of these regulations.

g) 15-Day Renotice Statement

Pursuant to Government Code Section 11346.8, a 15-day renotice and complete text of modifications made to the regulations were made available to the public following the public hearing. Written testimony on the modifications renoticed for public comment from September 3, to September 18, 2003 was received from Daniel M. Livingston, Attorney at Law, representing Olive Crest Treatment Centers, Inc. The comments received and the Department's responses to those comments follow.

Section 88030(a)

Comment:

Daniel M. Livingston wrote: "This firm represents Olive Crest Treatment Centers, Inc. ('Olive Crest'), and we are providing this letter to comment on the Changes to the Proposed Regulations of the California Department of Social Services ('CDSS') regarding Community Care Facilities, attached to your letter of September 2, 2003. We previously commented on the proposed regulations in our letter of July 16, 2003, and we incorporate by reference those comments." [See Comment and Response to Sections 88030(a) and 89002 et seq. under Section f) Testimony and Response] "Here, we focus on section 88030 of the proposed regulations, which is also impermissible and unnecessary rulemaking.

"First, as we explained in our letter of July 16, 2003, the proposed regulations, and section 88030 in particular, are not properly grounded in statutory authority, specifically the Unruh Act. Thus, the proposed regulations constitute impermissible regulatory 'legislation' that will not withstand judicial scrutiny. Indeed, as we explained, section 88030 would require foster family agencies to ignore potentially relevant characteristics in making child placement decisions through regulatory fiat which are not even protected by the Unruh Act.

"Second, since the Unruh Act does not prohibit discrimination based on many of the characteristics covered by section 88030, it appears to be derived from some notion that the law prohibits any decision that considers any of these factors. However, California law does not prohibit socially beneficial distinctions, particularly where, as here, the needs of children are paramount. See, e.g., *Sunrise Country Club Ass'n v. Proud*, 190 Cal. App. 3d 377, 235 Cal. Rptr. 404 (1987) (upholding designation of adult and family regions within a condominium development because different groups had different characteristics and needs); *Marina Pointe, Ltd. v. Wolfson*, 30 Cal. 3d 721, 180 Cal. Rptr. 496 (1982) (acknowledging compelling social interest in providing housing facilities for senior citizens and safety concerns for children).

"For example, section 88030 purportedly requires a foster family agency to put a 75 year-old single male applicant with a highly infectious disability on the same ground as a healthy married couple in their mid-30's in determining who is best able to care for a particular child. This is not to say that a foster family agency might not ultimately conclude that the 75 year-old applicant can provide foster care, but denying the professional judgments of agencies and trained social workers through such regulatory fiat is not in the best interest of children. The very nature of child placement requires a case-by-case clinical evaluation of numerous tangible and intangible factors that does not lend itself to general regulatory mandates of the consideration or non-consideration of any given potentially relevant factor or factors.

"Third, California Family Code section 7950(b) expressly permits foster family agencies to 'consider the cultural, ethnic or racial background of the child and the capacity of the prospective foster parents to meet the needs of the child of [a given] background as one of a number of factors used to determine the best interest of a child.' Thus, section 88030's

attempt to prohibit foster family agencies from considering race, color, national origin or ancestry in evaluating applicants directly conflicts with Family Code section 7950(b).

"For these reasons, and the reasons stated in our letter of July 16, 2003, we request that these proposed regulations not be adopted."

Response:

The California Department of Social Services (Department) would like to thank Olive Crest for providing comments on the proposed regulations 15-day renote. However, pursuant to Section 11346.8(c) of the Government Code, the Department is required to respond to any testimony received regarding any substantive change to the proposed regulations made after public hearing. After public hearing, the Department made a change to Section 89002, subparagraph (b), however this public comment speaks to Section 88030. Since there was no change made to Section 88030 after public hearing, the Department has responded to all concerns raised, and has met with the requirements of the Administrative Procedure Act.