

FINAL STATEMENT OF REASONS

Background

Penal Code Section 11169 requires child welfare agencies to submit a written report to the California Department of Justice (DOJ) to list an individual's name to the Child Abuse Central Index (CACI) for all inconclusive and substantiated allegation conclusions with the exception of general neglect. Until the *Gomez v. Saenz* lawsuit settlement, described below, there was no due process for individuals wishing to challenge their listing on the CACI. The 2004 ruling in *Burt v. County of Orange* required that due process be provided to individuals wishing to challenge their listing on the CACI, but did not specify the nature of the process. Subsequent to the Burt lawsuit, the *Gomez* settlement set forth the stipulation that applied to all 58 counties regarding the specific process for challenging a listing on the CACI. These regulations further implement and interpret the *Gomez* court case and provide instruction for county child welfare agencies regarding the process for implementing the requirements of settlement.

a) Specific Purpose of the Regulations and Factual Basis for Determination that Regulations Are NecessarySections 31-003(s)(2) through (s)(4)Specific Purpose:

These sections are adopted to inform counties of the California Department of Social Services (CDSS) forms that are required to notice individuals that their names were submitted to the Department of Justice (DOJ) for listing on the Child Abuse Central Index (CACI).

Factual Basis:

The parties to the stipulated court order chose a form-based notice in order to promote statewide consistency of process and content. The parties together agreed that the language and content of the forms met the requirements of the settlement. The following forms are incorporated by reference: *Notice of Child Abuse Central Index Listing* (form SOC 832), *Grievance Procedures for Challenging Listing to the Child Abuse Central Listing* (SOC 833), and *Request for Grievance Hearing* (SOC 834). These sections are necessary to clarify the CDSS forms that counties must use to notice individuals of their right to challenge their listing on the CACI, as required by the new grievance review procedures stipulated in the *Gomez v. Saenz* lawsuit settlement agreement.

Sections 31-021.1 through .13

Specific Purpose:

These sections are being adopted to include new grievance review procedures stipulated in the *Gomez v. Saenz* lawsuit settlement agreement. Specific language includes instructions for counties regarding the requirement to notice individuals whose names are being sent to DOJ for listing on the CACI. These sections further provide information regarding specific forms, which shall be utilized to adequately notify individuals of their right to challenge their listing on the CACI.

Factual Basis:

In recognition of existing heavy workload counties already face and in recognition of the need for timely notice, the parties to the stipulated court order agreed to a time frame which reconciled these two issues. These sections are necessary as they fulfill the requirements of the *Gomez v. Saenz* lawsuit settlement agreement. The agreement made with the plaintiff stipulates that the CDSS will adopt grievance hearing procedures for settlement purposes. The *Gomez v. Saenz* lawsuit provides due process for individuals whose names are listed on the CACI where none was previously provided. The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Sections 31-021.2 through .214

Specific Purpose:

These sections are being adopted to include new grievance hearing procedures stipulated in the *Gomez v. Saenz* lawsuit settlement agreement. Language includes specific timeframes when a complainant may request a grievance hearing, and when the grievance hearing must be scheduled. Information included in this section also requires the county to assist individuals with preparing the Request for Grievance Hearing form (SOC 834), if requested. In addition, this section allows for a "written request" to be submitted by an individual in lieu of the SOC 834 form to request a grievance hearing as stipulated in the *Gomez v. Saenz* lawsuit settlement.

Factual Basis:

The parties to the stipulated court order attempted to achieve a review process that provided reasonable timeframes for individuals to submit a request for hearing. While the parties acknowledged the need for the prompt submission of the request, they also wanted to provide individuals with reasonable time to gather the necessary information for the hearing. These sections are necessary to permit the county to rely on service to the individual's last known address as effective, and to ensure that the individual, if not properly served, has a right to request a grievance hearing within 30 days of learning they have been listed on the CACI. These sections also ensure that the county receives sufficient information from the complainant in order to process the matter. These sections are necessary as they fulfill the requirements of the lawsuit settlement described above, in particular, the agreement made with the plaintiff that the CDSS will adopt grievance hearing

procedures for due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Sections 31-021.3 through .312

Specific Purpose:

These sections are being adopted to clarify the circumstances when a grievance hearing may be denied. These sections also specify the timeline that an individual has to submit a request for a grievance hearing if a court has not determined that the child abuse and/or neglect has occurred or the matter is no longer pending before a court.

Factual Basis:

These sections are necessary as they fulfill the requirements of the *Gomez v. Saenz* lawsuit settlement agreement. The settlement agreement made with the plaintiff stipulates that the CDSS will adopt grievance hearing procedures to provide due process. These procedures are only specific to individuals who challenge their listing on the CACI. The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Sections 31-021.4 through .44

Specific Purpose:

These sections are being adopted to include new grievance hearing procedures stipulated in the *Gomez v. Saenz* lawsuit settlement agreement. Language in these sections provide specific timeframes that the county must adhere to when scheduling and holding a grievance hearing. In addition, Section 31-021.44 permits counties to downgrade a finding prior to a grievance hearing and remove an individual's name from the CACI by notifying DOJ. Information included in this section also includes an individual's right to have an attorney or other representative assist him/her at the grievance hearing.

Factual Basis:

The parties to the stipulated court order agreed that this section was necessary in order to ensure that grievance hearing requests are processed in a timely manner, to permit for a fair hearing and ensure that the basic interests of the individual are protected. These sections are necessary as they fulfill the requirement of the lawsuit settlement described above, in particular the agreement made with the plaintiff that the CDSS will adopt grievance hearing procedures for settlement purposes. The *Gomez v. Saenz* stipulation provided due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Sections 31-021.5 through 31-021.53

Specific Purpose:

These sections are being adopted to provide the counties with the qualifications necessary for individuals to act as a grievance review officer. This information clarifies who is and who is not qualified to conduct grievance review hearings for individuals who challenge their listing on the CACI.

Factual Basis:

The parties to the stipulated court order agreed that this process addressed the cost to the county agencies in administrative resources and the need to avoid bias of individuals directly involved in the case being reviewed. To promote efficient utilization of in-house resources, the parties agreed that existing county staff could fulfill the role of grievance officer. These sections of the regulations also ensure that the complainant has a basis to challenge the decision of the grievance review officer if a conflict of interest exists. This is consistent with other due process procedures currently in place. These sections are necessary as they fulfill the requirements of the lawsuit settlement described above, in particular the agreement made with the plaintiff that the CDSS will adopt grievance hearing procedures for settlement purposes. The *Gomez v. Saenz* stipulation provided due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Final Modification:

Sections 31-021.54 through .552(c) were added to the regulations to incorporate language regarding the duty of the grievance review officer to disqualify him or herself and withdraw from any proceeding in which he or she cannot give a fair and impartial hearing or in which he or she has an interest; the ability of a claimant to request that a grievance review officer be disqualified; and permit the rescheduling of a hearing to designate an alternate grievance hearing officer. The language used in these sections is based upon existing regulations (MPP 22-055 and 22-061) which outline the ability to challenge an administrative law judge in state fair hearings.

Sections 31-021.6 through .621(a)

Specific Purpose:

These sections are being adopted to include new grievance hearing procedures stipulated in the *Gomez v. Saenz* lawsuit settlement agreement. These sections outline specific discovery information, including the exchange of documents, other evidence and witness lists that all parties are permitted to review prior to the hearing. In addition, Section 31-021.621(a) provides instruction to the counties for redacting personal identifying information pursuant to applicable confidentiality laws.

Factual Basis:

These sections are necessary to promote the use of non-adversarial and informal procedures as agreed upon by the parties to the stipulated court order. This process is necessary to provide fairness to the individual including those persons who are unable to hire legal counsel and to ensure that parties have an opportunity to review documents, evidence and witness lists. These sections are necessary as they fulfill the requirement of the lawsuit settlement described above, in particular the agreement made with the plaintiff that the CDSS will adopt grievance hearing procedures for settlement purposes. The information that must be redacted is protected pursuant to Penal Code Section 11167. The *Gomez v. Saenz* stipulation provided due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Final Modification:

Sections 31-021.62 through .621(a) were amended to provide clarification regarding the documents a claimant may review. The complainant may examine “all records and evidence related to the county’s investigative activities and investigative findings associated with the original referral that prompted the CACI listing, except for information that is otherwise made confidential by law.” Sections 31-021.621 and .62 (a) were amended for consistency.

Sections 31-021.622 through .681

Specific Purpose:

These sections are being adopted to provide instruction regarding the information to be disclosed at the hearing, who may attend the hearing, witnesses who may testify at a hearing, the testimony given at the hearing, and information pertaining to the authority of the grievance review officer. It also defines the timeframes provided to the grievance officer to review the evidence and render a decision.

Factual Basis:

This section ensures that privacy and confidentiality are maintained as set forth in current state law. The parties to the stipulated court order agreed that these are the necessary ingredients to ensure a fair hearing, to avoid surprises in witness lists, to ensure a proper flow of evidence and to be consistent with other due process procedures in state hearings. These sections also ensure the protection of children as witnesses which is consistent with the mission of the Department to promote the best interest of children and cause no further harm. The provisions in this section further ensure that the county employee(s) who conducted the investigation are present, and that the grievance hearings are a non-adversarial and informal process. These sections are necessary as they fulfill the requirement of the lawsuit settlement described above, in particular the agreement made with the plaintiff that the CDSS will adopt grievance hearing procedures for settlement purposes. The *Gomez v. Saenz* stipulation provided due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to

adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez. v. Saenz* lawsuit settlement.

Final Modification:

Section 31-021.64 of the regulations was amended to add the phrase, “unless otherwise required by law” to provide clarification. This was deemed necessary in response to public testimony stating that the regulations conflicted with mandated reporting laws. The amended language clarifies that the requirement of confidentiality of information disclosed in a grievance hearing does not supersede mandated reporter laws, or any other area where disclosure is required by law. In addition, the words “documents or” was changed to “records and” for consistency with the previous sections.

Sections 31-021.7 through .72

Specific Purpose:

These sections are being adopted to provide the counties with instructions on archiving the administrative record of a grievance hearing for individuals challenging their listing on the CACI. These sections instruct counties to allow the record to be reviewed by the individual who requested the hearing and any attorney or representative assisting that individual. These sections are necessary as they further provide due process for individuals who have been listed on the CACI.

Factual Basis:

These sections ensure proper record keeping procedures which are consistent with other state hearing procedures. These sections ensure that unnecessary expense to the county is avoided. These sections are necessary as they fulfill the requirements of the lawsuit settlement described above, in particular the agreement made with the plaintiff that the CDSS will adopt grievance hearing procedures for settlement purposes. The *Gomez v. Saenz* stipulation provided due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Sections 31-021.8 through .86

Specific Purpose:

These sections are being adopted to provide the counties with specific instructions regarding rendering a decision in a grievance hearing. In addition, these sections provide specific timelines that must be adhered to by the grievance review officer as well as the county director when rendering, approving and archiving the final decision. This section also specifies who is entitled to receive the final decision.

Factual Basis:

The parties to the stipulated court order were unable to include a standard of evidence because they were unable to identify an appropriate standard of proof for inconclusive findings. Accordingly, parties resorted to definitions found in Penal Code Section 11165.12 as standards for the grievance officer's decision. The parties recognize that the "inconclusive" standard in Child Welfare Services is unique and different from other court processes in that it does not provide a method for factual findings. These sections are necessary as they fulfill the requirements of the lawsuit settlement described above, in particular the agreement made with the plaintiff that the CDSS will adopt grievance hearing procedures for settlement purposes. The *Gomez v. Saenz* stipulation provided due process for individuals whose names are placed on the CACI, where none was previously provided. The authority to adopt or amend regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Final Modification:

Section 31-021.84 of the regulations was amended to add the words, “recommended and final” in order to provide clarification that, as required by the *Gomez v. Saenz* lawsuit settlement agreement, both decisions shall be sent to the required parties.

Sections 31-410.514(a) and (b) (Handbook)

Specific Purpose:

These sections are being amended to correct cross references in Penal Code. Section 31-410.514(a) refers to notifying individuals of their listing on the CACI. Section 31-410.514(b) provides information regarding the responsibility of licensing, adoption or placement agencies to make an independent assessment of an individual who has been identified as listed on the CACI.

Factual Basis:

The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement.

Sections 31-410.515 through .515(d)

Specific Purpose:

These sections are being amended to include detailed information regarding the temporary placement of children with relatives and non-relative extended family members when there is a substantiated CACI listing of the potential caregiver. Sections 31-410.515 through .515(d) provide specific criteria for determining whether or not the CACI listing would preclude the child from being placed with the individual.

Factual Basis:

These amendments are being made to provide clarification regarding a potential caregiver's listing on the CACI and how that may or may not impact a child's placement in that home. The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554.

Sections 31-501.1 and .11 (Handbook)

Specific Purpose:

Technical amendments were made to this section regarding the manner in which cross-reports may be transmitted to other agencies. In addition, the wording "and/or neglect" was added to provide consistency in the language throughout this section of the regulations. A technical correction was made to the Penal Code reference. The addition of handbook Section 31-501.11 clarifies the definition of child abuse and neglect as found in Penal Code Sections 11165.1 through 11165.6.

Factual Basis:

In order to provide clarity in existing regulations, changes were made to provide flexibility and ease of administration for cross-reporting suspected child abuse and/or neglect reports to law enforcement and the District Attorney's office. The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554.

Section 31-501.2

Specific Purpose:

This section is amended to provide more descriptive language in regard to child abuse and/or neglect reports that are received by a county CWS agency. The term "and/or neglect" was added to provide consistency throughout this section of the regulations. Grammatical corrections were made to this section, as well.

Factual Basis:

The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554.

Sections 31-501.3 through .32

Specific Purpose:

These sections are amended to clarify the responsibilities of the CWS agency when a report of suspected child abuse and/or neglect is received for children residing in out-of-home care.

Factual Basis:

The addition of this section is necessary to ensure that the regulations adequately clarify the responsibility of the county CWS agency when reports of child abuse and/or neglect for a child residing in out-of-home care are received by the agency. The authority to adopt amended regulations can be found in Welfare and Institutions Code Sections 10553 and 10554.

Section 31-501.4

Specific Purpose:

This section is amended to add in the acronym 'DOJ' for Department of Justice. This addition is necessary for consistency throughout the section of this document. This section is also amended to replace the term 'not to be unfounded' with the language 'to be inconclusive or substantiated'. These amendments are necessary to maintain consistency with language used in the *Gomez v. Saenz* lawsuit settlement agreement as well as the definition for allegation findings in Penal Code Section 11165.12.

Factual Basis:

The *Gomez v. Saenz* lawsuit settlement agreement required CDSS to create new regulations that provide specific instruction to counties regarding CACI grievance hearings. While creating the new regulations, CDSS determined that this section should be amended to provide consistency with the new regulation Section 31-021.

Final Modification:

This section was amended to add the word “actively” in order to be consistent with Penal Code section 11169(a).

Sections 31-501.41 through .421(a) Handbook

Specific Purpose:

These sections are adopted to provide procedures and handbook information defining child abuse or neglect, as well as requirements for submitting the Child Abuse Summary Report to DOJ.

Factual Basis:

This adoption is necessary because counties are required to submit the Child Abuse Summary Report (SS 8583) to DOJ once they have completed a child abuse or neglect investigation resulting in a substantiated or inconclusive finding. The Handbook sections provide guidance to the counties to accurately report suspected child abuse or severe neglect to the CACI, which may later be needed for grievance hearing requests, per the *Gomez v. Saenz* lawsuit settlement.

Final Modification:

The phrase, “the county shall not submit a report to the DOJ for referrals it investigates and that are determined to be unfounded.” was added to Section 31-501.42 to provide further clarification to counties regarding what shall not be submitted to DOJ. In addition, the DOJ form "SS 8583" was changed to "BCIA 8583" to reflect modifications made to the form by DOJ in September 2009. The language previously contained in this section, as well as section .421-.421(a) was renumbered accordingly.

Section 31-501.43

Specific Purpose/Factual Basis:

This section is amended to renumber it from Section 31-501.31 for clarity, and to add the acronym 'DOJ' for the Department of Justice, for consistency.

Final Modification:

Section 51-501.43 was renumbered in accordance with previous sections.

Section 31-501.5

Specific Purpose:

This section is adopted to provide instructions for the counties when providing written information to individuals whose names have been submitted to the DOJ for listing on the CACI. This information is necessary for the counties so that they notify individuals of their right to due process within the specified timeframes of the settlement agreement.

Factual Basis:

The parties to the stipulated court order required that this section be consistent with DOJ rules of timing for due process and administrative resources. This process was developed per the *Gomez v. Saenz* settlement agreement. Counties must comply with the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement. If the counties fail to comply, they could be at risk of being in contempt of the Court Order.

Sections 31-501.51 through .54

Specific Purpose:

These sections are adopted to provide specific instruction to the counties for notifying individuals of their listing on the CACI. This information includes the use of the forms SOC 832-Notice of Child Abuse Central Index Listing, SOC 833-Grievance Procedures for Challenging Reference to the Child Abuse Central Index, and the SOC 834-Request for Grievance Hearing. These forms notify individuals of their listing and offer individuals the right to challenge their listing through the grievance review hearing process.

Factual Basis:

The information contained within each of the forms and the process was developed per the *Gomez v. Saenz* settlement agreement. Counties must comply with the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement. If the counties fail to comply, they could be at risk of being in contempt of the Court Order.

Section 31-501.6

Specific Purpose:

This section is adopted to provide instructions to the counties for individuals wishing to challenge their listing on the CACI. This section directs counties to the appropriate regulation section outlining the grievance hearing process. This section further provides the counties with the option to resolve grievances without a formalized grievance review hearing, when appropriate.

Factual Basis:

The alternative process to a formalized grievance review hearing was developed, allow an individual's grievance to be reviewed and the findings changed prior to a grievance hearing. The need for a hearing is alleviated when the county determines, during their internal review, that the individual's finding can be changed to "unfounded" and the individual's name removed from the CACI without the need for a hearing.

Sections 31-501.7 and .71

Specific Purpose:

These sections are adopted to provide instructions to the counties regarding changing an allegation finding as a result of the hearing or an internal review.

Factual Basis:

The process was developed per the *Gomez v. Saenz* settlement agreement. Counties must comply with the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement. If the counties fail to comply, they could be at risk of being in contempt of the Court Order. Further, the counties must adhere to current statute regarding reporting accurate information to the DOJ for CACI listing pursuant to Penal Code Section 11170.

Final Modification:

The DOJ form "SS 8583" was changed to "BCIA 8583" to reflect modifications made to the form by DOJ in September 2009.

Section 31-501.8

Specific Purpose:

This section is adopted to provide instructions to the counties for documenting the outcome of a grievance hearing within the child's case record.

Factual Basis:

The process was developed per the *Gomez v. Saenz* settlement agreement. Counties must comply with the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement. If the counties fail to comply, they could be at risk of being in contempt of the Court Order.

b) Identification of Documents Upon Which Department Is Relying

Gomez v. Saenz Settlement Agreement and Order, Case No: BC284896, filed October 3, 2007. Penal Code Sections 11165.5, 11165.12, 11166(g), 11166.3, 11167, and 11169.

c) Local Mandate Statement

The addition to Division 31, Section 31-021 (Child Abuse Central Index [CACI] Grievance Review Procedures), the amendments to Division 31, Section 31-501 (Child Abuse and Neglect Reporting Requirements), and the amendments to Division 31, Section 31-410 (Temporary Placement) will impose mandates on local county child welfare agencies.

These regulations will require additional workload for the agencies. The additional activities include noticing individuals of their listing on the CACI, preparing for and performing grievance hearings as requested, and other documentation as specified in the regulations. This will create additional costs for the local CWS agencies.

At this time, it is unknown what fiscal impact these new regulations will have on the CDSS. County CWS agencies are currently time-studying grievance hearing activities to a Program Code created specifically for this purpose.

d) Statement of Alternatives Considered

CDSS has determined that no reasonable alternative considered or that has otherwise been identified and brought to the attention of CDSS 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) Statement of Significant Adverse Economic Impact On Business

CDSS has made an initial determination 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 #1 at the public hearing held on January 13, 2010 in Sacramento, California. Testimony was received from the following during the 45-day comment period from November 20, 2009 to 5:00 p.m. on January 13, 2010:

Written Testimony

- Karl Nicholas, San Francisco, California: (Comment Nos. 1-3)
- George W. McFetridge, Jr., Deputy District Attorney, County of Orange (Comment Nos. 4-7)
- Kelly M. Hardy, Robert E. Kalunian, County of Los Angeles, Office of the County Counsel (Comment Nos. 8-20)
- Esther G. Boynton, Attorney at Law, San Diego, CA (Comment Nos. 21-24)
- Christopher (no last name provided) (Comment Nos. 25-26)

Oral Testimony

- Karl Nicholas, San Francisco, California: (Comment No. 27)

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

- Karl Nicholas, San Francisco, California, submitted the following written comments: (Comments Nos. 1-3)

1. Comment:

1. The regulations adopted have been re-written and changed from the *Gomez* regulations. These rewrites are not superficial, they are significant and substantive. The adopted regulations must conform to the orders of the Court in the *Gomez* case.

Response:

Thank you for your comment. Regarding concern that the regulations have been rewritten, the California Department of Social Services (CDSS) believes that these regulations conform to the *Gomez v. Saenz* lawsuit settlement agreement. The regulations were written in a manner that provides clarity and consistency regarding the requirements of the court order; it is not necessary for CDSS to cite the text verbatim. The language used in the regulations also conforms to existing definitions of terms used in current regulations found in the Manual of Policies and Procedures (MPP) Division 31.

2. Comment:

2. The regulations are overbroad. They infringe on the authority, indeed the responsibility, of a county to utilize a county hearing officer, pursuant to Government Code sections 27720, et seq.

Response:

Thank you for your comment. These regulations comply with Government Code (GC) section 27720 et. seq., which creates permissive authority by a county board of supervisors to create an office of county hearing officer. GC section 27720 et. seq. also permits a county board of supervisors to authorize the county hearing officer to exercise certain powers. These are discretionary powers. These powers may not apply in all hearings, as that will depend on the rules established for any given type of hearing. Further, these powers cannot exceed the scope of authority created by State law for any particular hearing. In these regulations, the activities grievance officers are authorized to perform are limited. Any county grievance officer, (for purposes of [CACI] grievances) whether they are a county hearing officer created pursuant to GC section 27720 or not, is required to follow the rules that are provided in these regulations.

3. Comment:

3. The General Provisions for Administrative Adjudication is applicable to CACI Grievance Hearings.

- a. The CDSS, and California CFS, is subject to the General Provision for Administrative Adjudication. See Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, commencing with section 11400.
- b. County Child Welfare Services is "an agency created or appointed by joint or concerted action of the state and one or more local agencies." "The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage." (Cal. Law Revision Com. com., 32D West's Ann. Gov. Code (2005 ed.) foll. § 11410.30, p. 272.)

Response:

Thank you for your comment.

- a. GC section 11400 et. seq. does not apply to the hearings required under these regulations. The hearings required by these regulations are not state level hearings, nor are they hearings conducted by a state agency. The *Gomez v. Saenz* lawsuit settlement agreement did not provide for state level hearings, and CDSS believes requiring state level hearings in these regulations would violate the terms of the *Gomez v. Saenz* lawsuit settlement agreement. In addition please refer to the response to Comment No. 7 for further information regarding this topic.
- b. CACI hearings are required to be performed by the county, which pursuant to GC section 11410.30, are not subject to the requirements of GC section 11400 et. seq.

- George W. McFetridge, Jr., Deputy District Attorney, Orange County, submitted the following: (Comments Nos. 4-7)
4. Comment:

An accurate Child Abuse Central Index (CACI) has value. One that is inaccurate does not. It doesn't protect children and harms individuals wrongly included on the Index. An erroneous listing on the Index, despite its purported confidentiality, without an opportunity for the stigmatized suspect to challenge the listing, is extraordinarily harmful and an unconstitutional deprivation of his/her due process rights. This is particularly true if the suspect is a teacher, foster or adoptive parent, works in law enforcement, the juvenile court system, the medical field, or is in the midst of a bitter custody dispute with the reporting spouse.

The proposed regulations to implement the stipulation reached in *Gomez v Saenz* are an improvement over the previous lack of any due process but are not as effective as they need to be in protecting the constitutional rights of individuals placed on the Index.

Response:

Thank you for your comment. We agree that the right to due process is critical and believe that these regulations improve the accuracy of the information contained in the CACI. The language in this regulations package specifically reflects the grievance review process that was agreed to by both parties in the *Gomez v. Saenz* lawsuit settlement agreement.

5. Comment:

REASONABLE ALTERNATIVES ARE AVAILABLE

The proposed regulations provide a grievance procedure AFTER a suspect has been reported to the CACI. Significantly, Penal Code section 11169 does not dictate any specific time requirements as to when an agency must forward a report to the DOJ.

In the absence of compelling factors, such as a substantiated finding of physical abuse (where the evidence is strong and supported by physical evidence that can be documented), there is no reason that due process cannot be afforded to suspects PRIOR to their being listed on the Index. If suspects are accorded a hearing before being reported to the DOJ and after such a hearing the findings of the county remain unchanged, then the report should be forwarded to DOJ. If the pre-listing hearing results in an inconclusive finding, then the damage to the suspects by an erroneous listing on the CACI will have been avoided. Due process is served, children are protected and the CACI is more accurate.

As mentioned above, a substantiated finding of physical abuse, severe neglect [as defined in PC 11165.2(a)] or serious emotional damage [as defined in PC 11166.05] should be immediately reported to the DOJ and the suspect listed on the CACI. The protection of the injured child and identification of the child abuser justifies an

immediate report. In these extreme situations, the post reporting grievance procedure protects the child first but still accords the suspect with due process rights.

However, in the majority of situations there is no such immediate danger to the child and therefore no compelling reason for failing to provide for a PRE-deprivation grievance procedure. The proposed procedures for a "Gomez type hearing" may still be used but the hearing simply held BEFORE the suspect is reported to the CACI.

Inconclusive findings are by their very definition [PC 11165.12(c)] based on a lack of proof. The investigating social worker doesn't know what happened. For that very reason, to avoid the detrimental effects and stigmatization of a CACI listing, the suspect should be accorded due process, in the form of a Gomez type hearing, BEFORE being reported to DOJ.

An inconclusive finding of severe neglect suggests an incomplete investigation – and an even more compelling reason to proceed cautiously, given the stigma of being listed on CACI. And where there is a lack of proof or an incomplete investigation, due process is only served when there is a hearing BEFORE the suspect is reported to the DOJ.

Likewise, "emotional abuse" is not something that happens overnight. If it exists, its something which occurs over an extended period of time. Consequently an inconclusive finding of emotional abuse, where there is a lack of proof, and no immediate danger to the child, there is no urgent need to "report first, permit grievance later."

In any situation where there is an inconclusive finding, due process dictates that a Gomez like hearing should be held BEFORE the suspect is reported to the DOJ.

This reasonable alternative is clearly more effective in protecting the due process rights of suspects. It is beyond dispute that it's far better to have never been listed on the Index in the first place, than to be listed, have time pass while awaiting a Gomez Hearing, then get "de-listed" off the Index months later. (Which would *you* prefer if some social worker decided to forward *your* name to the list?)

When inconclusive findings are found, holding a Gomez Hearing *before* reporting the suspect to DOJ does not endanger children. Furthermore, it is less burdensome on both the state DOJ and county agencies because both may avoid the administrative burden of removing suspects from the list.

Response:

Thank you for your comment. The CDSS believes that current statute and the *Gomez v. Saenz* lawsuit settlement agreement preclude counties from proceeding with a grievance hearing prior to submission of a name to the CACI. Penal Code (PC) section 11169(b) requires that notice to the individual referred to the CACI occur "at the time" the agency forwards a report to DOJ. PC section 11169(b) provides, in part, that "[A]t the time an agency specified in section 11165.9 forwards a report in writing to the [DOJ] pursuant to subdivision (a), the agency shall also notify in writing the known or

suspected child abuser that he or she has been reported to the Child Abuse Central Index.” The plain language of this statute does not provide counties the discretion to postpone the submission of an individual’s name for listing until after a grievance hearing is completed. In addition to notifying an individual that his or her name has been listed on the CACI, the *Gomez v. Saenz* lawsuit settlement agreement requires that an individual is notified of his or her right to challenge the listing, and provides instructions and a form for requesting a grievance hearing.

PC section 11169(a) also requires that counties report an individual’s name for listing on the CACI using the form adopted by DOJ. The current form is the Child Abuse or Severe Neglect Indexing Form (Bureau of Criminal Information and Analysis [BCIA] 8583), for which the instructions direct that counties shall “Submit the completed BCIA 8583 to the DOJ as soon as possible after completion of the investigation as the information may contribute to the success of another investigation. It is essential that the information on the form be complete, accurate, and timely to provide maximum benefit in protecting children and identifying instances of suspected abuse or severe neglect.”

Without diminishing the constitutional import of having one’s name placed on CACI, it is important to understand that the CACI is confidential and that a state level hearing is afforded to any individual who is denied a license or approval based on any information derived from CACI. The CDSS believes that the review process provided in *Gomez* is commensurate with the level of constitutional deprivation associated with CACI listing.

Finally, it is clear from a full reading of the Child Abuse and Neglect Reporting Act (CANRA), PC sections 1165-11174.3, that an individual’s interest in CACI accuracy is subordinate to the interest of preserving child safety, and that the legislature constructed a system intended to err in favor of child safety, even when uncertainty exists as to whether an individual actually committed child abuse or not. The legislature determined that inconclusive investigative findings were sufficient for listing an individual’s name on CACI.

6. Comment:

DUE PROCESS CALLS FOR A PRE-DEPRIVATION HEARING

As the Ninth Circuit Court of Appeals noted in noted in *Humphries v County of Los Angeles* (9th Cir. 2008) 547 F.3d 1117, 1141

In this case, we ask, "after examining the process by which persons are listed on the CACI, what is the risk of someone being erroneously listed?" In light of the Humphries' allegations--and keeping in mind that we are reviewing a grant of summary judgment in favor of the state--the answer is "quite likely."

A determination that the report is "not unfounded" is a very low threshold. As we explained above, CANRA defines an "unfounded report" as a report that the investigator determines "to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." CAL. PENAL

CODE § 11165.12(a). Effectively, a determination that a report is "not unfounded" merely means that the investigator could not affirmatively say that the report is "false." This is the reverse of the presumption of innocence in our criminal justice system:

the accused is presumed to be a child abuser and listed in CANRA unless the investigator determines that the report is false, improbable, or accidental. Incomplete or inadequate investigations must be reported for listing on the CACI.

In *Cleveland Board of Education v Loudermill* (1985) 470 US 532,542 the United States Supreme Court stated:

"An essential principal of due process is that a deprivation of life, liberty, or property 'be **preceded** by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v Central Hanover Bank & Trust Co.* 339 US 306, 313 (1950). We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing **before** he is deprived of any significant property interest.' *Boddie v Connecticut*, 401 US 371, 379 (1971) (emphasis in original)."

In *Armstrong v Manzo* (1965) 380 US 545, 550 the United States Supreme Court quoted its earlier decision in *Mullane v Central Hanover Bank & Trust Co.* 339 US 306, 313 (1950):

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the **pendency** of the action and afford them an opportunity to present their objections. *Milliken v Meyer*, 311 US 457; *Grannis v Ordean*, 234 US 385, *Priest v Las Vegas*, 232 US 604; *Roller v Holly*, 176 US 398."

In *Boddie v Connecticut*, (1971) 401 US 371, the Supreme Court made it clear that "absent a countervailing state interest of overriding significance" (*Boddie*, 401 US at 377) or "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event" (*Boddie*, 401 US at 379), "an individual must be given an opportunity for a hearing **before** (emphasis in original) he is deprived of any significant property interest." (*Boddie*, 401 US at 379). A similar pronouncement was made in *Smith v Organization of Foster Families* (1977) 431 US 816, 848.

In *Board of Regents of State College v Roth* (1972) 408 US 564, 569-570 the Supreme Court stated "When protected interests are implicated, the right to some kind of **prior** hearing is paramount" and in footnote seven identified those few "rare and extraordinary situations" where the "deprivation of a protected interest need not be preceded by an opportunity for some kind of hearing."

In *Mathews v Eldridge* (1976) 424 US 319, 333 the Supreme Court acknowledged that "This Court consistently has held that some form of hearing is required **before** an individual is finally deprived of a property interest" citing *Wolff v McDonnell* (1974) 418 US 539, 557-558. The Court went on to articulate a three part test to determine what process is due **prior** to the deprivation of rights, stating:

"Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, 424 US at 335.

In *Zinermon v. Burch*, (1990) 494 U.S. 113, 115, the Supreme Court applied the three part test set forth in *Mathews* and acknowledged:

Applying this test, the Court usually has held that the Constitution requires some kind of a hearing **before** the State deprives a person of liberty or property. See, e.g., *Cleveland Board of Education v. Loudermill*, 470 US. 532, 542 (1985) ("The root requirement' of the Due Process Clause" is "that an individual be given an opportunity for a hearing **before** he is deprived of any significant protected interest"; hearing required **before** termination of employment (emphasis in original)); *Parham v. J. R.*, 442 US. 584, 606-607 (1979) (determination by neutral physician whether statutory admission standard is met required **before** confinement of child in mental hospital); *Memphis Light, Gas & Water Div. v. Craft*, 436 US. 1, 18 (1978) (hearing required **before** cutting off utility service); *Goss v. Lopez*, 419 US. 565, 579 (1975) (at minimum, due process requires "some kind of notice and ... some kind of hearing" (emphasis in original); informal hearing required **before** suspension of students from public school); *Wolff v. McDonnell*, 418 US. 539, 557-558 (1974) (hearing required **before** forfeiture of prisoner's goodtime credits); *Fuentes v. Shevin*, 407 US. 67, 80-84 (1972) (hearing required **before** issuance of writ allowing repossession of property); *Goldberg v. Kelly*, 397 US. 254, 264 (1970) (hearing required **before** termination of welfare benefits).

In summary, the United States Supreme Court has clearly and repeatedly ruled that in the absence of some "rare and extraordinary" situation where a state interest of "overriding significance" is at stake, the constitutional mandate of due process indicates a preference for a hearing **before** the deprivation of constitutionally protected interests.

With respect to inconclusive findings, there are no such exigencies, nothing so "rare and extraordinary" or involving a state interest of such "overriding significance" to justify ignoring the constitutional preference for a hearing **before** depriving individuals of their constitutional rights.

In summary, where inconclusive findings are the basis for a report to the DOJ, the due process rights of suspects are met only by holding a Gomez type hearing **prior** to reporting to the DOJ.

Response:

Thank you for your comment. The CDSS agrees with the commenter that the government has a high burden to justify the post-deprivation due process provided for

in the *Gomez v. Saenz* lawsuit settlement agreement. The CDSS believes that that this burden is met in that the Legislature intended CANRA to promote child safety, and to err in favor of child safety even when uncertainty exists as to whether an individual actually committed child abuse or not. The Legislature determined that inconclusive investigative findings were sufficient for listing an individual's name on the CACI. The CDSS believes that post-deprivation due process requirements in the *Gomez v. Saenz* lawsuit settlement agreement are consistent with the high priority given by the Legislature to the interest of protecting children from abuse and neglect, because pre-deprivation due process would necessarily delay the time an individual's name would be placed on the CACI. This time delay would create unavoidable risk to the health and safety of children. Even assuming, for the sake of this discussion, that PC section 11169(b) did not require pre-deprivation due process, the CDSS would still be left with having to choose between avoiding the adverse impact on those individuals whose short term constitutional deprivation without prior due process would have been avoided if a pre-deprivation hearing was required (i.e. those individuals whose hearings resulted in unfounded determinations), and the health and safety interest of children who are put at risk due to a delay in listing on CACI for all individuals whose name are placed on CACI. Under these circumstances the CDSS believes protection of children is a compelling basis to choose a post-deprivation due process.

Further, were the CDSS to promulgate a regulation requiring pre-deprivation due process despite the plain language of PC section 11169(b), both the State and counties might incur a risk of liability for damages in the event a child was abused by a person whose access to that child might have been prevented if that person's name was placed on CACI at the earliest possible time.

In addition, one important fact that distinguishes this situation from other situations where courts have required pre-deprivation due process is the fact that CACI listing does not result in deprivation of employment or volunteer contact opportunities with children or the placement of a child. CACI is a flagging system only. When an agency conducts a background check for the purposes of licensure, or employment in a licensed facility, or when an agency conducts a background check for purposes of approval, those agencies are responsible under law for obtaining the original investigative report from the reporting agency, for conducting an investigation of the facts and circumstances concerning information derived from the CACI check, and for drawing independent conclusions regarding the fitness of the individual subject to the background check. Only when those agencies determine that the underlying facts warrant adverse administrative action is there a potential interference with employment or volunteer opportunities. When this happens, an individual is entitled to challenge that action and avail themselves of due process. The CDSS believes that the availability of this second level of review for individuals denied employment or voluntary activities in licensed or approved homes substantially mitigates the impact the post-deprivation hearing rights afforded in the *Gomez v. Saenz* lawsuit settlement agreement has on individuals. Taken as a whole, the *Gomez* lawsuit settlement agreement deprivation due process along with the full due process rights attendant to licensure, approval, or employment denials comprises constitutionally acceptable governmental practices.

In response to the comment regarding the “not unfounded” issue, the CDSS has determined that the investigative dispositions of “unfounded,” “inconclusive,” and “substantiated” represent the universe of possible investigative findings, and that “not unfounded” is the functional equivalent of an “inconclusive” and “substantiated” finding. The commenter has not provided an example of an investigative finding that triggers the duty to refer the individual’s name to DOJ for listing on CACI under the “not unfounded” standard that would not be subject to referral under the inconclusive or substantiated finding standard. The CDSS is unable to conceive of such an example. The CDSS believes that the regulations are more clear and understandable to those responsible for compliance with these rules if the finding which triggers the duty for referral of an individual’s name for listing on CACI is described in the affirmative rather than in the double negative. Accordingly, the CDSS believes that describing the trigger for referring an individual’s name to DOJ for listing on CACI as “inconclusive or substantiated” is a clear and more readily understandable description than “not unfounded.” For more information on this issue, please see the response for Comment No. 23.

7. Comment:

A NEUTRAL UNBIASED HEARING OFFICER

Schedule A, paragraph 4 of the Gomez v Lockyer, Saenz Settlement (LA Case # BC 284896) briefly outlines the qualifications of the "grievance officer." However it is highly unrealistic to assume that an employee of the very same social services agency that reported the suspect to the Index would be a neutral and unbiased adjudicator.

Moreover, since these hearings involve *state* law as codified in the *state* Penal Code, regulations implemented by the *state* Department of Social Services regarding an Index maintained by the *state* Department of Justice to provide suspects with due process rights under the *state* and federal constitution, it is appropriate that the hearing be conducted by a *state* Administrative Law Judge, not a local county social worker who attended a *mere three hour training session* on how to be a "Gomez Hearing Officer."

The hearings should be conducted by the Office of Administrative Law under the Administrative Procedure Act (Government Code section 11370 et seq).

As a Court of Appeals stated in *Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 394* "One of the primary purposes of the Legislature in passing and of the [Judicial] council in proposing the legislation [the Administrative Procedure Act of 1945] was to remedy the evils in connection with hearings before administrative boards frequently composed of laymen, untrained in procedure. To this end there was created the position of hearing officer. Such officer is a civil service employee and *must be an experienced lawyer* [italics added]. All administrative hearings relating to the revocation of licenses by the agencies designated in the act must be conducted by these legally trained hearing officers (Gov. Code, § 11512(a)).

A social worker with a mere three hours of "Gomez Hearing Officer" training, employed by the social services agency whose report is in dispute and whose

employees are being examined for their competency and credibility, is not a neutral, unbiased, or even qualified hearing officer.

The matter should be resolved by Administrative Law Judges pursuant to the provisions of the Administrative Procedure Act.

COST SAVINGS TO THE STATE AND COUNTY

The reasonable alternatives proposed here will result in a cost savings to both the state and counties.

State funds will not be needed to train social workers to be "Gomez Hearing Officers." Administrative Law Judges are already familiar with the law, rules of evidence, constitutional rights and the like and can conduct these hearings in the normal course of their duties. Furthermore, there is absolutely no evidence to support the fear that they will be overwhelmed with requests for Gomez like hearings.

County funds will be conserved because local agencies will not have to hire or reassign a social worker to be the designated Gomez Hearing Officer. Instead, that individual may continue to perform the duties of a social worker and help protect children, rather than be diverted into a hearing officer. Lawyers and judges should do legal work and social workers should do social work.

SUMMARY

There are reasonable alternatives to the regulations proposed by the Department of Social Services, alternatives that will result in greater protection to the constitutional rights of suspects without endangering the safety of children as well as creating budgetary savings at both the state and county level.

To protect children in cases where there is a **substantiated** finding of **physical abuse**, **severe** neglect or **serious** emotional damage, the report should be immediately forwarded to the DOJ, the suspect listed on the CACI and a *post-listing* Gomez like hearing provided. In these situations both the evidence and threat of harm are strong.

In all other situations, the suspect should be accorded a *pre-listing* Gomez like hearing since no child is in immediate danger and the risk of error and subsequent harm to the suspect is great.

In both situations, the Gomez like hearing should be conducted by an Administrative Law Judge, not a social worker who sat through a three hour training class. The constitutional rights of the suspect (a parent, teacher, nurse, police officer, day care worker, etc) and harm they suffer from an erroneous and hastily filed report demands this level of constitutional protection and due process.

Finally, the reasonable alternatives proposed here will result in budgetary savings at both the state and county level at a time when financial resources are under severe strain. Let trained administrative law judges adjudicate these issues and keep social workers in the field protecting children.

Response:

Thank you for your comment. The CDSS agrees that additional rule making is necessary to ensure that a claimant has the ability to challenge a grievance hearing officer if there is concern regarding the officer's ability to be objective and unbiased. In effort to diminish the impact of this, sections 31-021.54 through .552(c) were added to the regulations to incorporate language regarding the duty of the grievance review officer to disqualify him or herself and withdraw from any proceeding in which he or she cannot give a fair and impartial hearing or in which he or she has an interest; the ability of a claimant to request that a grievance review officer be disqualified; and the rescheduling of a hearing to designate an alternate grievance hearing officer. The language used in these sections is based upon existing regulations (MPP 22-055 and 22-061) which outline the ability to challenge an administrative law judge in state fair hearings.

The CDSS believes that these regulations provide for an efficient and cost effective process that will promote accuracy in CACI listings. While ensuring due process is an important governmental purpose, the primary purpose of county child protection agencies is to protect children. Time spent by child protection staff in administrative proceedings relating to CACI referrals is time not spent protecting children at risk of abuse or neglect. It is important; therefore, that administrative proceedings relating to CACI referrals minimize the impact participation in these proceedings will have on child protection staff while meeting constitutional requirements. Additionally, the grievance review process has been determined by the CDSS to be less costly than state level hearing processes. It is critical that cost effectiveness and cost containment be factors in deciding between constitutionally adequate review processes.

The CDSS agrees with the commenter that differentiating between substantiated serious abuse cases and lower level cases for purposes of determining whether pre-deprivation due process is a rational approach to addressing the timing of due process issue. As indicated in the CDSS' responses to Comment Nos. 5 and 6, however, the CDSS believes that PC section 11169(b) does not provide for or permit that differentiation, and the CDSS therefore lacks the authority to overrule the Legislature's determination in this regard. Additionally, as indicated above in response to Comment No. 4, the CDSS believes post-deprivation due process as provided for in the *Gomez v. Saenz* lawsuit settlement agreement is most consistent with the Legislature's intent in CANRA to err in favor of protecting children.

- Kelly M. Hardy, Robert E. Kalunian, County of Los Angeles, Office of the County Counsel (Comment Nos. 8-20)

8. Comment:

Dear Sir/Madam:

Los Angeles County submits the following Statements and Arguments regarding the proposed Division 31 Grievance Review Procedures; Child Abuse Central Index (hereinafter "CACI")

A. STATEMENTS

1. Proposed regulations MPP 31-021.6.62 and .621 fail to provide guidance regarding how a county welfare agency/social worker may share confidential Juvenile documents and other confidential juvenile information, contained in a juvenile case file, with a claimant who is not an identified individual for review or receipt of confidential juvenile records pursuant to California Welfare and Institutions Code Section 827(hereinafter "WIC 827"), (a)(1)(A) through (P) and (a)(2) through (a)(4). When a person is not identified for release or review of confidential Juvenile records under WIC 827, the confidential juvenile records shall not be released unless a petition has been filed and an order of the Juvenile Court is obtained. Further, the language, "(t)he county and complainant shall make available for inspection the documents and other evidence they intend to rely on ... to the extent permitted by law" is vague and fails to delineate the duties of the parties. The proposed regulations should be amended to clarify and provide guidance regarding how to release confidential juvenile records under WIC 827(a)(1) through (4), and which party will have the duty to seek a release, under specified circumstances. Based on the above, Los Angeles County would request clarification or the California Department of Social Services ("CDSS") consider requesting a legislative modification of WIC 827 to include release of Juvenile records to individuals who have requested a CACI review hearing arising out of child abuse investigations, pursuant to Welfare and Institutions Code Section 300 (hereinafter "WIC 300") and resulting in a Penal Code Section 11169 CACI report to the Department of Justice (hereinafter "DOJ").

Response:

Thank you for your comment. It is true that Welfare and Institutions Code (WIC) section 827 does not provide clear authority for counties to release case file records to *Gomez* complainants. It is also true, however, that PC section 11167.5 clearly permits a county welfare department to disclose "reports of child abuse or neglect and information contained therein" to "persons who have been identified by the Department of Justice as listed in the Child Abuse Central Index . . ." (WIC section 11167.5(11)). The CDSS believes this statute authorizes the county to provide the *Gomez* complainant with the records in question here. The CDSS also recognizes, however, that not all county counsel concur with this view, and that their position is not unreasonable, particularly in light of the potential liability that exists for unauthorized disclosure of confidential information by a county. The CDSS agrees with the commenter that that WIC section 827 does not adequately address the issue of disclosure of confidential information.

For counties that maintain that PC section 11167.5 does not provide necessary authority to release the relevant records to the *Gomez* complainant, the *Gomez* grievance hearing procedures provide for the authority of the grievance officer to grant continuances in the proceeding for cause. The CDSS believes that granting continuances for the purpose of obtaining court permission to release relevant child abuse investigative documents is well within the scope of the hearing officer's authority.

9. Comment:

2. The attorney or other representative selected by a claimant requesting a CACI review hearing, in most cases, will not be the identified attorneys or legal staff designated for release or inspection of the juvenile case file records pursuant to WIC 827 (a)(1)(B)(E)(F) or (J),(a)(3) and (a)(4). Thus, even when a claimant is designated as a person able to obtain or inspect records under WIC 827, the agency will not, or claimant may not, be authorized to disseminate the confidential juvenile records to their selected attorney or other representative as they fail to meet the WIC 827 criteria. Therefore, the proposed regulations should be amended to clarify and provide guidance regarding how to release confidential Juvenile records under WIC 827 to selected attorneys or other representatives not identified by WIC 827. Further, the proposed regulations should delineate the duty each party will have to seek release of records by WIC 827 petition under specified circumstances. Based on the above, Los Angeles County would request clarification or CDSS consider requesting a legislative modification of WIC 827 to include release of juvenile records to a claimants' attorney or other representative, where a claimant has requested a CACI review hearing arising out of a child abuse investigation pursuant to WIC 300, and resulting in a Penal Code Section 11169 CACI report to the DOJ.

Response:

Thank you for your comment. Neither PC section 11167.5 nor WIC section 827 give clear legal authority to provide a *Gomez* complainant's representative with relevant child abuse records. The CDSS agrees with the commenter that WIC section 827 does not adequately address this issue. However, these regulations are required under the terms of the *Gomez v. Saenz* lawsuit settlement agreement. Further, the CDSS believes that their provision is necessary to permit fair and thorough review of the issues in the grievance hearing.

The CDSS recognizes that the proposed regulations may unfairly limit either party's access to important documents and evidence in the matter. Under the proposed rules, exculpatory evidence that is in the possession of the county may not be revealed to the complainant if the county does not intend to introduce that evidence at the grievance hearing. In order to correct this problem, the CDSS has modified sections 31-021.62 and .621 to provide that the complainant may examine all records and evidence related to the counties' investigative findings associated with the original referral that prompted the CACI listing, except for documents or other records that are otherwise made confidential by law. The CDSS believes this change is consistent with the terms and intent of the *Gomez v. Saenz* lawsuit settlement agreement.

10. Comment:

3. The 60-day time period is not an adequate amount of time to complete the CACI review process. Los Angeles County would request a 180-day period to accommodate the delays and continuances which have arisen during the CACI hearing process, which may not have been contemplated by the proposed regulations. Los Angeles County is experiencing a three to four- month wait to obtain a release of confidential records for those claimants not identified by WIC 827. If the claimant is identified

under WIC 827, a four to five-week period is required to allow for compilation of the records from the field office, legal review and redaction of protected information, provision of copies, if allowed, and/or scheduling inspection 10 days prior to hearing. The 60-day period does not allow enough time to accommodate attorney calendar conflicts where the attorney for claimant, county, and/or advise counsel for the Grievance Review Officer have pre-scheduled Superior Court appearances which take precedence over administrative reviews. Last, additional delays such as illness of the claimant, transportation issues on the date of hearing, and other legitimate circumstances have resulted in delays consistently exceeding the 60-day period.

In attempts to meet the shortened period, Los Angeles County has been required to reschedule matters multiple times, incur additional costs for multiple notice mailings, added phone calls, and obtain manpower to assist and verify attempts to meet the 60-day period. The additional period of 180 days would allow for reasonable determination for date of hearing to assure release of records, accommodation of attorneys and other delays. This, in turn, will result in lowered cost and reduction in manpower due to fewer continuances, mailings, phone calls, and/or need for time waivers to verify a county's attempt to meet the 60-day period. It will also assure due process as contemplated by the proposed regulations.

Response:

Thank you for your comment. The *Gomez v. Saenz* lawsuit settlement agreement and section 31-021.43 of the proposed regulations authorizes the grievance review officer to grant continuances for cause to the claimant and/or the county. One possible reason for a continuance is the need to file a WIC section 827 petition for the purposes of authorizing the release of confidential information. In addition, the CDSS takes note of the fact that this is a post-deprivation hearing, and the commenter's proposed 180 day additional hearing period in all cases would unreasonably delay a complainant's ability to obtain timely due process.

11. Comment:

4. Proposed MPP 31-021.6.64 and Grievance Procedures for Challenging Reference to the Child Abuse Central Index (hereinafter "State Form 833") section (4)(D) states, "information disclosed at the grievance hearing may not be used for any other purpose". The proposed regulation conflicts with mandatory reporting statutes pursuant to California Penal Code Section 11166, which require mandated reporters, identifying social workers under Penal Code Section 11165.7(a)(15) to report victims of abuse or neglect when that information is disclosed during a CACI review hearing, either from a claimant, witness, or representative. Further, the proposed regulation MPP 31-021.67 and .671 requiring "the county employee(s) who conducted the investigation ... *shall be present.*" has resulted in conflicts with social worker's employment/union rights under *Weingarten* (See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260; 88 LRRM 2689 (U.S. Sup. Ct. 1975)). Social workers have claimed the process is also an "investigatory interview" regarding employment performance. Although a county welfare department can argue this is not "an investigatory interview." it is solely based on the employee's perception. To act contrary to the employee's assertion will require a county welfare department to risk committing an unfair labor practice by denying a

steward. Last, the right to a union steward conflicts with proposed regulations MPP 31-021.63 and .64, when the claimant refuses to waive the stewards presence during the hearing.

Response:

Thank you for your comment. The CDSS agrees with the commenter that the proposed regulations must not interfere with statutorily imposed disclosure requirements, including mandated reporting under PC section 11166. Accordingly, changes have been made to the regulations and to the forms associated with Grievance Procedures for Challenging Reference to the Child Abuse Central Index (SOC 833) to incorporate clarification that information disclosed at the grievance hearing may be used for other purposes if required by law. The CDSS believes these changes are consistent with the provisions and intent of the *Gomez v. Saenz* lawsuit settlement agreement.

Additionally, the CDSS disagrees that the social worker's participation in the grievance hearing conflicts with normal work requirements. This duty of presenting information regarding an emergency response assessment for the purposes of a determination of "unfounded," "inconclusive," or "substantiated" is approved by a social worker's supervisor and would be similar to a social worker giving testimony and/or providing a recommendation to the court regarding an adjudicated juvenile case. When a social worker, on behalf of the Child Welfare Services (CWS) agency, makes a recommendation or gives testimony to the court, even if the court overrules the recommendation, it does not result in an "investigatory interview" regarding the employee's performance. The CDSS feels that this is insufficient reason to deny an individual due process as required by the *Gomez v. Saenz* lawsuit settlement agreement.

12. Comment:

5. State Form 833; fails to provide notice to the identified claimant of the right to seek a CACI review hearing within 30 days of a judicial determination. Although direction is set forth in proposed regulation MPP 31-021.3.311, the State Form 833 will be the only notice of procedures sent to the identified claimant. A failure to provide direction in the State Form 833 has the potential to give rise to a claim of failed due process, under these circumstances.

Response:

Thank you for your comment. The CDSS agrees and has amended the SOC 833 form to provide clarification. The form was changed to include the information found in MPP 31-021.311 of the regulations, which instructs a claimant on how to file a grievance hearing once a court of competent jurisdiction has rendered a decision in their favor.

13. Comment:

6. State Form 833 provides for both the recommended decision and the Director's decision to be sent to the aggrieved party, their representative and CDSS. However, the

proposed regulation is inconsistent with the State Form 833 Procedures (5)(a) which requires both the recommended decision and the Director's decision to issue.

Response:

Thank you for your comment. The CDSS agrees and changes were made to the regulations and the SOC 833 form for clarification. MPP 31-021.84 has been changed from "a copy of the decision shall be sent to the following:" to "A copy of the recommended and final decision shall be sent to the following." The SOC 833 was also changed to mirror the revised language in MPP 31-021.84.

14. Comment:

B. ARGUMENTS IN SUPPORT OF STATEMENTS

Statement 1: CACI perpetrator is not a designated WIC 827(a) recipient of Juvenile Records which negatively impacts due process rights and disclosure of evidence.

The proposed regulations require parties, 10 days prior to the hearing, to exchange witness lists and review evidence the parties intend to rely on at time of hearing, *not otherwise confidential*. Further, the proposed regulations and State Form 833 require the claimant be allowed to inspect the documents the county intends to rely on, *to the extent permitted by law* (See MPP 31-21.6.62 and 621 and State Form 833(4)(c)). However, neither the proposed regulations nor State Form 833 provide guidance regarding how to seek release of confidential records or the circumstances which give rise to a county welfare agency or claimant's duty to seek release to access records which are confidential juvenile case records.

A county social worker will rely on records generated in response to a suspected child abuse emergency referral, pursuant to California Welfare and Institutions Code Section 300 (hereinafter referred to as "WIC 300"). The social worker's additional case notes and other documents will be placed into a "juvenile case file." These documents will be within the jurisdiction of the juvenile court to release, and considered confidential documents under WIC 827, whether a matter has a filed petition or not (See *Elijah S.* (2005 Cal App 1st Dist) 125 Cal. App. 4th 1532; 24 Cal Rptr. 3d 16 and *Claudia S.* 131 Cal. App. 4th 236; see *Claudia S.* 131 Cal.App. 4th 236; 31 Cal Rptr. 3d 697.)

If the claimant is a girlfriend, boyfriend, a relative, step-parent, family friend, prior foster family provider or other person, *which is often the case*, they will not be identified for review or release of confidential records under WIC 827. Disclosure and/or dissemination will be prohibited until a court order is obtained in accordance with WIC 827(a)(1)(P), (a)(3) and (a)(4), by way of petition to the Juvenile Court.

Further, proposed regulation MPP 31-021.6.62 states, "(t)he county, complainant, and his or her representative, if any, shall be permitted to examine all documents and relevant evidence that is *not otherwise made confidential by law*, which the opposing party intends to introduce at the grievance hearing." Proposed regulation MPP 31-021.6.621 states, "(t)he county and the complainant shall make available for inspection

documents and other evidence they intend to rely upon, *to the extent permitted by law*". The language of the regulations are vague and unclear. Do these regulations create a duty for a county social worker to identify records relied on by the social worker, identify to the complaining party that they are confidential and then, inform complainant to seek disclosure pursuant to a WIC 827 petition to the Juvenile Court? Or, do these regulations indicate the county social worker should take action to release the documents they relied on for the report to CACI and, as the law permits a petition and order pursuant to WIC 827, the county social worker is required to file a petition to "make documents relied on available" to the complaining party?

*As an intentional violation of the confidential provisions of WIC 827 carries a punishment of a misdemeanor finding and fine of five hundred dollars (\$500.00), the proposed regulations and State Form 833 should contain guidance on how to access confidential juvenile records for dissemination under WIC 827, delineate the duties of each party, and state the circumstances giving rise to each party's duty to seek release. A clarification will avoid failure to disclose documentation, confusion of the parties to seek release of records and hearing delays. Also, by clarifying the duties and obligations under WIC 827, the claimant will be provided timely and full disclosure of evidence, avoid duplication of information at time of hearing, and provide the claimant with insight into the type of information which may not have been previously considered in *the* county decision to rereport. Last, the clarification will avoid the illegal dissemination of confidential juvenile records contained in a juvenile file under WIC 827 and assure the due process contemplated by the *Gomez Saenz* lawsuit and proposed regulations.*

Los Angeles County would request that CDSS consider requesting a legislative modification of the listed persons designated for review and receipt of records pursuant to WIC 827. WIC 827 could be modified to include claimants referred to the CACI by report pursuant to Penal Code Section 11169 et., seq. and their attorney or other representative. The inclusion of these individuals would be limited to circumstances where a CACI review hearing has been requested, delineate the claimant's right of inspection and/or to receive copies of confidential juvenile records, and restrict release of records to those relied on by the county welfare department to issue a CACI report.

Response:

Thank you for your comment. Please refer to the CDSS' response to Comment No. 8.

15. Comment:

Statement 2: The attorney or other representative for the claimant will generally not meet the definition of the designated attorney/legal staff for release or inspection of the Juvenile Records under WIC 827.

The proposed regulation MPP 31-021.42 allows for representation of the aggrieved party by "*an attorney or other representative*". However, a case filed with CACI may not require a filed petition under WIC 300. Thus, generally the attorney for claimant will not be "an attorney for the party who is actively participating in the criminal or juvenile proceedings involving the minor" (See WIC 827(a)(1)(E)). Even when a

petition is filed, the attorney for claimant generally is not one of the attorneys "actively participating" in the proceedings. In the majority of cases handled in Los Angeles County, the attorney or other representative does not meet the definitions of other attorneys or legal staff, as set forth in WIC 827(a)(1)(B)(E)(F) or (J)

WIC 827(a)(3) and (4) precludes access and dissemination of the records by an agency to persons not otherwise identified by WIC 827 and/or to those persons not entitled to access under other State law or Federal law or regulations. Persons not entitled to access must seek a court order by filing a petition with the Juvenile Court and request release and/or dissemination. When a claimant's selected attorney or other representative is not authorized to receive these documents, the county agency will not be permitted to disseminate confidential records to persons not designated by WIC 827 (See WIC 827(a)(1)(3) & (4)), despite a written authorization from claimant. Further, it remains questionable whether a claimant, if they are a parent or guardian and are sent the confidential records by the county agency, will be at liberty to share the documents with the selected attorney or other representative pursuant to WIC 827.

An intentional violation of the confidentiality provisions of WIC 827 carry a punishment of a misdemeanor finding and fine of five hundred dollars (\$500.00). Both the proposed regulations and State Form 833 should contain guidance on how to access confidential juvenile records and delineate the duties and/or obligations of each party, including a WIC 827 petition, to allow dissemination to the individual and/or their attorney or other representative. Because neither party is directed to obtain a release of records, especially regarding the claimant's attorney or representative, often the CACI review hearing must be continued. By clarifying the duties and obligations under WIC 827, counties will avoid confusion of the parties, non-disclosure, and hearing delays. Further, clarification will result in timely and full disclosure of evidence/documents, assure due process to the claimant, and avoid probable illegal dissemination of confidential juvenile records pursuant to WIC 827.

Los Angeles County would request consideration be given to legislative modification of the listed persons designated for review and receipt of records, pursuant to WIC 827. WIC 827 could be modified to include claimants reported to the CACI, pursuant to Penal Code Section 11169 et seq., and their attorney or other representative, when a CACI review hearing has been requested. The modification could include limiting language which restricts review to those records relied by a social worker for purpose of reporting to CACI.

Response:

Thank you for your comment. Please refer to the CDSS' response to Comment No. 9.

16. Comment:

Statement 3: The time period of 60 days to complete the CACI Review Hearing is not adequate and should be increased to 180 days.

The 60-day period to complete the CACI review hearing has failed to be an adequate amount of time as it did not consider delays, including, but not limited to, WIC 827

release of records, scheduling of attorney calendars, delays for illness, transportation and other causes. The WIC 827 requirement to release Juvenile Records by way of order, either to a claimant who is not designated by WIC 827(a)(1) and/or legal counselor other representative not designated by WIC 827(a)(1), result, in continuances and extensive delay. Often, the parties to the review process are unclear on who should be seeking the release and the initial hearing must be continued to allow for filing of a petition. Once a petition issues, the delay can extend the hearing three to four months, as Los Angeles County has experienced a heavy volume of records request for CACI and other matters. Even when a claimant is a designated individual under WIC 827, four to five weeks is required to compile the documents from the field office, legal review and redaction is required, provision of copies, if allowed, and if inspection only is allowed, time to set the matter 10 days prior to the hearing date. The 60-day period to complete CACI review hearings, including review of the information 10 days prior to hearing, when WIC 827 requirements and legal preparation of the documentation necessary, is not adequate.

Further, delays have occurred due to scheduling difficulties when the claimant is represented by an attorney and the county is represented by counsel. Both attorneys will present requested delays exceeding the 10 day period, due to prior calendared Superior Court hearings. If the claimant also experiences illness or transportation problems on the date of the hearing, additional delay and rescheduling has been required. These additional causes of delay, along with records requested under WIC 827, have resulted in additional cost and manpower to Los Angeles County, requiring clerical staff to verify information regarding methods to obtain release of records, telephoning claimants and attorneys for scheduling purposes, multiple continuances of hearings with written notice, and written time waivers for hearings which will not meet the 60-day period.

Los Angeles County requests the proposed regulations be increased to allow 180 days for completion of a CACI review hearings. This time period would allow for a County to determine the need for confidential records release under WIC 827 and set an initial date for hearing which would accommodate the release of records. Further, the additional time will assure calendar accommodations for all attorneys involved, avoid the need for multiple continuances and notices, and avoid having to provide time waivers when the 60-day period can not be met. In turn, the added cost incurred and need for additional manpower will be substantially reduced as the need for additional telephone calls to reschedule dates, multiple notice mailings, request for time waivers verifying the county's attempts to set hearings in 60-day period will be substantially reduced, if not eliminated. Last, the additional time will assure the complainant is provided all due process required in a timely manner, including the allowance of time to review all records requested by the court and relied on for CACI reporting purposes.

Response:

Thank you for your comment. Please refer to the CDSS' response to Comment No. 10.

17. Comment:

Statement 4: Clarification MPP 31-021.6.64 and the State Form 833 (4)(d) regarding limitation of use of CACI hearing information

The proposed regulation MPP 31-021.6.64 and State Form 833 provides, "(t)he information disclosed at the grievance hearing may not be used for any other purpose". This statement requires further clarification as it raises questions and conflict with a mandated reporter's duty to report suspected child abuse or neglect pursuant to Penal Code Section 11166. This conflict has arisen where, during a CACI review hearing process, a participant at a grievance hearing provides statements which create reason to believe a child's safety risk for abuse or neglect may exist. Is the grievance officer, generally a social worker mandated by law or the social worker present to testify, prohibited from utilizing this information obtained during a CACI hearing to report for investigation? This type of disclosure can occur whether that person is the claimant, a representative, or a witness at the CACI review hearing.

The proposed regulation MPP 31-021.6.67 requires that the county employee(s) who conducted the investigation that is the subject of the grievance hearing, "shall be present". Los Angeles County has experienced, at the time of a CACI review hearing, the social worker determining they have reason to believe the grievance hearing may also be an "investigatory interview" regarding work performance, as identified in *NLRB v. J Weingarten, Inc.*, 420 U.S 251, 260, 88 LRRM 2689 (U.S. Sup Ct. 1975). Under *Weingarten*, the worker is allowed to have a steward present or determine not to provide statements, if the employee reasonably believes the meeting is an investigatory interview. The denial of the employer to allow a request for union representation and continued requirement to answer questions, can be found to result in an unfair labor practice. However, the right to have a steward present will be in conflict with the claimant's right to confidentiality, the limitation on persons allowed to be present during testimony, and right to have the reporting social worker present, if the claimant will not agree to allow the steward to remain present (MPP 31-021.67 and .671). Further, Los Angeles County social workers' union representatives have requested a guarantee from the County that the language, "information disclosed at the grievance hearing may not be used for any other purpose (MPP 31-021.6.64)" means the information will not be used for employment purposes.

Based on the conflicts which have arisen during the *CACI* review hearing process, Los Angeles County would request clarification of the statement "information disclosed at the grievance hearing may not be used for any other purpose (MPP 31-021.6.64)" and whether it represents an absolute bar to the use of information or is subject to limitations. If subject to limitation, what type of limitation is contemplated by *CDSS*?

Response:

Thank you for your comment. Please refer to the *CDSS*' response to Comment No. 11.

18. Comment:

Statement 5: State Form 833 fails to advise of the 30-day period to file for CACI Review Hearing after a determination made by a court of competent jurisdiction.

State Form 833 advises complainant of the following "no hearing shall be required when a court of competent jurisdiction hears the matter". However, the form fails to include the advisement that a complainant may seek a CACI review hearing, within 30 days of a judicial determination as set forth in proposed MPP 31-021.3.311. Failure to modify State Form 833, gives rise to a potential failure of notice and due process claim, as this form is the only notice a claimant will receive.

Response:

Thank you for your comment. Please refer to the CDSS' response to Comment No. 12.

19. Comment:

Statement 6: State Form 833 indicates that both the recommended decision and the Director's decision be sent to the aggrieved party, their representative and CDSS. However, the proposed regulation is inconsistent with the State Form 833(5)(c).

Although the regulations describe preparation of the recommended decision and the Director's decision, the proposed regulation MPP 31-021.8.82 through 84 only state "a copy of the decision shall be sent to the following...". Los Angeles County contemplates that the State MPP intends the Director's decision only but, in light of the State Form 833 advising both reports are to be sent, clarification would assist. Further, if the State regulation will now only require the Director's final decision, the State Form 833 Procedure (5)(c) should be modified to assure the claimant is advised they will receive only the Director's decision rather than both the recommended decision and Director's decision.

Response:

Thank you for your comment. Please refer to the CDSS' response to Comment No. 13.

20. Comment:

C. CONCLUSION

Based on the forgoing, Los Angeles County believes necessary changes are required:

1. Regulations need to outline duties of the parties under WIC 827 or changes to WIC 827 be considered to allow proper inspection and/or release and dissemination of confidential juvenile records/information to complainants and their designated attorney or other representative (See Statement & Argument 1 and 2 above).

2. The time period for such hearings should be increased to 180 days to allow for release of records, avoid continuances, time waivers, and scheduling issues which have resulted in added manpower and expenses resulting from the minimal time frame of 60 days (See Statement & Argument 3 above).

3. Los Angeles County requests clarification on the use of information, arising during the hearing or as a result of the hearing, which conflict with mandatory reporting requirements and social worker labor union rights (See Statement & Argument 4 above).

4. Last, changes to the State Form 833, including the 30-day notice period after judicial determination and delineation of which report or reports are to be provided to the claimant and the CDSS should issue to provide consistency between the proposed regulations and State Form 833, assuring proper notice/due process is provided (See Statement and Argument 5 and 6 above)..

Response:

Thank you for your comment. Please refer to the CDSS' responses to Comment Nos. 8 through 13.

(Continued)

- Esther G. Boynton, Attorney at Law, San Diego, CA (Comment Nos. 21-23)

21. Comment:

Dear Mr. Jennings:

I am submitting this letter and attachments ("Opposition") to oppose the proposed changes to Division 31 of the California Department of Social Services ("DSS") Manual of Policies and Procedures ("Manual"), delineated in and/or designated as ORD No. 0508-03 ("Proposals").¹ The Proposals relate to the entry, classification and maintenance of information in the Child Abuse Central Index ("Index"), administered by the California Department of Justice ("DOJ") under the Child Abuse and Neglect Reporting Act ("CANRA"), Penal Code § 11164 et seq.

I am informed that the Proposals are currently being implemented on an "emergency basis," as stated in the Finding of Emergency ("Finding") posted among the "Public Hearing Documents" on the Proposals Website. The Finding purports to describe (at page 1) the decision of the United States Court of Appeals, Ninth Circuit in "the matter of *Humphries v. County of Los Angeles*."² I have been the plaintiffs' sole attorney throughout that litigation, both in the trial court and in the Ninth Circuit.

FOOTNOTES

¹ I obtained the Proposals from a DSS website: <http://www.dss.cahwnet.gov/ord/Division%2031%20Grievance%20Review%20Procedures.htm> ("Proposals Website"). In addition to the Finding, this letter refers to other "Public Hearing Documents" posted on the Proposals Website, including the "Public Notice," the "Initial Statement of Reasons" and the "Regulations Text."

² The Ninth Circuit's final decision, issued January 30, 2009, is published at *Humphries v. County of Los Angeles*, 554 F.3d 1170 (9th Cir. 2009).

END FOOTNOTES

(Continued)

This Opposition is made on grounds that (a) DSS lacks authority to make the proposed regulations and/or Manual changes; (b) the cited "references" do not justify or support the Proposals; (c) the Proposals are inconsistent with and would violate constitutional, statutory and regulatory law, including but not limited to the U.S. Constitution, CANRA and DOJ's Index regulations; (d) the Proposals lack clarity and are misleading; and (e) there is no valid necessity for the proposed regulations and/or Manual changes. These grounds are further discussed below in relationship to particular sections or elements of the Proposals.

1. The Proposals Exceed DSS's Rulemaking Authority.

In the Regulations Text ("RT"), DSS cites Welfare and Institutions Code sections 10553 and 10554 as authority for all the Proposals (RT, pp. 1, 7, 9, 12) and Welfare and Institutions Code section 10850.4 as further authority for proposed Chapter 31-000, Section 31-003 (RT, p. 1).³

In addition to the Welfare and Institutions Code sections cited above, the Finding states that DSS "adopts these regulations under the authority granted in ... *Gomez v. Saenz* Settlement Agreement and Court Order, Case No: BC284896, and *Nicholas v. CDSS and Marin County*. Case No.CIV092626." (Finding, p. 3.) Similarly, the Initial Statement of Reasons states (at pp. 1, 2, 3, 4, 5 and 7) that "[t]he authority to adopt amended regulations can be found in Welfare and Institutions Code sections 10553 and 10554 as well as the stipulations outlined in the *Gomez v. Saenz* lawsuit settlement."

DSS's reliance on *Gomez*, *Nicholas* or any other judicial case as "authority" for the Proposals is wholly misplaced, because courts cannot grant an administrative agency any rulemaking authority. Rather,

"[a]dministrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void. [Citations.]

FOOTNOTES

³ DSS also cites "Assembly Bill 1695, Section 21" as authority for proposed Chapter 31-400, section 31-410 (RT, p. 9); however, I have been unable to locate any "Assembly Bill 1695" relevant to the Proposals.

END FOOTNOTES

(Continued)

To be valid, administrative action must be within the scope of authority conferred by the enabling statutes."

(*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872-873 (emphasis added); see Govt.Code §§ 11342.1, 11342.2).

The Legislature has expressly authorized *DOJ*, not *DSS*, to "adopt rules governing recordkeeping and reporting pursuant to [CANRA]." (Penal Code § 11170(a)(1); see *id.*, § 11164(a).) Further, CANRA mandates that forms for reporting information to the Index and for notifying "known or suspected child abusers" that they have been reported to the Index must be "approved by" *DOJ*.⁴ (*Id.*, §§ 11169(a),(b).) These statutory provisions reflect the fact that *DOJ*, not *DSS*, implements the Penal Code, including CANRA, and administers the Index. Moreover, the Legislature could not have intended to give *DSS*, as well as *DOJ*, authority to make regulations concerning the maintenance of Index listings, because such duplication of rulemaking power could lead to *conflicting* regulations.⁵

Moreover, none of the three Welfare and Institutions Code sections cited in the Public Hearing Documents grants *DSS* authority to make the regulations and/or Manual changes it now proposes. (1) Welfare and Institutions Code section 10553(e) generally authorizes *DSS* to adopt "regulations ... affecting the purposes, responsibilities, and jurisdiction of [DSS] which are consistent with law and

FOOTNOTES

⁴ *DSS* has usurped *DOJ*'s authority by issuing form SOC 832 (Rev. 5/08), entitled "Notice of Child Abuse Central Index Listing." (See RT, p. 1.) Although *DSS* presents this form as a "proposed regulatory action" (Public Notice, p. 1), the designation "Rev. 5/08" indicates that *DSS* first issued this form nearly two years ago (in May 2008) for use by county welfare agencies.

⁵ Indeed, the Proposals conflict with *DOJ*'s Index regulations. For example, *DOJ*'s regulation states that "[w]hen an agency conducting an abuse or neglect investigation determines that the allegations of abuse or severe neglect are not unfounded as defined by CANRA, the agency must submit a report in writing to the *DOJ*, indicating whether the agency finding is inconclusive or substantiated as these terms are defined by CANRA." (Title 11, Cal. Code Regs. § 900, amended as of 1/5/2010.) In contrast, the Proposals ignore CANRA's definition of an "unfounded report," set forth at Penal Code section 11165.12(a). See pp. 4-5, *infra*.

END FOOTNOTES

(Continued)

necessary for the administration of public social services...." But the administration of the Index is *not* within DSS's "purposes, responsibilities, and jurisdiction." *DOJ* maintains the Index. (2) Welfare and Institutions Code section 10554 states that DSS "shall adopt regulations ... to implement, interpret, or make specific the law enforced by" DSS. But the Penal Code in general and CANRA in particular are enforced by DOJ, *not* DSS. (3) Welfare and Institutions Code section 10850.4 is simply irrelevant. It grants rulemaking authority *not* with regard to the Index, but concerning a county's release of juvenile case file information, upon request, following a child fatality.

Finally, **even if these statutes are read to authorize to DSS to make the proposed regulations or Manual changes, this delegation of power would be void because the Welfare and Institutions Code does not set any standards for providing "due process" to Index-listed individuals (as the Proposals purport to do).** The Legislature cannot grant administrative agencies uncontrolled discretion to create laws or regulations.

Response:

Thank you for your comment. California statute and regulations impose duties on counties to conduct child abuse and/or neglect investigations. In addition, counties are required under PC section 11169 to submit an individual's name to the CACI, maintained by DOJ, when it is determined by a CWS agency that an allegation is found to be substantiated or inconclusive (except in general neglect cases) as part of the overall administration of CWS programs. Courts have determined (*Burt v. County of Orange*; *Gomez v. Saenz*) that due process is required for individuals whose names are submitted to the CACI. The CDSS is required to conform to rulings set forth in applicable case law; the *Gomez v. Saenz* lawsuit settlement agreement required the promulgation of regulations specific to CACI grievance procedures.

The CDSS does not administer the CACI. County child welfare agencies submit names to the DOJ, the agency responsible for the administration of the CACI.

Regulations are developed consistent with the administration of the program, and the trigger for regulations development can be statute or court decisions. If a court order imposed upon the CDSS a requirement to promulgate regulations, the Department must comply. If the CDSS failed to comply with a valid court order, it could be found in contempt of the court order.

22. Comment:

2. The Proposals Are Inconsistent With And Would Violate Statutory and Constitutional Law, and Are Not Justified by the "References."

A. CANRA

DSS's proposed forms and "grievance procedures" misstate and conflict with CANRA's mandatory standards for the entry and retention of information in the Index. The Proposals would impose *different* standards and would negate even the minimum safeguards that CANRA offers against the Index-listing of unfounded reports.

For example, contrary to proposed Section 31-501.4, Penal Code section 11169 does *not* require that an agency report a person for Index-listing when the agency has "completed an investigation of child abuse or neglect and determined that the allegations of abuse or neglect are either inconclusive or substantiated as defined in Penal Code section 11165.2 [sic]." (RT, p, 10; see also proposed form SOC 832(5/08).) Indeed, **Penal Code section 11169** (cited as a "reference" for this proposal) **does not even mention the terms "substantiated" or "inconclusive."** Rather, Penal Code section 11169 requires that an agency send to DOJ

"a report in writing of every case it investigates of known or suspected child abuse or severe neglect which is determined not to be unfounded, other than cases coming within subdivision (b) of Section 11165.2. An agency shall not forward a report to the Department of Justice unless it has conducted an active investigation and determined that the report is not unfounded, as defined in Section 11165.12."

In turn, Penal Code section 11165.12(a) defines an "unfounded report" as

"a report that is determined by the investigator who conducted the investigation [1] to be false, [2] to be inherently improbable, [3] to involve an accidental injury, or [4] not to constitute child abuse or neglect. ..."

Consistent with these mandates, CANRA provides that the type of report *required by Penal Code section 11169(a)* - **i.e.**, a report submitted for entry in the Index after an agency has conducted an active investigation and determined the report is **not "unfounded"** - "be in a form approved by" DOJ. (Pen. Code § 11169(a).)

The Proposals disregard, and effectively negate, CANRA's express *prohibition* against the submission of a report to the Index unless the submitting agency has conducted an "active investigation" and the investigator has *affirmatively determined* that the report is "not unfounded" under CANRA's four-part test.

Response:

Thank you for your comment. Concerning the statements regarding the "not unfounded" issue, the CDSS has determined that the investigative dispositions of "unfounded," "inconclusive," and "substantiated" represent the universe of possible investigative findings, and that "not unfounded" is the functional equivalent of an "inconclusive" and "substantiated" finding. The commenter has not provided an example of an investigative finding that triggers the duty to refer the individual's name to DOJ for listing on CACI under the "not unfounded" standard that would not be subject to referral under the inconclusive or substantiated finding standard. The CDSS is unable to conceive of such an example. The CDSS believes that the regulations are more clear and understandable to those responsible for compliance with these rules if the finding which triggers the duty for referral of an individual's name for listing on CACI is described in the affirmative rather than in the double negative. Accordingly, the CDSS believes that describing the trigger for referring an individual's name to DOJ for listing on CACI as "inconclusive or substantiated" is a clear and more readily understandable description than "not unfounded." In addition, the counties are

required under PC section 11169(a) to use a DOJ adopted form, currently the BCIA 8583. The only possible determinations listed on the BCIA 8583 for referrals for allegations of child abuse or severe neglect which are “not unfounded” are “inconclusive” and “substantiated.” In an effort to enact regulations that more closely mirror the statute, the word “actively” was added to section 31-501.4.

To clarify that county child welfare agencies should not be submitting unfounded reports to the Child Abuse Central Index, a section was added, Section 31-501.42, that addresses this point and states, “[t]he county shall not submit a report to the DOJ for referrals it investigates and that are determined to be unfounded.”

See also response to Comment No. 6.

23. Comment

B. Procedural Due Process and Equal Protection of Law Under the Fourteenth Amendment of the U.S. Constitution⁶

In *Humphries*, the Ninth Circuit held *inter* that

"California's maintenance of [the Child Abuse Central Index ("CACI" or "Index")] violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them."

FOOTNOTES

⁶ The Fourteenth Amendment, in pertinent part, prohibits a state from depriving "any person of life, liberty, or property, without due process of law" and from denying "any person within its jurisdiction the equal protection of the laws."

END FOOTNOTES

(Continued)

(554 F.3d at 1176) (emphasis added). The Court

evaluate[d] the process that California provides persons listed on the [Index] under the three part test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *Mathews* instructs us to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. *Id.* The procedural due process inquiry is made "case-by-case based on the total circumstances" *California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 711 (9th Cir.2003).

(554 F.3d at 1193.) The Ninth Circuit found that the Index affects an individual's constitutionally protected "stigma plus" liberty interest, in part because California law requires that certain agencies consult the Index and conduct an additional investigation of Index-listed individuals prior to granting those individuals certain jobs, licenses or registration in Trustline; and this stigma plus liberty interest constituted the particular "private interest" that the Ninth Circuit considered in applying the *Mathews* balancing test.

The Settlement Agreement and Stipulated Judgment in Gomez were entered in the Los Angeles County Superior Court before *Humphries* was decided, and do not justify the "grievance procedures" set forth in the Proposals. First of all, the Gomez settlement and judgment did *not* address or resolve *any* federal due process issue; the plaintiffs sole federal civil rights claim had been dismissed years earlier. Further, the Gomez Settlement Agreement expressly states that DSS's agreement "to adopt" the procedures that are now set forth in the Proposals shall not "be construed to be an admission or concession" by DSS that such procedures "are required to satisfy any state or federal constitutional or legal requirement, including, but not limited to, the requirements of due process...." (See Settlement Agreement and Order, p. 3, at Exhibit A hereto.).

Moreover, the Stipulated Judgment in Gomez states that the "litigation did not involve issues of using [Index] information in the licensing, employment or the Trustline Registry context." (See Stipulated Judgment, p. 3 at Exhibit B hereto.) Those very issues were the focus of the Ninth Circuit's decision in *Humphries* that the Index impinges on "stigma plus" liberty interests, requiring procedural due process under the federal Constitution.

In any event, the "grievance procedures" set forth in the Proposals are unfair and ambiguous on their face. For example, the Proposals do not specify "standards for retaining a name on the [Index] after it has been challenged," 554 F.3d at 1201, and does not afford individuals a right to inspect the entire investigation file compiled against them by a county social services agency. (Compare *Dupuy v. Samuels* (7th Cir. 2005) 397 F.3d 493.)

Finally, the Proposals would violate rights to equal protection of law, because the Proposals would provide "grievance procedures" only to individuals reported to the Index by county social services agencies.

Response:

Thank you for your comment. The CDSS believes that, with the exception of the post-deprivation issue, the regulations are consistent with federal and state due process requirements. It is beyond the scope of the CDSS' authority to make additions or amendments to MPP Division 31 without specific statutory or court ordered requirements.

The CDSS agrees with the commenter that the proposed regulations may unfairly limit either party's access to important documents and evidence in the matter. Under the proposed rules, exculpatory evidence that is in the possession of the county may not be revealed to the complainant if the county does not intend on introducing that evidence at the grievance hearing. In order to correct this problem, the CDSS has modified paragraphs .62 and .621 to provide that the complainant may examine all records and evidence related to the counties' investigative findings associated with the original referral that prompted the CACI listing, except for documents or other records that are otherwise made confidential by law. The CDSS believes this change is consistent with the terms and intent of the *Gomez v. Saenz* lawsuit settlement agreement.

Concerning the commenter's statement about standards for retaining a name on CACI, after it has been challenged, the CDSS believes that the Penal Code describes the only situation where the name can be removed, that is when the investigative finding is determined to be unfounded. Proposed regulations in MPP 31-501.7 and .71 require the county to submit within five working days the information necessary for DOJ to remove the name from CACI if the county changes its investigative findings from inconclusive or substantiated to unfounded.

Concerning the commenter's statement regarding the fact that these grievance procedures apply only to county social service agency referrals, the CDSS believes it lacks the authority to extend these requirements to agencies which are not subject to the oversight and authority of the CDSS.

See also the CDSS' response to Comment No. 6.

- Christopher (last name not provided) submitted the following comments. (Comment Nos. 24-25)

24. Comment:

Dear Sir/Madam:

My name is Christopher and I write you about the so-called "Division 31 Grievance Review Procedure". My name is in the California Child Abuse Central Index (CACI) so I have a stake in the final outcome of this proposal. I have tried to find out any information I could regarding this proposal. It has been difficult. It seems as though private attorneys who have played a part in this whole process of giving rights to people like me are afraid to comment on what is going on. I'm not sure why. Maybe it is just the affliction that affects all attorneys who are asked to comment on any issue they are involved in. They just choose not to comment.

Whatever the reason, it has prevented me from becoming knowledgeable on this subject. As I am sure you are aware, there are many disparate chunks of data that may go into a final result; that being what the rules are for an "administrative hearing" that a government entity provides persons whose names are in the CACI in order to fight that placement. You have the Gomez case, the Burt case, the Humphries case, etc. A lay person has no idea what to make of all these cases and how they relate to each other. Simply, what has been accomplished with all these cases?

Now you have the California Department of Social Services, you, who seems to be going out on its own to make regulations that are being created via one public hearing next month. What is finally decided upon as the procedure for this hearing is important to many people. There are many stakeholders. I think the way the CDSS is going about making its own rules for this hearing does not respect all those stakeholders by giving every stakeholder a fair say in what is finally agreed upon.

Response:

Thank you for your comment. Please refer to the response to Comment No. 23 which discusses the CDSS' authority to implement regulations based on statute and court orders. The proposed regulations for the Division 31 Grievance Review Procedures have been implemented, currently on an emergency basis, as a requirement of the *Gomez v. Saenz* lawsuit settlement agreement. The regulations were written to closely mirror the language jointly agreed upon by the parties in the case. In addition, existing definitions of frequently used terms in the MPP Division 31 were incorporated into the regulations to promote overall consistency in the regulations.

25. Comment:

The end result in the Burt case in Orange County, California seemed to be a worthy procedure. The rights afforded Ms. Burt treated her as a human being and not just someone caught up in government bureaucracy. What I remember about that public document was a relaxed atmosphere in which Ms. Burt had the opportunity to refute charges made against her by government employee(s). No attorneys were allowed in this hearing that allowed her to confront the persons who made the allegations against her and to bring in her own witnesses who might support her side of the story.

With regard to the public hearing happening in January of next year in Sacramento, I want to put in my two cents. I think the public needs to have significant rights when it comes to what it can do to fight inclusion in the CACI. Having one's name placed into the CACI is an irreparable injury if it is an incorrect placement. The judges in the Humphries case point out the significant possibility of error, and therefore, harm. This, I believe, comes from one of the three conclusions that can be arrived at as the result of a child abuse investigation.

The abuse can be described as substantiated, unsubstantiated, or inconclusive. It is this third term that allows for error on the part of the investigating official. Allowing a government official to say he or she doesn't know whether abuse has occurred doesn't require him or her to put his job on the line and risk anything. He or she doesn't risk

anything by coming to this vague conclusion. But when you allow such latitude, it DOES risk the future of the named individual whose life is now negatively affected. This third term needs to be removed from the list of choices.

I want the CDSS to adopt the procedure given to Ms. Burt as the general procedure used for the hearing that is provided to a person who wishes to challenge his/her placement in the CACI. I also want the CDSS to respect the public and prevent a significant possibility of error by removing that third choice from the FORM 8583 that is used to report child abuse to the California DOJ.
Sincerely, Christopher

Response:

Thank you for your comment. As discussed in the response to Comments for Nos. 6, 23 and 24, the CDSS' authority to implement regulations is strictly based on statute and court orders directly affecting the CDSS and CWS agencies. The CDSS has no legal authority to alter the conditions of the *Gomez v. Saenz* lawsuit settlement agreement. In addition, the CDSS was not a party in the *Burt v. The County of Orange* case, therefore, it has no authority to implement any of the provisions ordered in that matter.

Concerning the commenter's statement regarding elimination of the "inconclusive" finding as a basis for a CACI listing, this would require a statutory change, and is beyond the scope of these regulations and authority of the CDSS.

Transcription of Public Hearing Comments

- Karl Nicholas, San Francisco, California, submitted the following oral comments: (Comment No. 27)

27. Comment:

MR. JENNINGS: This public hearing is being held by the Department of Social Services in accordance with the provisions of Government Code Sections 11346.5 and .8.

We gave notice that this hearing would be held on this date, January 13th, 2010 at 10:00 a.m. in the CDSS Office, Building Number 8, 744 P Street, Room 105, Sacramento, California.

My name is Kenneth Jennings, Analyst, Office of Regulations Development, and I will be conducting this hearing.

The purpose of this hearing is to receive testimony concerning the items on the agenda. We will not be responding directly to any questions or comments at today's hearing; however, all testimony received at today's hearing and testimony received through the mail via fax and from e-mail will be fully considered by the Department.

Copies of the proposed regulations are available here. Anyone wishing to testify is asked to complete an interest card indicating he or she wishes to offer testimony. We may impose reasonable limitations on oral presentations.

The Department may modify the regulations after public hearing. If changes are made, the text of any regulation that's modified will be mailed at least 15 days prior to adoption by the Department to all persons who have testified, all who have submitted written comments during the public comment period, including today, and those who have requested notification.

If you are not presenting oral testimony but would like to be notified if the regulations are modified, please fill out an interest card at the registration table.

The following items are on today's public hearing agenda: Item number 1, ORD number 0508-03, Division 31 Grievance Review Procedures. This is the only item.

The first item on today's agenda has been processed by the Director on an emergency basis. Regulations adopted on an emergency basis must meet the test imposed by Section 11346.5 of the Government Code.

Most often, the emergency adoption procedure must be utilized to change regulations in response to a court decision, meet and impose the deadline, or for similar pressing reasons. We are then required to bring such emergency regulations to public hearing within 180 days of the date they are effective and certify to the Secretary of State that the hearing has been held.

With respect to the regulation changes I have just mentioned, we are taking testimony to determine what revisions, if any, should be made to these emergency regulations which have been filed or will be filed soon.

As indicated in the notice of hearing, written versions of your oral testimony are not required but are helpful to us in considering your exact testimony.

As your name is called, please come up front and state your name for the tape to record -- tape recorder. Please speak directly to the issue you are concerned with. If you are -- if you agree with the testimony -- if you agree with earlier testimony, simply state that fact and add any new information you feel is pertinent to the issue.

We have -- we have Karl Nicholas that would like to -- would you like to speak, Karl?

MR. NICHOLAS: Sure. Anyone else want to go first?

MR. JENNINGS: It's -- it's for your testimony.

MR. NICHOLAS: Okay. All right. Did I fill that card out properly?

MR. JENNINGS: Yes.

MR. NICHOLAS: Yeah, okay, good. Well, thank you for calling me up front here.

I am listed on the child abuse central index, and the way I got there was as a -- as a father through -- in the middle of a divorce proceeding. Accusations were made by my -- just to present my point of view, where I'm coming from.

So I'm -- I'm very interested in the grievance procedures because it, in my experience, which was in 2002 which is before any procedures, the -- the experience was -- was very one-sided. In other words, the information came from child services or Child Protect (phonetic) Services, and -- and was not vetted, if you will, or -- or adjudicated -- on the way. And, in other words, I was not given opportunity at that -- that level to really get involved with the situation, which was kind of the way the -- or the law was working at the time.

A little background on -- on the involvement of these regulations with family law. Family code is simply that in such -- in such situations where allegations of -- are made, the court will order an evaluation -- custody and visitation evaluation, and that means that either somebody employed -- somebody that's part of, say, Family Court Services or -- or a private evaluator will interview everybody and make a recommendation to that court. They will also -- and by -- by law, by mandate, review the file -- Child Protective Services' investigation, and so these -- this hearing is important, these regulations for a hearing at that level is important, because this is where information's coming ex parte. They call it "ex parte." From one -- one party without a chance for anybody else to get involved. In other words, that investigator talks to the child, talks to the caretaker, the primary caretaker -- in this case, the mother -- but may not talk to me. And didn't talk to me. And wrote down everything, you know, that was said. Took notes and things, and then gave that to somebody to do an evaluation.

Now, nobody in that process has any experience -- well, nobody in that process has any experience with determining a value of evidence from a -- from a legal point of view. I mean, obviously, that's the reason -- that's the job of the court, but also, nobody -- nobody stops that process before that information goes to the evaluator and says, Okay, have you got everybody? Does anybody else wish to make a comment -- neighbor. Do you want to bring yourself in and put your comments in this information before they go to the evaluation, before they go to that recommendation that goes to the court? The court's very busy, and once that recommendation shows up, you -- you really have to work hard to change that. And for good reason. I mean, that's -- that's the purpose of the recommendation, is go figure it out and let me know, and then we'll talk about it.

So these -- this -- these hearings are -- are not only a chance to review the procedures, you know, which is what it seems -- which is the way they -- of, you know, of the investigation; was the investigation done right? It's not only a chance if somebody -- I think in the case of Gomez, she was a babysitter or something, she had an issue, and she -- she wished to refute that, and -- and that ties into, for example, TrustLine. You know, which is investigations are looked at

through TrustLine applicants which are, effectively, child care providers.

And then, of course, I mean, these -- these hearings are important if issues come up for -- parent. It's a very -- the point I'm trying to make at this point is it's a very wide range of people that get involved when -- very wide range of possibilities. You know, from foster care to volunteering at, I forget, but it's some -- some -- you know, anything with child, juvenile stuff. You know, people stuff. And -- and then, of course, like I said, family law. So these -- these -- the hearings are important to a lot of different people for a lot of different reasons. My -- I've reviewed -- I've reviewed these Gomez regulations and looked them over and the basis of what I'm going to bring up today has to do with administrative -- the quality, if you will, minimum standards for the administrative adjudication -- administrative hearing. And as I've spent a lot of time, a lot of time looking through the laws and regulations pertaining to Social Services, and state departments in general. I've also looked and read very careful the CANRA Task Force Report. Are you familiar with that? It's a report that was done -- it was done by -- for the legislature. The legislature paid for it. We want to know how CANRA's, the Child Abuse Neglect -- is that working out? You know, is there improvements and what sort of suggestions do you need?

All in all, they seemed to think it was going pretty well, and they noted in the report that a lot of the suggestions were not any mechanism for being able to address being placed on the -- on this child abuse list. And to talk about it, you know, procedures for getting off, procedures for -- of course, that's what all these regulations are. One of the big things that came out of the -- that report was there's a need for -- for these hearings. You know, counties are kind of doing things on their own, but there's -- it's not standardized and counties may or may -- and the only way to get a hearing was to go into court and say I have the right, which was very expensive and complicated.

The -- the task force came out and said, Yeah, you need to really standardize these things, you know, and they put that to the legislature, and the legislature put a bill in there, and they said, Okay, we're going to have state level hearings. And that bill made it over to the finance committee who promptly killed it. You know, We're not paying for state-level hearings for this stuff. Forget it; it's way to expensive. And I can understand that.

What the Gomez regulations do is place the burden or the onus to do the hearings on the counties. So fine, you guys did the investigations, you guys conduct the hearings. Pick yourself some member of the staff. You know, send out notice when somebody gets placed on the list, and -- hearing. And that way, it's not -- it's something that needs to be funded at the state level or really done to state standards for formal hearings or -- or -- or informal hearings for that.

With -- however, my concern is that with these regulations come from a state department, and what I like about state-level hearings at the informal level is -- is what's called the Administrative Bill of Rights and -- Administrative Bill of Rights is in this -- this Administrative Procedure Act, and it's -- it's just about seven or eight bulletin points that say, You need to do at least these things. And

I'll -- and I'll summarize for you real quickly to give you a point -- some idea. The first and very important one is a separation of the hearing officer from the people that do the investigation and prosecution and advocacy.

In other words, people that -- that have done the investigation are saying, We're going to put your name on the list. That's their -- their effective prosecuting and their advocacy is then, This is the evidence that the investigator came up with. And that bill of rights says that needs to be separated. You know, there can't -- they can't -- they can't be the same group, can't have communication to each other. That's -- the next part is there's sort of very restrictive requirements on, well, if somebody talks to the -- to the hearing officer, you've got to tell the other person involved. You know, this is what, I wrote him a letter and it said, you know, such and such, and so forth.

These things are important because -- they're important for -- for obvious reasons in just separation of powers. They're important because the way these regulations are now in the Gomez, it's -- it's somebody that's working for the department that's doing the investigation that has to be -- that has to judge that department's investigation. I wouldn't want to do that to my boss. You know, plain -- plain English. You know, my -- I'm sorry, Boss, but I don't think what whoever did over there on the other desk did -- came to the right conclusion here.

So -- so it just puts them in a bad situation. And the hearing's trying to address that -- I mean, the regulations, excuse me, do very much address that. The person has to say that they're impartial, they're not going to be moved, they're not in -- they're not associated with the person that did the investigation and the invest -- the regulations do address that, but I don't think that they -- they can guarantee it, and they can't guarantee it at the level that the Administrative Bill of Rights says. You know, if you get up and say, I don't think that you've done this -- separation, it's -- I don't think that the regulations can really show that that's going to take place.

It's just, if you're part of the same department, you're part of the investigative and advocacy functions.

The other thing about the regulations, it says, either here in person or somebody hired on an ad hoc basis. And the ad hoc basis has actually been shown by California law to -- and the issue is simply that if I call you up and say, Would you come and run this hearing for me, and you say, Yeah, how much. Well, I'll give you \$200.00 or whatever it turns out to be. If that becomes a commonplace occurrence, the -- the issue is that the person will not make negative judgments because they're afraid of not being called again. Well, if you keep shooting down our investigations, we're going to call somebody else who doesn't. And hence, it's a financial conflict, and that's the case of Haas (phonetic), it is. But I -- you know, I think -- so that right there, those regulations have that issue and could be challenged on that issue, and I think that it's -- it's certainly a good idea to take that out, you know, because that challenge would be successful, you know, and who needs it, right?

Then my issue and -- and it's a question that's not easy to resolve. If the state's making the regulations, is -- are these regulations subject to the bill of rights, Administrative Bill of Rights? Counties are not. And it's clear, counties can pretty much do what they want. They have a hearing on where you can park your bicycle or something, they can have an employee from the Department of Bicycle and -- not to make too much light, but there's nothing legally wrong with having a person from that department be the presiding officer, right, but in the -- in state-level hearings, they don't -- we don't do that in California, have the Office of Administrative Hearing, and so hearings go there for the reason of, it's just very difficult to prove that there's a separation if people are -- and so, legally, if the state's promulgating these regulations, are these regulations subject to -- to that -- to that level, that Administrative Bill of Rights, even though the county's implementing them? And -- and that's a question that has been answered very, very briefly by the courts and very briefly by -- by the law, but I don't know the answer, and I believe if -- if the regulations that we -- we put out here in Gomez don't meet those standards, I believe there will be challenges for that.

MR. JENNINGS: So, excuse me, Karl?

MR. NICHOLAS: Sure, yeah. Please.

MR. JENNINGS: In your summary, is that -- that Point 1?

MR. NICHOLAS: That's Point 3, yeah.

MR. JENNINGS: Point 3, okay.

MR. NICHOLAS: Actually, yeah. I'm kind of working my way backwards.

MR. JENNINGS: Okay, great.

MR. NICHOLAS: The ones that are sort of more important --

MR. JENNINGS: Okay.

MR. NICHOLAS: -- and yeah, and that is Point 3. And the Point 3 simply says that -- that the law says anything that's -- that's a joint county and state program or joint agency -- agency, I guess they use the word "agency" -- if it's a joint county and state agency, it's then -- the whole -- anything they do is subject to the state level, goes up to the higher level. And that was -- that was tested in the court in -- in -- for the Department of Pesticide Control -- county, somebody sprayed pesticide and landed on somebody's house, you know, and the county fined the person that did the spraying. The person got upset saying, Well, the hearing wasn't at state level -- hearing requirements. In other words, somebody from the county's department presided over the hearing. And it was exactly this complaint. You know, you did the -- the county did the investigation, the county did the judging, and that's not fair.

And the court agreed, it's not fair, but they -- they fell short saying, Well, what is

it that you didn't get? -- to that, but the case -- the courts did find in that situation that at least the pesticide place was a joint state and county situation. And my question is, is Child and Family Services a joint county and state agency?

And -- and the test of the court was, Does the state direct, supervisor and cooperate and -- the counties? And in the case of the pesticide control, yeah, the state -- you know, you do what our regulations say. If you report back to us on what you're doing, and if we don't like it, we're going to be upset about it. In fact, we will take you out. I'm not -- you know, we will put somebody else in there. And you -- and to be approved as a pesticide officer, you have to -- to meet state standards. So they had a lot to say about it -- mind, that was -- that was significant enough to show that the state and the counties, it was really one agency.

And -- and that's my question here, and my -- my comments here, is that I think that for child/family services, I think the state, I think, gives some 70 percent of the budget, and the state mandates all these -- all these orders, and also the state's providing the forms and the regulations and saying you have to do the hearings.

Now, if -- so that -- that would be my -- my contention. If -- if that's true, if the state -- if the county does have to meet this requirement, then I think the only way the county can meet that requirement is to use a county hearing officer. There's government code that says the county employ a separate county hearing officer if they have to determine issues of fact and if they want to, they can also, they're authorized to contract with the Office of Administrative Hearings. So they can get an administrative law judge there.

Marin County, which is the one I'm involved with, has hearing officers. Certainly L.A. County has a hearing officer. And you might -- some comments about that, too.

That hearing officer already exists, and that hearing officer is the perfect person to do the hearing. It's not part of the Child and Family Services Agency.

MR. JENNINGS: At this point, Karl --

MR. NICHOLAS: Yeah.

MR. JENNINGS: -- do you have the government code cite --

MR. NICHOLAS: It's in the --

MR. JENNINGS: (Inaudible).

MR. NICHOLAS: Yeah, it's in -- I think I cited in my letter, which I didn't bring --

MR. JENNINGS: In your letter?

MR. NICHOLAS: -- myself a copy of.

MR. JENNINGS: Okay, very good.

MR. NICHOLAS: But it's --

MR. JENNINGS: I got it.

MR. NICHOLAS: -- Government Code 2 -- 27720. And that's for counties allowed -- that's for county hearing officers.

MR. JENNINGS: For your reference, here's your letter.

MR. NICHOLAS: Oh, thank you. Yeah, I didn't -- no, right here, 2770, right here, bullet point 2.

And -- and that's where I'm working up to bullet point 2, is that in -- in legal terms, the Department's specifying that you must use -- the county must use a department employee is overbroad. It's -- you're -- you are exceeding your authority, you're stepping on the authority of the county to decide who they want to do the hearing. Definitely I can see the Department's trying to get standard, you know, everybody has to do this and everybody, you know, sort of needs to do it in more or less a consistent fashion and use our forms and things, and that's -- that's great idea. I mean, that's -- that makes sure that everybody's doing it, but I -- but then to take away their right to use a county hearing officer, somebody they're already paying for, is -- is -- legally, it's overbroad. You know, legislature's giving the county the right to determine who they want to run administrative hearings and so your regulations are stepping on that. And that's -- that's the point.

And that's really -- you know, that's really what it -- it comes down to. You know, I see that the -- the hearings are closed and very confidential, and I -- I don't necessarily agree with that, but I'm not making a strong point about it this time. It's -- it's -- I haven't sorted it out in my head, so to speak.

But one of the things that the -- the administrative -- the informal level administrative -- give the state for a hearing is -- is a procedure where a person can ask, Can I subpoena somebody? Or -- and they can also ask, Can I bring this to a formal hearing? And both things, I think, are very important to -- to the wide range of people that could be involved in these hearings. If this -- if this is accusations made against somebody that's running a child daycare center, that's their livelihood. They may well want a formal hearing, and they may well deserve a formal hearing. Something that takes away your livelihood generally gets formal hearings. If a psychologist or somebody is accused of something or the other, license is threatened, they get a formal hearing at the state level because it's their livelihood. Not quite so much to become a childcare center, but you know, nonetheless, it's still a livelihood.

And in -- in a situation of family law where it's not livelihood, I don't think a hearing officer would approve a formal hearing, but other people in other situations may -- may request one and -- and -- well approval, and should have the

right to so, which these -- these regulations don't really give them, as well as, along with the -- the optional thing, besides the bill of rights, is that -- that ability to subpoena. In my situation, I would have very well have liked to go to the hearing and subpoenaed my spouse. You were taking care the child. Let's get you -- let's get both of us in this hearing and let's both of us say what we have to say before this evidence goes to evaluator. It's only fair.

In other words, it's sort of a cross-examination. You said all these things to the investigator; what did you mean by this? You know, and -- it's the ability to cross-examine.

So that may or may not be approved by the hearing officer, but it -- but the option's there, and so it -- it ties in really with -- and the section of code is Government Code 11400 or eleven four, something like 410. You can look it up. 11400. And it's called the General Provisions For Administrative Adjudication, and that's -- again, it applies to the state department, Social Services, but does it apply to state and county? Does it apply to the grievants, to Hackey (phonetic) grievance hearings? And that's -- that's -- you know, my contention is that it does, and that's basically what I -- I brought up to say, that really, if you were to change these regulations, I would change them to say these hearings have to be held to the standards of general provisions for administrative adjudication, and the county must utilize the office of the hearing officer or equivalent to do these hearings. And --

MR. JENNINGS: Okay. Great. So does this complete your summary?

MR. NICHOLAS: That does.

MR. JENNINGS: Okay. Do you have anything further to say, Karl?

MR. NICHOLAS: No, my letter -- well, no, but did I say something further? Yes, I worked up to Point 1, which was simply that the Gomez regulations spell out very clearly what -- you know, what were the regulations, but the adopted regulations have been changed. They're not the same. Changed in ways that I think would be considered substantive. Substantive meaning they have legal -- legal effect that's different than the original, and that's certainly something that could end up being challenged. When I say challenged, of course, I mean, you know, to the court and --

MR. JENNINGS: Okay.

MR. NICHOLAS: -- bring Mr. Ginsberg in and say, You know, you guys, we need to -- something you need to check, and that's part of my letter.

MR. JENNINGS: At this juncture, I'd like to ask if you, Karl, would like to leave any written note? Would you like --

MR. NICHOLAS: I had -- I had the notes I made just to give this presentation, but I can hardly read them --

MR. JENNINGS: Okay.

MR. NICHOLAS: -- so I put down --

MR. JENNINGS: That's fine.

MR. NICHOLAS: Yeah.

MR. JENNINGS: So we'll stick with your written testimony and --

MR. NICHOLAS: Exactly, yeah.

MR. JENNINGS: -- your oral testimony.

MR. NICHOLAS: Exactly.

MR. JENNINGS: Okay.

MR. NICHOLAS: The only thing that's really not in that testimony which I -- is just the whole, the interconnectedness with the family law. By -- by -- by statute, courts can ask to get involved, and get that information back, and the -- the -- the idea of the confidentiality of meetings and the closedness (phonetic) of the meetings, I don't think fits well with -- and that information then goes into a public, more or less -- confidentiality can be protected, true, but it -- it just -- I would -- it just seems to make more sense to me that there's at least a stronger communication between these two groups, between the official counsel and the -- the planning that you're doing, and they need to be -- should have some input really.

MR. JENNINGS: Very good. Thank you, Karl.

MR. NICHOLAS: Uh-hum.

MR. JENNINGS: Unless there's anyone else in the audience who would like to present testimony -- is there anyone that would like to say anything? -- I declare this hearing closed.

(Hearing adjourned.)

Response:

Thank you for your comment. Please refer to the CDSS' responses to Comments Nos.1-3.

g) 15-day Renotice Testimony and Response

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 from March 19 to April 2, 2010. The following written testimony was received from:

- Kelly M. Hardy, Principal Deputy County Counsel, County of Los Angeles (Comment Nos. 1-4)
- Esther G. Boynton, Attorney at Law, San Diego, CA (Comment Nos. 5-7)
- Christopher (*no last name provided*) (Comment Nos. 8-9)

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

- Kelly M. Hardy, Principal Deputy County Counsel, County of Los Angeles (Comment Nos. 1-4)

Los Angeles County submits the following arguments regarding the changes to the Proposed Division 31 Grievance Review Procedures; Child Abuse Central Index (hereinafter "CACI").

1. Comment:

1. Argument #1; Proposed Regulation MPP 31-021.6.62 and 621, has been changed in a manner which increases the scope of confidential juvenile records to be released for CACI Grievance Review. However, the regulation does not provide guidance to the parties/counties regarding a method of release of confidential juvenile records or information, especially to persons not specified for access to juvenile case files pursuant to California Welfare and Institutions Code 827 (hereinafter "WIC § 827").

A child is by definition within the jurisdiction of the juvenile court pursuant to California Welfare and Institutions Code § 300 (hereinafter "WIC § 300"), if he or she is one who either has or will likely suffer serious neglect or abuse, without regard to whether a California Welfare and Institutions Code § 332 (hereinafter "WIC § 332") dependency petition--or indeed any jurisdictional petition--has yet been filed to establish that particular child as a dependent of the juvenile court. California Welfare and Institutions Code § 827 (*hereinafter WIC § 827*) and WIC § 300 do not contain a requirement making the filing of a dependency petition a prerequisite to the exercise of juvenile court jurisdiction. To the contrary, WIC § 300 expressly provides that the juvenile court may adjudge any child who is within the jurisdiction of the juvenile court to be a dependent child of the court. *By implication, such a child may come within the jurisdiction of the juvenile court before the juvenile court has adjudged him or her to be a dependent child.* (See *Elijah S.* (2005 Cal App 1st Dist) 125 Cal. App. 4th 1532; 24 Cal Rptr. 3d 16 and *Claudia S.* 131 Cal. App. 4th 236; 31 Cal Rptr. 3d 697.).

When a county social worker receives an initial emergency referral pursuant to WIC § 300, the county social worker will generate records containing information of the

investigation and findings regarding the alleged abuse. The information received during this initial investigation will also be information which may prompt the filing of a report to CACI with the Department of Justice (hereinafter "DOJ"). The records generated pursuant to a WIC § 300 investigation, are within the jurisdiction of the Juvenile Court and contained in a juvenile case file, whether a case is opened by petition or not.

The juvenile case file and information, containing a county's investigative activities and findings pursuant to WIC § 300, which may prompt the CACI report, can only be inspected by those individuals designated for access under WIC Code § 827(a)(1)(A) through (O). Persons who are not designated by WIC § 827(a)(1)(A) through (O), may access the file for review of the information only after obtaining a court order (See WIC § 827 (a)(1)(P)). If copies are desired, only those persons designated by WIC § 827(a)(5), may receive copies without a court order, subject to limitations on dissemination set forth in WIC § 827(a)(4).

Referrals for neglect or abuse pursuant to WIC § 300, have and do involve third parties, such as relatives or friends living in the home, who have or are suspected of physically or sexually abusing a child while in the parents care and supervision. The mandatory CACI report is not limited to parents or guardians during the WIC § 300 investigation. Once the social worker conducts an active investigation and determines who the known or suspected abuser is and the abuse is "not" unfounded, the social worker is mandatorily required to report in writing every case of known or suspected child abuse (See California Penal Code § 11169(a)). Further, the social worker is required to notice the "known or suspected child abuser" that they have been reported to CACI (See California Penal Code § 11169(b)). When a friend or relative is identified as an abuser, the friend or relative will be reported to CACI. However, friends and relatives are not identified individuals allowed access to confidential juvenile case files or information, pursuant to WIC § 827(a)(1)(A) through (O) and (a)(4). If a case results in a WIC § 332 petition against the parent or guardian for negligent supervision, the details of the abuse investigation and findings prompting the CACI report against a friend or relative, will be set forth in juvenile court reports, in support of the WIC § 332 petition.

County agencies receive referrals for WIC § 300 abuse or neglect regarding children in foster care placement. The child in foster care will already be a dependant of Juvenile Court. If the investigation activity and findings prompt a report to the CACI system, the foster care provider will not be entitled to access to the juvenile case file and information pursuant to WIC § 827. Again, they are not identified persons for access. If the finding is substantiated and the child is removed from the home, the investigation and findings will be placed in juvenile court reports specifically prepared for the Juvenile Court proceedings. If a CACI Grievance Review Hearing is requested by the foster care provider, the county agency, without a court order, will not be able to disclose the confidential juvenile records and information.

The proposed change to language in section MPP 31-21.6.62 and 621 has increased the scope of confidential juvenile records subject to released for CACI Grievance Review. However, the proposed change to language does not provide guidance regarding each parties obligations to seek a release of confidential information contained in a

confidential juvenile case file, pursuant to WIC § 827. The right to redact information pursuant to California Penal Code § 11167 will not result in changing the confidential nature of the juvenile case file and information pursuant to WIC § 827. (See California Penal Code § 11167.5(e))

As the intent of the Gomez v. Saenz settlement was to *ensure due process for all individuals reported to the DOJ for CACI purposes*, guidance and instruction to the parties/counties regarding the release of the reports containing investigations and findings, maintained in a confidential juvenile case file, will be necessary. The proposed change to Regulation 31-021.6.62 and .621 results in increasing the scope of juvenile records subject to release for grievance review. The violation of the confidentiality provisions of WIC § 827 carries a punishment of a misdemeanor finding and fine of five hundred dollars (\$500.00). As such, The additional information will avoid illegal dissemination of confidential juvenile records contained in a juvenile file under WIC § 827. The Regulation should contain guidance on how to access confidential juvenile records for CACI Grievance Review pursuant to WIC § 827, delineate the duties of each party, and state the circumstances giving rise to each party's duty to seek release of records. This will avoid confusion of the parties regarding release of records and ensure due process to all individuals reported to CACI

Response:

Thank you for your comment. The commenter's issues over the grievance hearing delays inherent in obtaining proper legal authority under Welfare and Institutions Code (WIC) section 827 to provide a grievant with relevant documents are grounded in its position that WIC section 827 represents the sole legislative authority for releasing child case file information. Under this view, Penal Code (PC) section 11167.5(11) which authorizes disclosure of appropriately redacted reports of suspected child abuse and/or neglect and information contained therein, to persons identified by the Department of Justice (DOJ) as listed on Child Abuse Central Index (CACI) has no operative effect. CDSS respectfully disagrees with this position. While it is true that WIC section 827 does not identify these persons as ones who may inspect juvenile case records; it is also true that WIC section 827 does not identify the DOJ as an agency the county is authorized to provide child case file records. To our knowledge, no county has refused to refer this information to the DOJ on this basis, nor has any county felt it necessary to obtain court approval prior to providing the DOJ with these records. This is because the county's duty to provide this information to the DOJ is clearly set forth in the Child Abuse Neglect and Reporting Act (CANRA) (PC sections 11164-11174.3). As indicated above, PC section 11167.5(11) authorizes the disclosure of the documents in question to persons whose names are listed on the CACI. The commenter does not cite a single court decision in which a court invalidated PC section 11167.5(11) or which found a county in violation of section 827 for providing relevant case file records to a person whose name appears on CACI. CDSS is not aware of any such decisions. Accordingly, CDSS believes that the delays in the Gomez grievance hearings associated with obtaining judicial approval for the disclosure of necessary documents to a Gomez complainant are not necessary, and that extending the Gomez hearing time-frames on this basis are not necessary. Additionally, even assuming the commenter is correct that PC section 11167.5(11) has no operative effect, authority exists in the regulations to obtain continuances for cause. The need for judicial

approval to provide documents to a complainant would constitute cause to continue a hearing.

2. Comment:

Argument # 2 Regulation MPP 31-021.42 fails to address how a county will disseminate information to an attorney or representative of an individual reported to CACI, where that attorney or representative is not identified under WIC 827 for access to a juvenile file and information;

Regulation MPP 31-021.42 allows for representation of the aggrieved party by "an attorney or other representative". However, when the attorney for claimant is not an attorney for the party who is actively participating in the criminal or juvenile proceedings involving the minor, disclosure to that attorney or representative will be prohibited without a court order (See WIC § 827(a)(1)(E)) . When a petition is filed pursuant to WIC § 332 against a parent, the attorney generally selected by an individual reported to the DOJ, who is not a parent or guardian, will not be an attorney "actively participating in the proceedings" due to potential conflict of interest.

In the majority of CACI Grievance Reviews handled by Los Angeles County since the Gomez v. Saenz settlement, the attorney selected by the individual challenging the CACI report to the DOJ, has failed to meet the definitions of "attorneys or legal staff", as set forth in WIC § 827(a)(1)(B)(E)(F)or (J). Further, no provisions exists which allow a non attorney "representative" to access the juvenile case file and information pursuant to WIC § 827.

WIC § 827(a)(4) precludes access and dissemination of the juvenile case file, any portion thereof, and the information relating to the content of the case file, by an agency to persons, other than those persons or agencies authorized to receive documents pursuant to this section. Despite the written authorization provided per Regulation MPP 31-021.42, the regulation fails to resolve the statutory requirements for access by an attorney or representative who is not a designated individual for access, pursuant to WIC § 827.

As the intent of the Gomez v. Saenz settlement was to *ensure due process for all individuals reported to the DOJ for CACI purposes*, guidance and instruction to the parties regarding the release of the reports containing investigations and findings, maintained in a confidential juvenile case file, will be necessary. The violation of the confidentiality provisions of WIC § 827 carries a punishment of a misdemeanor finding and fine of five hundred dollars (\$500.00). As such, The additional information will avoid illegal dissemination of confidential juvenile records contained in a juvenile file under WIC § 827. The Regulation should contain guidance on how to access confidential juvenile records for CACI Grievance Review pursuant to WIC § 827, delineate the duties of each party, and state the circumstances giving rise to each party's duty to seek release of records. This will avoid confusion of the parties regarding release of records and ensure due process to all individuals reported to CACI

Response:

Please see CDSS' prior response to Comment No. 9 in section f), above.

3. Comment:

Argument # 3: The time period of 60 days to "hold" the CACI Review Hearing is not adequate and will require multiple continuances to obtain orders to release juvenile records. Juvenile records request can take 3 to 4 months to obtain an order for release. The time period to hold a CACI review should be increased to 180 days.

The 60-day period, in which a county "shall hold" the CACI review hearing will not be an adequate amount of time to ensure proper due process. The 60 day period does not consider additional time necessary to allow access to the juvenile file and release of confidential information contained in the juvenile file, pursuant to WIC § 827. Specifically, the Los Angeles County Juvenile Court can take 3 to 4 months to issue an order for release of records.

Los Angeles County requests the proposed regulations be increased to allow 180 days to hold a CACI review hearing. This time period would allow a County to determine the need for confidential records release under WIC § 827 and set an initial date for hearing which would accommodate the time necessary to obtain an order to release confidential juvenile records. Los Angeles County has experienced an increase in man power for additional telephone calls to reschedule dates, delays as the county nor the party are directed to seek petitions pursuant to WIC § 827, and multiple mailings for notices. By providing additional time, the added cost incurred and need for additional manpower will be substantially reduced. The additional time will ensure the individual reported to CACI receives full due process by provision of all records containing the investigation activities and findings timely, no less than 10 days prior to hearing.

Response:

Please see CDSS' prior response to Comment No. 10 in section f), above.

4. Comment:

CONCLUSION

Based on the forgoing, Los Angeles County the regulations require additional changes as follows;

As stated in Arguments 1 and 2, the changes to the proposed regulations require and increase access to juvenile case files and information contained therein. Therefore, Regulations MPP 31-021.6.62 and 621 and Regulation MPP 31-021.42 should outline the duties of the parties to seek orders under WIC § 827, for persons not identified to access juvenile case file information. This will ensure all individuals reported to CACI are provided full due process and allow such confidential juvenile information contained in a juvenile case file to be properly disseminated to the individuals

designated attorney or other representative. Further, it will eliminate delays as the county nor the party are directed to seek petitions pursuant to WIC § 827. Last, the clarification requested will avoid claims of improper dissemination of confidential juvenile case file information pursuant to WIC § 827 against county agencies.

As state in Argument # 3, where orders are necessary due to the requirements of WIC § 827, release and dissemination of information, the period of 60 days to hold a hearing is inadequate. Los Angeles County Juvenile court can take 3-4 months issue orders allowing proper dissemination of juvenile case information, where a person is not designated for access pursuant to WIC § 827. The time period for counties to "hold hearings" should be increased to 180 days to allow for the proper release of records, avoid continuances and multiple notice mailings, and accommodate hearing time frames.

Response:

Please see responses to Comment Nos. 1–3, above.

- Esther G. Boynton, Attorney at Law, San Diego, CA (Comment Nos. 5-7)

5. Comment:

I object on procedural and substantive grounds to the California Department of Social Services' (DSS) revisions in its proposed regulations regarding Division 31, Manual of Policies and Procedures, emailed to me on March 18, 2010, and to DSS's purported Final Statement of Reasons (FSR) and Updated Informative Digest, which DSS did not provide me until March 22, 2010, following my repeated attempts to obtain those items. (See email correspondence attached hereto as Exhibits 1 through 3).

Also, I ask that DSS place all of the following items in the Rulemaking File and that DSS provide these items to the Office of Administrative Law for its consideration in this matter:

(a) my January 13, 2010 letter to DSS (7 pages), headed "Opposition to Proposed Changes in California Department of Social Services Manual of Policies and Procedures, Division 31/ORD #0509-03";

(b) the attachments submitted by me with that January 13 letter as Exhibits A and B, *i.e.*, conformed copies of the 9-page "Settlement Agreement and Order" and the 4-page "Stipulated Judgment" filed in the Gomez case on October 3, 2007, which I obtained from the Los Angeles County Superior Court; and

© this letter (dated April 2, 2010) and all exhibits attached hereto.

Objections

Response:

Thank you for your comments. CDSS provided the Final Statement of Reasons and the Updated Informative Digest the same day requested (i.e., March 22, 2010). Although contact with CDSS by phone was made on or about Thursday, March 18, 2010, there was no specific request made by U.S. Mail, phone, fax, or e-mail for the said documents until Monday, March 22, 2010. Further, the commenter did not request for an extension of time to respond to the 15-day re-notice as provided under Government Code (GC) section 11346.8(e).

CDSS agrees to include the listed items in the rulemaking file as part of the submission to OAL as required in GC section 11347.3(b)(6).

6. Comment:

1. DSS has thwarted public participation in the rulemaking process by (a) failing to furnish its purported Final Statement of Reasons and Updated Informative Digest to individuals who provided written or oral comments on the proposed regulatory amendments during the 45-day comment period, and (b) by failing to respond directly to those individuals' comments.

On Thursday, March 18, 2010, DSS emailed me a letter headed "Notification of 15-Day Public Availability of Changes to Regulations and Supporting Documents and Information" ("Notification"). Although the Notification stated DSS had "revised the Statement of Reasons" for its proposed regulations, no revised Statement of Reasons was provided with the Notification; the only attachment was an item described as "the full text of the regulations with the proposed changes indicated."

The Notification also stated that "Copies of the Final Statement of Reasons and the Updated Informative Digest are available for review and comment" at DSS's Office of Regulations Development in Sacramento. Given that I live in San Diego, the documents' availability for inspection in Sacramento did not permit me to access the documents' contents. Likewise, people from San Francisco, Orange County and Los Angeles who commented on the proposed amendments were also denied ready access. (See "Updated Informative Digest," p. 2.)

On March 18, I called the phone number specified in the Notification in efforts to see DSS's "Final Statement of Reasons" and "Updated Informative Digest," . No one answered, nor was there any voice mail. I then dialed DSS's general number, was referred to several other numbers at DSS, and was eventually connected to a person in DSS's Administration Division, who agreed to pass my inquiry on to the Office of Regulation Development. (These events are reflected in my March 22, 2010 email to DSS, attached hereto as Exhibit 3.)

On March 22, 2010, I requested by email that DSS send me its response (if any) to my written comments concerning ORD 0508-03. (See Exhibit 1.) In response, DSS emailed me on March 22 that, "**It is not CDSS' regulations policy to answer public comments directly to the individual**, however, you should see written responses to your comments within the Final Statement of Reasons (attached)." (Exh. 2, emphasis

added.) Thus, **I did not receive DSS’s purported response to my written comments until four days after the onset of DSS’s announced 15-day period for comments on the now-proposed regulatory revisions. Thus, DSS has effectively reduced the length and meaningfulness of the 15-day comment period provided under California’s Administrative Procedure Act.** See Govt. Code section 11346.8©.

Furthermore, in its Final Statement of Reasons, DSS has inaccurately retyped and reformatted my January 13 letter and has omitted and disregarded the exhibits I submitted with that letter.

In any event, the 15-day period of Government Code section 11346.8© should not apply here, because DSS’s revisions include extensive changes which are not “nonsubstantial or solely grammatical” and are not “sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.” See, e.g., newly proposed sections 31-021 **.54 through .55 and all of their subparts.**

Response:

Thank you for your comment. Please see response to Comment No. 5, above. Note that the CDSS provided multiple contact methods in the 15-day re-notice. CDSS disagrees that access to the documents was denied.

CDSS has the right to summarize each objection or recommendation pursuant to GC section 11346.9(a)(3). CDSS has reviewed the released Final Statement of Reasons (FSOR) for typographical errors and is maintaining internal formatting of the FSOR. As required in GC section 11347.3(b)(6), every piece of testimony received is included in the rulemaking file (e.g., attachments submitted with comments). CDSS has not omitted or disregarded the exhibits submitted with the "January 13" letter in the rulemaking decisions (Please see section b), above).

GC section 11346.8(c) subsections (1) and (2) are separated with the conjunctive "or," not "and" as stated in comments. Therefore, GC section 11346.8(c)(2) does apply.

7. Comment:

2. In its purported responses to my January 13 letter, DSS disregards the law and misstates the language and effect of the Gomez settlement and judgment.

DSS’s fails to cite *any* statutory rulemaking authority for its proposed regulations, and fails to address the fact that the Legislature has granted CACI-related rulemaking authority *not* to DSS, but to the California Department of Justice. See FSR, p. 37. The Gomez settlement and judgment did not and do not “require the promulgation of regulations” (FSR, p. 37.) DSS directed county social services departments **years ago**, without *any* regulatory action, to implement Gomez-type grievance procedures. Certainly, DSS would not have done so had it believed the Gomez settlement and judgment required that regulations be promulgated.

Moreover, Penal Code section 11169 does NOT require “counties ... [to] submit an individual’s name to the CACI ... when it is determined by a CWS agency that an allegation is found to be substantiated or inconclusive (except in general neglect cases) as part of the overall administration of CWS programs.” FSR, p.7. Penal Code section 11169 does not even mention or refer to “substantiated” or “inconclusive” reports.

DSS ignores the actual language and import of Penal Code section 11169 and other provisions of the Child Abuse and Neglect Reporting Act (CANRA). For example, DSS wrongly treats the second sentence of Penal Code section 11169(a) as surplusage.¹ That is, DSS maintains that investigators must submit reports to the Index in all cases investigated *other* than those determined to be unfounded. (See FSR, pp. 38-39.) This negates CANRA’s mandate that a report “shall not” be submitted for Index-listing unless the report has been *determined* not to be “unfounded.”² § 11169(a) (second sentence). While other parts of CANRA have been amended since 1986, this prohibition has not, indicating the Legislature’s intent to maintain it.

Moreover, Penal Code section 11169 expressly *prohibits* the submission of a report for entry in the CACI unless the report has been affirmatively determined not to be “unfounded.” DSS’s proposed regulations would simply erase this statutory prohibition, denying individuals their constitutionally protected liberty interest, created by Penal Code section 11169, in not becoming CACI-listed without a lawful determination that the report is not unfounded.

¹ “[A] construction making some words [of a statute] surplusage is to be avoided.” People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, Inc. (“Eichenberger”), 203 Cal.App.3d 225, 236, 249 Cal.Rptr. 762, 767 (1988).

² DSS’s error is shown by this analogy: Given the choice of eating either (a) an apple not determined to be poisonous, or (b) an apple determined not to be poisonous, which would a person choose? Most likely, he or she would choose the apple “determined not to be poisonous,” because that apple presumably would have been subjected to some test that showed it to be poison-free. The other apple – the one “not determined to be poisonous” – may not have been tested at all.

Response:

Thank you for your comment. WIC section 10553(e) states that the director [of the state Department of Social Services] shall “formulate, adopt, amend, or repeal regulations and general policies affecting the purposes, responsibilities, and jurisdiction of the department and which are consistent with law and necessary for the administration of public social services,” Please also see CDSS’ prior response to Comment No. 21 in section f), above.

CDSS acknowledges your opinion and respectfully disagrees. CDSS believes the analogy presented by the commenter is inapplicable to this issue. Unlike the potential population of “untested” apples presented in the commenter’s analogy, CANRA requires that all cases referred to DOJ for listing on CACI be investigated, i.e., “tested.” It is the results of that investigation that determines the unfounded, inconclusive, or substantiated finding. Please also see our previous response to Comment No. 22 in section f), above.

- Christopher (*no last name provided*) (Comment Nos. 8-9)

8. Comment:

From: Bonjovi Johnson
Sent: Sunday, March 21, 2010 5:17 PM
To: ADM MSS ORD@DSS
Subject: Division 31 comment period (March 19-April 2)

To whom it may concern:

I am writing regarding the new Division 31 procedures that are almost law. I already wrote to ORD a few months ago regarding what I thought would be reasonable regulations. I don't believe I stated my opinion on a couple things, though.

When a California government agency places someone's name into the CACI, that agency is potentially taking away someone's rights. If that placement is incorrect, that person's rights will be negatively affected. And those rights could be negatively affected for as long as that person's name is in the CACI. (For an example of this, please see *Humphries v. Los Angeles County et al.*, United States Court of Appeals for the Ninth Circuit 05-56467.)

Therefore, the agency who places a name into the CACI must prove that name belongs there. The burden of proof belongs on that agency and NOT on the individual. I must emphasize that. If you want to take away someone's rights, YOU need to prove why you want to do that.

Response:

Thank you for your comment. The *Gomez v. Saenz* court ordered settlement agreement did not address the concept of “burden of proof.” This phrase is not applicable to these

regulations. PC section 11165.12 (b) requires that any substantiation of an allegation be “based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred.” PC section 11165.12 (c) defines an inconclusive report as “the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in PC section 11165.6, has occurred.” These sections define the standard of evidence (i.e., level of proof) required for a county to refer an individual for listing on the CACI. This same standard applies to the grievance hearings required by the settlement. One reason why CDSS opted not to include the concept of a “burden of proof” in the regulation is because a “burden of proof” is only appropriate for affirmative findings. Here, however, the law requires CACI referrals for inconclusive findings. CDSS was not able to reconcile the establishment of a burden of proof in a finding that lacks affirmative content. CDSS believes there is ample clarity by law in the definitions of unfounded, inconclusive, and substantiated so that “burden of proof” is unnecessary in the hearings.

In addition, MPP 31-021.68 requires that the county shall present its “evidence supporting its action or findings” first and then allows the complainant to respond, with rebuttals also allowed. Further, the regulations instruct the grievance review officer to make a determination based upon the evidence presented at the hearing. CDSS has no further authority to include the language suggested by the commenter.

9. Comment:

Secondly, there is a big deal made about length of time someone has to request a hearing to challenge an index listing. A person who is listed in the CACI as a "substantiated" abuser will have his rights taken away until after that listed person dies. A person who is listed in the CACI as a result of an investigation that leads to an "inconclusive" finding will have his/her name removed from the index 10 years from the date of the report unless there is another inconclusive or substantiated finding.

Therefore, if someone's rights are going to be taken away for good(until they die), they need to have the right to challenge that listing until they die. (Some people don't even know they are currently listed in the CACI. The right to challenge placement needs to stick with that person according to how long that name will be in the index.) Similarly, a person who is listed in the CACI with a designation of "inconclusive" needs to have the right to a hearing until that ten year period is up.

I know this is contrary, probably, to what the government wants, but it needs to be included in these new regulations. When crafting any regulations like this, someone needs to look at them from the angle of how can government officials take advantage of these regulations to purposely hurt someone. This may sound like a waste of time but this will come up. This will happen. There will be a case where the government abuses this system and THAT is what needs to stop. The government needs to take every opportunity to prevent that.

I think the above ideas are vital to prevent abuse. I hope the person(s) reading this will see the wisdom in my presentation.

Thanks.
Christopher

Response:

Thank you for your comment. CDSS does not have the authority to change the length of time that an individual's name is listed on the CACI. The requirements for removing an individual's name from the CACI are defined in PC section 11170(a)(3). Further, the *Gomez v. Saenz* court ordered settlement agreement did not change this requirement, nor did it provide CDSS with the authority to make such a change in the proposed regulations. The *Gomez v. Saenz* court ordered settlement agreement allows an individual 30-days to request a hearing to challenge the listing. CDSS does not have the authority to alter the timelines outlined in statute or in the settlement agreement. Neither the statute, nor the *Gomez v. Saenz* court ordered settlement agreement, provide an individual the opportunity to challenge the listing for the length of time they are listed.

Additionally, CDSS does not support altering the time frame in a way that would degrade the ability to provide efficient and timely due process. Efficient administration provides a process which ensures that all of the evidence and testimony are the result of recent activities, where evidence is accurate and uncompromised, and there is assurance of the availability of witnesses who have the events in question readily accessible in memory. Extending the timeline indefinitely would result in the degradation of quality of evidence and difficulties in access to necessary witnesses. Ultimately, this could result in decisions that are made without full knowledge of the original circumstances and evidence and could place children at-risk.