

FINDING OF EMERGENCY

These regulations are being implemented on an emergency basis for the immediate preservation of the public peace, health and safety, or general welfare, within the meaning of Government Code Section 11346.1.

DESCRIPTION OF SPECIFIC FACTS WHICH CONSTITUTE THE EMERGENCY

1. Senate Bill (SB) 84, Chapter 177, Statutes of 2007, enacted legislation to amend and adopt, on an emergency basis, regulations to require counties to remit payment of the federal share for overpayments. These changes are necessary to clarify and implement processes and procedures to comply with federal reporting requirements for overpayments of Title IV-E foster care and adoption assistance overpayments. Counties are held harmless for this repayment until emergency regulations are filed.
2. This legislation mandates that the CDSS modify its regulations for overpayments of Title IV-E foster care and adoption assistance overpayments on an emergency basis. Specifically, Welfare and Institutions Code sections 11466.23(d) and 11466.235(c) state:

"(1) The department [CDSS] shall modify existing regulations and adopt new regulations to implement this section by December 31, 2008. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the department, in consultation with the CDWA, may adopt emergency regulations to implement this section.

"(2) The adoption of emergency regulations ... shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare..."

Accordingly, CDSS has modified the Manual of Policies and Procedures – Division 45 AFDC-FC (Foster Care), Sections 45-302, 45-303, 45-304, 45-305 and 45-306; Division 11 (Foster Care Audits and Rates), Section 11-435; and, Division 22 (State Hearing and Request for Review), Sections 22-001, 22-003 and 22-009. The time frame for modification of these regulations was not met by December 31, 2008 due to several factors: 1) the collaborative process required agreements through lengthy discussion; 2) the time frame for developing the emergency regulations was an ambitious undertaking due to reviewing and amending county and state processes and the different fiscal systems that needed review and modification; 3) the lack of human resources to adequately implement within the time frame specified due to loss of positions and vacancies within positions; and, 4) the lack of staffing with appropriate knowledge in program and regulation development.

3. The proposed regulatory and handbook changes are being made to implement Senate Bill 84. These changes are necessary to clarify and implement processes and procedures to comply with federal reporting requirements for overpayments of Title IV-E foster care and adoption assistance overpayments.

The CDSS was informed by the Federal Department of Health and Human Services (DHHS) that it was out of compliance with the Improper Payments Information Act of 2002 and must repay all identified overpayments of foster care and adoption assistance funds. Additionally, the CDSS's practice of repaying overpayments when collections were made was not acceptable to the federal government. Accordingly, the CDSS worked with County Welfare Directors Association (CWDA) and county representative to implement new regulations as well as preventative measures and best practices to reduce overpayments.

The proposed regulatory changes meet the "authority," "clarity," "consistency," "necessity," "nonduplication," and "reference" standards of the Administrative Procedure Act (APA), Government Code section 11349, subsections (a), (b), (c), (d), (e), and (f), the requirements of style pursuant to Government Code section 11343.1, and the principles of "plain English" rule drafting. Non-substantive and substantive rewording of sections has been undertaken to make them more concise and user-friendly. Sections have been renumbered to accommodate regulatory changes. Handbook ensures that regulations are consistent with statute and provides a reference for counties. Authority and reference citations are amended to reflect relevant statute.

Without these emergency regulations, the CDSS will remain out of compliance with federal requirements for oversight and repayment of federal funds, in a manner required through State legislation enacted by SB 84.

4. The CDSS and the CWDA have collaborated to develop these new regulations as well as preventative measures and best practices to reduce overpayments. From the period of October 2003 to February 2008, the CDSS has repaid a total of \$12.3 million dollars in federal share of overpayments identified as a result of county errors, state audits and Los Angeles County compliance audits. The majority of the overpayments were county errors made to providers. The implementation of these regulations will place the appropriate burden on counties to implement best practices and develop local oversight functions to reduce the occurrence of overpayments through county errors, thereby reducing the county's and the State's liability for repayment of the federal share of the identified overpayments. Additionally, statute prohibits the State from recovering the county share of overpayments until these regulations are enacted. Failure to enact these regulations on an emergency basis will delay the State's ability to recover the county share of overpayments, resulting in a loss of General Fund dollars.
5. It is anticipated there will be no opposition because of the collaborative effort between CDSS and CWDA to develop these regulations and the processes/procedures to eliminate or reduce overpayments through identification of best practices.
6. Emergency regulations were filed with the Secretary of State and became effective on July 1, 2009. The public hearing was held on August 12, 2009. Due to the complexity of the testimony received, further review of the regulations was necessary. The analysis of the testimony received and the review of the regulations has been time consuming. Once the analysis of the testimony and the review of the regulations were completed, it was deemed

necessary to amend the emergency regulations necessitating a 15-day renote. Time has passed and the Department is not able to complete the regulatory process in time to file the Certification of Compliance timely. The readoption is necessary to complete the regulatory processes mandated by the Government Code. The readoption is also necessary to implement federal and state requirements to comply with the Federal Improper Payments Information Act of 2003, clarifying and implementing processes and procedures to comply with the federal reporting requirements for overpayments of Title IV-E foster care and adoption assistance overpayments. Counties were held harmless for this repayment until emergency regulations were filed. Lack of these regulations may result in the delayed release of information which the Legislature has deemed to be public and of great importance.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

In June 2006, the CDSS was informed that the State was not in compliance with Aid to Families with Dependent Children-Foster Care (AFDC-FC) overpayment recoupment that requires the federal share of overpayments identified through state program audits, county compliance audits, and county overpayment errors be returned immediately once the overpayment has been identified. The past practice at CDSS, based on a federal financial management cost principal of Office of Management and Budget (OMB) Circular A-87, had been to repay the federal share of overpayments upon recoupment from foster care providers. However, the Department of Health and Human Services (DHHS) Region IX advised CDSS that it was out of compliance with the federal Improper Payments Information Act (IPIA) and that it had misinterpreted the federal law. Moreover, DHHS Region IX advised CDSS that it is responsible for crediting the federal government the full amount of the federal share of Title IV-E funds upon identification following the completion of due process, regardless of whether the state or county collects or has the ability to collect overpayments. Therefore, CDSS informed the DHHS Region IX that it would take immediate steps to comply with identifying, tracking, and reporting overpayments and remitting the federal share as required.

In October 2006, CDSS began a series of workgroup meetings with the County Welfare Director's Association (CWDA) and county representatives to address statewide concerns with identifying, tracking, and reporting overpayments, and identify current and potential best practices to prevent and reduce overpayments. Additionally, current state statutes and regulations that prohibit collection of overpayments, information system problems for identifying overpayments, and a need for clarification of policy and oversight for overpayments were identified as issues. Counties were advised to begin tracking identified overpayments regardless of the ability to collect.

Based on the county overpayment lists submitted for specified retroactive periods, CDSS has identified and repaid to date approximately \$12.3 million dollars as the federal share of identified overpayments from county errors, county compliance audits, and state program audits. The DHHS Region IX demanded repayment of any outstanding federal share of overpayments; otherwise, it would begin the formal disallowance process for the federal share of Title IV-E funds prospectively. In response, CDSS made necessary modifications to the county claim form to allow counties to make adjustments for county overpayments beginning with the March 2008 claim month.

Senate Bill (SB) 84 (Chapter 177, Statutes of 2007) contains legislative language that statutorily requires CDSS to collaborate with CWDA to develop and implement processes, procedures, and develop regulations that will ameliorate systemic problems with identifying, tracking, reporting, collecting, and remitting the federal share of Title IV-E foster care and AAP overpayments. The workgroup identified current issues with state statute and regulations that preclude counties from notifying and recovering overpayments; identified possible best practices to reduce or eliminate overpayments; identified issues with due process and appeal rights of providers; identified problems associated with Adoption Assistance Program (AAP) payments, that may occur only every two years when AAP agreements are renegotiated and may affect the timely discovery of an overpayment; defined "uncollectible debt;" and identified the appropriate roles of both counties and the state in recouping overpayments including those identified through state program audits.

Pursuant to SB 84, CDSS is required to repay the federal share of all overpayments identified by counties until such time as CDSS promulgates regulations, or by December 31, 2008, thus, relieving counties of the responsibility to pay back overpayments.

COST ESTIMATE

1. Costs or Savings to State Agencies: Currently, the State incurs all costs for foster care overpayments but pursuant to Welfare and Institutions Code Section 11466.23, counties will share in the costs resulting in savings to the State. Beginning in July 1, 2009, the State's estimated annual savings will be \$1.5 million.
2. Costs to Local Agencies or School Districts Which Must Be Reimbursed in Accordance With Government Code Sections 17500 - 17630: None.
3. Nondiscretionary Costs or Savings to Local Agencies: Under Welfare and Institutions Code Section 11466.23 counties will be required to share in the costs of uncollectable overpayments. Beginning in July 1, 2009, counties estimated annual cost will be \$1.5 million.
4. Federal Funding to State Agencies: The estimated annual Federal savings adjustment for incurred overpayments is \$2.6 million.

LOCAL MANDATE STATEMENT

These regulations do impose a mandate on local agencies but not on school districts. There are no state-mandated local costs in this order that require reimbursement under the laws of California. Any local costs associated with this order can be avoided through local agency compliance with State rules requiring accurate payments to foster care providers.

AUTHORITY AND REFERENCE CITATIONS

CDSS adopts these regulations under the authority granted in Welfare and Institutions Code Sections 10553 and 10554 and SB 84, Chapter 177, Statutes of 2007, Sections 32 and 33. Subject regulations implement and make specific Welfare and Institutions Code Sections 11466.23, 11466.235, and 11466.24.