

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

ENDORSED FILED
IN THE OFFICE OF

2010 AUG 23 PM 3:27

2010 OAL DETERMINATION NO. 17
(OAL FILE NO. CTU2010-0211-01)

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: CHARLES THACKER

**CONCERNING: DEPARTMENT OF SOCIAL SERVICES' REQUIREMENT OF
A CRIMINAL RECORD CLEARANCE FOR INDIVIDUALS
EMPLOYED IN EACH CALIFORNIA CHILD CARE FACILITY**

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT
CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600, and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULES

After reviewing the petition submitted by Charles Thacker (Petitioner) and the accompanying documentation, OAL accepted the petition for consideration on the following two issues:

1. Whether the Department of Social Services' (Department) requirement that every employee of a child care facility have a criminal record clearance associated with each facility prior to the employee's presence at each facility, is an underground regulation; and,

¹ As defined by California Code of Regulations, title 1, section 250(a), an "[u]nderground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

2. Whether the requirement that any employee who does not have a criminal record clearance associated with each facility must be discharged immediately, is an underground regulation.

The challenged rules are expressed in the Complaint Investigation Report, issued by the Department, and dated July 1, 2008.²

DETERMINATION

As to the first challenged rule, OAL determines that the Department's requirement that every employee of a child care facility have a criminal record clearance associated with each facility prior to the employee's presence at each facility is not an underground regulation because it falls within the "only legally tenable interpretation" exemption of Government Code section 11340.9(f).

With respect to the second challenged rule, whether an employee who does not have a criminal record clearance associated with each facility "must be discharged immediately," the Department provided a certification³ pursuant to California Code of Regulations, title 1, section 280. The certification provides:

The Department will not issue, use, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which requires the 'immediate discharge' (defined as a termination of employment rather than a temporary removal) of an employee who does not have a criminal record clearance associated to the licensed facility where the individual is presently employed.

Providing the certification as to non-enforcement of the alleged underground regulation requires OAL to suspend all action in connection with the challenged rule pursuant to California Code of Regulations, title 1, section 280(a)⁴. Accordingly, this Determination will relate solely to the first challenged rule.

FACTUAL BACKGROUND

On February 11, 2010, Petitioner submitted a petition to OAL pursuant to Government Code section 11340.5 challenging as underground regulations various provisions contained in, or related to, the citation issued by the Department to Petitioner as owner of Leap and Bound Academy (Exhibit A).

² Petitioner and the Department refer to this document as the "citation." Petitioner only provided page two of the report as an exhibit to his petition. A copy of that page is attached as Exhibit A to this Determination.

³ The certification is attached as Exhibit B to this Determination.

⁴ Section 280(a) provides:

Any action of OAL or an agency pursuant to this chapter in connection with a petition shall be suspended if OAL receives a certification from the agency that it will not issue, use, enforce, or attempt to enforce the alleged underground regulation along with proof that the certification has been served on the petitioner. This certification shall be made by the head of the agency or a person with a written delegation of authority from the head of the agency.

Petitioner owns a number of child care facilities and has many employees, some of whom work at multiple locations. The citation concerned failure to obtain criminal record clearance (or associate a criminal record clearance from one facility to another)⁵ with respect to certain employees of Leap and Bound Academy prior to their presence in the facility. The employees had a California Clearance for a *specific* Leap and Bound facility, but were cited by the Department for not obtaining a new clearance for the additional facility or transferring the California Clearance previously obtained, to each additional facility prior to their presence in the facility. A California Clearance is defined in title 22, California Code of Regulations, section 101152(c):

“California Clearance” means an individual has no felony or misdemeanor convictions reported by the California Department of Justice. However, the individual may have been arrested with no criminal conviction, convicted of a minor traffic offense or adjudicated as a juvenile.

Petitioner contends that California Code of Regulations, title 22, section 101170(e) “only requires that an individual be cleared but the EMBELLISHED 101170(e) [in the citation (Exhibit A)] requires them to be cleared AND associated.” (Emphasis in original.) In essence, Petitioner alleges that the Department has gone beyond the language contained in 101170(e) by requiring a clearance for *each* facility or to have transferred a current California Clearance to the new facility. Petitioner believes that the wording of California Code of Regulations, title 22, section 101170(e) allows individuals to *either* have a California Clearance associated with *any* facility, *or* request a transfer of a prior California Clearance to a new facility. He contends that once a California Clearance is obtained for one facility nothing further is required by the law. The Petitioner further argues that a reading of section 101170(e) provides an individual with a choice and that section 101170(e) does not mandate an individual to have a California Clearance associated to *each* facility where he or she is to be present.

The Department provided a response to the petition on June 7, 2010. Petitioner replied to the Department’s response, which was received on June 21, 2010, by OAL. OAL did not receive any public comments in response to this petition.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general

⁵ The Department uses the terms “associate” and “link” interchangeably with “transfer.” The Health and Safety Code and California Code of Regulations, title 22, section 101170, use the term “transfer” as the process by which a California Clearance is linked via the Department of Justice Live Scan reporting system from one facility to another. The Live Scan technology is a process by which an individual’s digitally scanned fingerprints are electronically submitted to the Department of Justice for comparison with fingerprints in the criminal history database. If no criminal conduct is related to the individual via the process, they are “cleared.”

application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in California Code of Regulations, title 1, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600 and whether any exemption from the APA applies.

A regulation is defined in Government Code section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).⁶

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.

⁶ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

The Department's rule challenged by Petitioner requires that all employees of child care facilities obtain a California Clearance for each facility or request a transfer of a current clearance prior to an employee's presence in each child care facility. Therefore, there is a clearly defined class of all those seeking to work in a licensed child care facility and the first element of *Tidewater* is met.

The second element used to identify a "regulation" as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. As stated above, the challenged rule is whether the Department's requirement that every employee of a child care facility have a California Clearance or request a transfer of a current California Clearance prior to the employee's presence at each facility is an underground regulation.

Health and Safety Code section 1596.871 provides:

The Legislature recognizes the need to generate timely and accurate positive fingerprint identification of applicants as a condition of issuing licenses, permits, or certificates of approval for persons to operate or provide direct care services in a child care center or family child care home. It is the intent of the Legislature in enacting this section to require the fingerprints of those individuals whose contact with child day care facility clients may pose a risk to the children's health and safety. **An individual shall be required to obtain either a criminal record clearance or a criminal record exemption from the State Department of Social Services before his or her initial presence in a child day care facility.**

(a) (1) Before issuing a license or special permit to any person to operate or manage a day care facility, the department shall secure from an appropriate law enforcement agency a criminal record to determine whether the applicant or any other person specified in subdivision (b) has ever been convicted of a crime other than a minor traffic violation or arrested for any crime specified in subdivision (c) of Section 290 of the Penal Code, for violating Section 245 or 273.5, subdivision (b) of Section 273a or, prior to January 1, 1994, paragraph (2) of Section 273a of the Penal Code, or for any crime for which the department cannot grant an exemption if the person was convicted and the person has not been exonerated.

(2) The criminal history information shall include the full criminal record, if any, of those persons, and subsequent arrest information pursuant to Section 11105.2 of the Penal Code. [Emphasis added.]

Thus, Health and Safety Code section 1596.871 requires that an individual have a criminal record clearance or a criminal record exemption prior to being present in a child day care facility. Subdivision (h) of section 1596.871 goes on to provide for an *exception* from the foregoing requirement of a criminal record clearance or criminal record exemption. Subdivision (h) states:

For the purposes of compliance with this section, the department may permit an individual to *transfer* a current criminal record clearance, as defined in subdivision (a), from one facility to another, as long as the

criminal record clearance has been processed through a state licensing district office, and is being transferred to another facility licensed by a state licensing district office. The request shall be in writing to the department, and shall include a copy of the person's driver's license or valid identification card issued by the Department of Motor Vehicles, or a valid photo identification issued by another state or the United States government if the person is not a California resident. Upon request of the licensee, who shall enclose a self-addressed stamped envelope for this purpose, the department shall verify whether the individual has a clearance that can be transferred.
[Emphasis added.]

The statutory scheme, therefore, sets forth the requirement for a criminal record clearance or a criminal record exemption prior to an individual being present in a child care facility. It further provides for an exception where the Department may permit an individual to transfer a current criminal record clearance. The Department adopted California Code of Regulations, title 22, section 101170 to implement the exception in Health and Safety Code section 1596.871(h) and established the process and criteria for transferring a criminal record clearance. Section 101170 states:

101170. Criminal Record Clearance.

(a) The Department shall conduct a criminal record review of all persons specified in Health and Safety Code Section 1596.871(b). The Department has the authority to approve or deny a facility license, or employment, residence or presence in the facility, based on the results of this review.

...

(e) All individuals subject to a criminal record review pursuant to Health and Safety Code Section 1596.871 **shall prior to working, residing or volunteering in a licensed facility:**

(1) **Obtain a California clearance** or a criminal record exemption as required by the Department or

(2) **Request a transfer of a criminal record clearance as specified in Section 101170(f) or**

(3) Request and be approved for a transfer of a criminal record exemption, as specified in Section 101170.1(r), unless, upon request for a transfer, the Department permits the individual to be employed, reside or be present at the facility.

(f) **A licensee or applicant for a license may request a transfer of a criminal record clearance from one state licensed facility to another, or from TrustLine to a state licensed facility by providing the following documents to the Department:**

(1) A signed Criminal Background Clearance Transfer Request, LIC 9182 (Rev. 4/02).

(2) A copy of the individual's driver's license, or

(3) A valid identification card issued by the Department of Motor Vehicles, or

(4) A valid photo identification issued by another state or the United States government if the individual is not a California resident.

(5) Any other documentation required by the Department (e.g., LIC 508, Criminal Record Statement [Rev. 1/03] and job description). . . . [Emphasis added.]

The challenged rule requiring that every employee of a child care facility have a California Clearance for each facility or request a transfer of a current California Clearance prior to the employee's presence at *each* facility implements, interprets and makes specific Health and Safety Code section 1596.871 and California Code of Regulations, title 22, section 101170. It therefore meets the definition of a "regulation."

EXEMPTION

Generally, a rule that meets the definition of "regulation" in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA.

Government Code section 11340.9(f) creates an exemption from APA requirements for a rule which consists of the only legally tenable interpretation of existing statutory and regulatory requirements. The "only legally tenable interpretation" exemption applies to a regulation that, although meeting the APA definition of a "regulation" in section 11342.600, represents the only interpretation that would allow an agency to carry out its authority or duties under the law governing its activity, and that does not otherwise further interpret, implement or make specific that law. The exemption is not limited to interpretation of a single provision of law, but may be an interpretation derived from multiple legal provisions in statutes, cases, and duly adopted regulations that govern the Department's activities, provided that the interpretation does not further interpret, implement or make specific those laws.

"A regulation that embodies the only legally tenable interpretation of a provision of law" is not subject to the requirements of the APA. (Government Code section 11340.9(f).) The California Supreme Court discussed the "only legally tenable interpretation" exception in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 328, 132 P.3d 249. The court stated:

...the exception for the lone "legally tenable" reading of the law applies only in situations where the law "can reasonably be read only one way" (1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3122, 3124), such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. (See Cal. Law Revision Com. com., 32D West's Ann. Gov. Code (2005 ed.) foll. §11340.9, p. 94; 1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3124-3131 [reviewing an agency interpretation of the law for compliance with the APA and concluding that although the agency had a "well-supported" rationale for its view, it was not the only legally tenable interpretation of the pertinent statute].)

Petitioner argues that the Department's interpretation of California Code of Regulations, title 22, section 101170 goes beyond the statutory and regulatory scheme found in Health and Safety Code section 1596.871 and California Code of Regulations, title 22, section 101170 by requiring a new criminal record clearance for each facility or the transfer of a current criminal record clearance when an employee is working at more than one facility and, therefore, is enforcing an underground regulation.

Petitioner contends that California Code of Regulations, title 22, section 101170(e) allows individuals to *either* have a California Clearance associated with any facility *or* request a transfer of a prior clearance (associate the new facility to the California Clearance). Petitioner further alleges that the Department's requirement that an employee who has obtained a California Clearance for one Leap and Bound facility must transfer the California Clearance to each additional Leap and Bound facility prior to the employee's presence in that additional facility goes beyond the language of section 101170(e), thereby creating an underground regulation.

As set forth in the Analysis portion above, Health and Safety Code section 1596.871 requires a criminal record clearance or a criminal record exemption for an individual prior to their initial appearance in each child care facility. However, section 1596.871(h) allows for an exception to this rule: the Department may permit an individual who already has a current criminal record clearance to transfer the current criminal record clearance to a new facility. California Code of Regulations, title 22, section 101170, implements Health and Safety Code section 1596.871, subdivision (h) by further articulating the requirement for a California Clearance and setting forth the process and criteria for transferring an existing California Clearance to a new facility. Health and Safety Code section 1596.871 read in conjunction with California Code of Regulations, title 22, section 101170, provides that the individual who already has a California Clearance must, prior to their presence at any facility, either 1) obtain a new California Clearance for each specific facility or, 2) request a transfer of their current California Clearance to that specific facility. The second option transfers the individual's clearance to the additional facility via the Department of Justice Live Scan screening system as was briefly discussed *supra*, at footnote five. The purpose, as was stated by the Department in their Final Statement of Reasons for adopting the regulatory scheme is described as follows:

It is necessary to require that the individual submit the transfer request to ensure current association to easily locate the individual in the event the individual is subsequently arrested. [OAL file no. 2004-0709-02 C, FSOR p. 129.]

In the event that the Department of Justice notifies the Department that a "cleared" person had a subsequent arrest, the Department may be required to remove or exclude the individual from *each* of the facilities. The submission of a Live Scan fingerprint electronically "associates" the individual to a specific facility so that the Department knows where the individual might be working. If an individual subsequently works at another facility, the system would not account for that fact absent a new scan for that facility or a transfer of the already cleared scan through a state licensing facility.

Petitioner's contention is that the language of California Code of Regulations, title 22, section 101170(e) only requires an individual to obtain a California Clearance once prior to their presence in *all* facilities and that once they have obtained a California Clearance prior to their presence in the *first* facility, they have met their legal obligations as to all subsequent facilities. Such an interpretation of subsection (e) does not give full effect to subsection (f) or section 1596.871(h) of the Health and Safety Code. Subsection (f) provides for a licensee or applicant to "transfer" a criminal record clearance from one state licensed facility to another in lieu of obtaining a new California Clearance. It would be unnecessary to have subsection (f) if a licensee only needed to have an initial California Clearance and not have it transferred to other facilities where the person is also intending to be present. Subsection (f) would be without purpose if Petitioner's interpretation were correct. Further, Petitioner's interpretation ignores the plain language of Health and Safety Code section 1596.871(h) and California Code of Regulations, title 22, section 101170(e) that a California Clearance is required for each facility prior to working, residing or volunteering in a licensed child care facility.

For the reasons stated above, OAL finds that the Department's interpretation of California Code of Regulations, title 22, section 101170(e) to require *either* a California Clearance for *each* child care facility *or* the transfer of a previously obtained California Clearance from one facility to another prior to the individual's presence in the facility meets the definition of "regulation," however, falls within the "only legally tenable interpretation" exemption from the APA.

AGENCY RESPONSE

The Department contends that "it is not an underground regulation to require submission of a clearance transfer request prior to presence and to associate the person's name to the facility as the rule is contained in statute and regulation." As shown above, OAL agrees with this analysis.

PETITIONER REPLY

The Petitioner contends that the use of the word "or" in California Code of Regulations, title 22, section 101170(e) must be given its plain meaning, and therefore, the transfer is "optional." He further contends that the Department's use of "or" in the list of requirements in subsection (e) indicates that "a choice exists with respect to the listed mandatory actions and any ONE of the listed actions will suffice to comply with the mandatory action." Therefore, "transfers are optional actions" and an individual "may choose ONE of the three possible actions to comply with the criminal background clearance requirements." Based on its analysis of Health and Safety Code section 1596.871 and California Code of Regulations, title 22, section 101170, above, OAL does not agree with the Petitioner.

Although not relevant to this analysis, Petitioner also contends that "Form 9182 needs a fully promulgated regulation to implement the law under which this form is issued." Form LIC 9182 (Rev. 4/02) is a Criminal Background Clearance Transfer Request. On July 14, 2003, OAL approved the Department's submission of file number 2003-0702-03 E. Incorporated by reference into the OAL approved regulation was form LIC 9182 (Rev. 4/02). OAL file number 2003-0702-03 E was refiled on November 12, 2003 and March 11, 2004. On August 20, 2004, the Certificate of Compliance was filed with the Secretary of State. Therefore, LIC

9182 (Rev. 4/02) is a duly adopted form and all regulatory matter contained in the form has been approved by OAL as having met the substantive and procedural standards of the APA. (See Cal. Code Regs., tit. 1, sec. 20.)

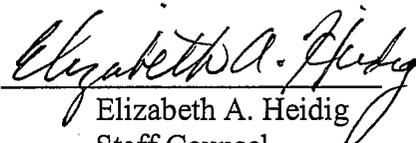
CONCLUSION

In accordance with the above analysis, OAL determines that the Department's requirement that every employee of a child care facility have a criminal record clearance associated with each facility prior to their presence at the facility is not an underground regulation because it falls within the "only legally tenable interpretation" exemption of Government Code section 11340.9(f).

As noted above, with respect to the second challenged rule, whether an employee who does not have a criminal record clearance associated with each facility "must be discharged immediately," the Department provided a certification pursuant to California Code of Regulations, title 1, section 280. OAL has suspended all action on this challenged rule and makes no determination as to whether it is an underground regulation.

Date: August 23, 2010


SUSAN LAPSLEY
Director


Elizabeth A. Heidig
Staff Counsel

cc: Charles Thacker, Leap and Bound Academy
John Wagner, Director, DSS
Pat Baron, Senior Counsel

EXHIBIT A

STATE OF CALIFORNIA - HEALTH AND HUMAN SERVICES AGENCY

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES
COMMUNITY CARE LICENSING DIVISION
Central Coast CC, 360 S. Hope Ave. C-105
Santa Barbara, CA 93103

COMPLAINT INVESTIGATION REPORT (Cont)

FACILITY NAME: LEAP AND BOUND ACADEMY SIMI VALLEY
DEFICIENCY INFORMATION FOR THIS PAGE:

FACILITY NUMBER: 566211691
VISIT DATE: 07/01/2008

Deficiency Type POC Due Date / Section Number	DEFICIENCIES	PLAN OF CORRECTIONS(POCs)
Type A 07/01/2008 Section Cited 101170(e)	1 Regarding Complaint Visit/Deficiency:	1
	2	2
	3 101170(e) CRIMINAL RECORD CLEARANCE:	3
	4 Regulation reads: "All individuals subject to a	4
	5 criminal record review pursuant to Health and	5
	6 Safety Code Section 1596.871 shall prior to	6
	7 working, residing or volunteering in a	7
	8 licensed facility:	8
	9 (1) Obtain a California clearance or a criminal	9
	10 record exemption as required by the Department;	10
	11 (2) Request a transfer of a criminal record	11
	12 clearance as specified in Section 101170(f)."	12
	13	13
	14	14
Type A 07/01/2008 Section Cited 101170 cont	1 The facility had three staff members working at the	1
	2 center one or more days without having their name	2
	3 and background clearance information associated	3
	4 with their license.	4
	5	5
	6 (Names of staff are designated S1 through S3 on	6
	7 confidential document LIC 811, dated 7/01/08)	7
1	1	
2	2	
3	3	
4	4	
5	5	
6	6	
7	7	

Failure to correct the cited deficiency(ies), on or before the Plan of Correction (POC) due date, may result in a civil penalty assessment.

SUPERVISOR'S NAME: Maria Valencia
LICENSING EVALUATOR NAME: Katrinka Kramer
LICENSING EVALUATOR SIGNATURE:

TELEPHONE: (805) 583-5532
TELEPHONE: (805) 722-5133

Katrinka Kramer

DATE: 07/01/2008

I acknowledge receipt of this form and understand my appeal rights as explained and received.

FACILITY REPRESENTATIVE SIGNATURE:

Sarallanan

DATE: 07/01/2008

This Notice must be posted for 30 days

EXHIBIT B



CDSS

JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



ARNOLD SCHWARZENEGGER
GOVERNOR

**CERTIFICATION PURSUANT TO CALIFORNIA CODE OF REGULATIONS
TITLE 1, SECTION 280**

I, Frank Furtek, Deputy Director/Chief Counsel of the Legal Division, California Department of Social Services (CDSS), hereby certify:

1. CDSS will not issue, use, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which requires the "immediate discharge" (defined as a termination of employment rather than a temporary removal) of an employee who does not have a current criminal record clearance associated to the licensed facility where the individual is presently employed.
2. This certification shall not prevent CDSS from notifying the licensee to take appropriate action pursuant to Health and Safety Code section 1596.871 and California Code of Regulations, Title 22, sections 101170 or 101170.1 when applicable.
3. This certification shall not prevent CDSS from acting pursuant to Health and Safety Code, section 1596.8897 and California Code of Regulations, Title 22 regulation sections 101170 or 101170.1 when applicable.
4. A copy of the certification was sent to the petitioner by certified mail, and a copy of the proof of service is attached hereto as **EXHIBIT B**.

SIGNED BY:

FRANK S. FURTEK

Deputy Director/Chief Counsel

DATE:

7/1/10